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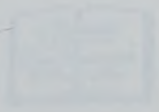
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CALIFORNIA REPORTER

188 PACIFIC REPORTER

182 Cal. 338

In re BAIRD'S ESTATE.

BAIRD v. BAIRD et al.

(S. F. 8995.)

(Supreme Court of California. Feb. 24, 1920. Rehearing Denied March 25, 1920.)

1. BASTARDS ⊂=13 — FOUR ESSENTIALS FOR ADOPTION OF ILLEGITIMATE CHILD.

The four things essential to the adoption of an illegitimate child by its father under Civ. Code, § 230, are: That he shall be its natural father; shall have publicly acknowledged himself to be the father; shall have received the child into his family; and he shall have otherwise treated it as his legitimate child.

2. BASTARDS ⊂=13 — ILLEGITIMATE CHILD NOT RECEIVED "INTO HIS FAMILY" BY THE FATHER.

Where the unmarried father of an illegitimate child lives in the same community and maintains constant relations with his own legitimate family, and, at the same time, under an assumed name, maintains the illegitimate child clandestinely in another home with its mother, with whom he lives in illicit relations a great part of his time, he is not receiving the child as his own "into his family" within the meaning of Civ. Code, § 230.

3. BASTARDS ⊂=13—FATHER, NOT "TREATING ILLEGITIMATE AS A LEGITIMATE CHILD," DOES NOT ADOPT IT.

Where the father of an illegitimate child has members of his own family living in the same community with whom he is almost constantly associated and maintains cordial relation, he does not "treat the child as if it were a legitimate child" within the meaning of Civ. Code, § 230, pertaining to adoption, if he conceals its existence from such members of his real family, never has them visit the child or has the child visit them, nor in any other manner acts towards the child with regard to his own legitimate relatives as any father reasonably would do if he intended to adopt the child and treat it as his own legitimate child.

Department 1.

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

In the matter of the estate of David Jennings Baird, deceased. Petition by David Jennings Baird for a partial distribution of the estate. From a judgment and decree directing partial distribution as prayed for, Veronica C. Baird appeals. Judgment and decree reversed.

See, also, 186 Pac. 351.

Mastick & Partridge and Karl C. Partridge, all of San Francisco, for appellant.

Charles M. Fickert and Edward A. Cunha, both of San Francisco, for respondents.

LAWLOR, J. This is an appeal by Veronica C. Baird, as executrix of the last will and testament of David Jennings Baird, deceased, from a judgment and from a decree of partial distribution of the superior court in and for the city and county of San Francisco. The petitioner, by the guardian of his person and estate, Lydia Margaret Valencia, applied for a partial distribution of the said estate on the ground that he is the illegitimate son of the decedent and said Lydia M. Valencia, and that he had been adopted by the decedent in the manner provided by section 230 of the Civil Code, that is to say, that the decedent had publicly acknowledged the petitioner as his own child, received him as such into his family, and had otherwise treated him as if he were a legitimate child.

On a former hearing a judgment denying the petition was made and entered by the superior court, sitting without a jury, from which an appeal was taken to this court. The judgment was reversed, and the cause remanded for a new trial (Estate of Baird,

173 Cal. 617, 160 Pac. 1078) on the ground that the superior court erred in refusing the demand of the petitioner for a trial by jury as contemplated by sections 1716 and 1312 of the Code of Civil Procedure. A trial was thereafter had before a jury, which resulted in a verdict in favor of the petitioner, in approval of which the trial court made findings of fact and conclusions of law, entered judgment in favor of petitioner, and made a decree of partial distribution on June 14, 1918, distributing the entire estate to him, namely, certain real property situate in Contra Costa county, $10,000 in money, and 221 shares of the capital stock of the Sausalito Land & Ferry Company.

It is alleged in the petition that Lydia M. Valencia is the guardian of the estate and of the person of petitioner; that David Jennings Baird, the decedent, died on November 25, 1908, leaving an estate of the appraised value of $98,666.38, consisting of real and personal property; that the decedent left a last will and testament dated July 30, 1903, by which he bequeathed and devised his entire property to his mother, Veronica C. Baird, and to two brothers and to two half-brothers; that in said will the decedent appointed his mother, the said Veronica C. Baird, and I. I. Brown, executrix and executor, respectively; that petitioner is the child and son of the decedent and Lydia M. Valencia, and that neither the decedent nor Lydia M. Valencia was ever married; that petitioner was born in San Francisco on December 7, 1906; that at the time of and for more than one year preceding the birth of petitioner, the decedent and Lydia M. Valencia lived and cohabited together in San Francisco without having been married, and that during all of that time the decedent had a family, consisting of himself and Miss Valencia; that from the time of the birth of petitioner and up to the death of the decedent he maintained a home and family in San Francisco, consisting of the decedent, Miss Valencia, and petitioner, and of no one else, and that from and after the birth of petitioner and up to the death of the decedent he publicly acknowledged himself to be the father of the child to numerous and various persons by open and public declarations, statements, admissions, and acts; that upon the birth of petitioner the decedent received him into his family, constituted as aforesaid, as his own child, and that the petitioner remained and was by the decedent kept continuously and uninterruptedly in the said family as a part of the same and a member thereof, in the care and custody and control of the decedent, as the father of petitioner, up to the decedent's death, and did otherwise so treat the said child as if it were a legitimate child by the exercise of those acts, declarations, and conduct which are usual to the father of a legitimate child and legitimate born child with respect to such a child and the ordinary and usual treatment of such a child; that the decedent adopted petitioner as his own child; that the said will of decedent was made before petitioner was born, and that it left petitioner unprovided for by any settlement; that the decedent in no way provided for petitioner in said will, and that by reason thereof petitioner is entitled to the whole of decedent's property; and that the estate of decedent is but little indebted, and that the share of petitioner may be allowed to him without loss to the creditors of the estate.

The devisees and legatees of the decedent opposed the application for partial distribution. In their answer they denied all the material allegations of the petition as to the paternity and the adoption of the child, and alleged that the family of the decedent consisted of himself, his mother, sister, and brothers, into which family the child was never received; and that he indignantly denied in terms of opprobrium that the child was his, and continuously concealed its existence from them.

A mass of evidence was introduced in support of and against the claim of adoption, but in the consideration of the question here we will assume that, upon the evidence, the verdict of the jury, and the findings of the court, it was established that the decedent was the natural father of petitioner, and that he publicly acknowledged him as his own child. We will therefore discuss the evidence with special reference to the remaining propositions—whether petitioner was received into the family of the decedent, and by him otherwise treated as a legitimate child, and view it in the light most favorable to petitioner.

Beginning in the year 1902, at which time they set up housekeeping, and ending with the death of the decedent, he and Miss Valencia, though unmarried, lived together in various places in San Francisco under the assumed name of Mr. and Mrs. David Tyler. The petitioner was born in the St. Helen Apartments, one of their abodes, on December 7, 1906. Miss Valencia testified that for more than a year preceding this event and until the decedent died, they lived together as man and wife, accomplishing all the relations of man and wife, and that she had no relations whatever with any other man, and that she and the decedent constituted a family at that time, of which he was the head, and that petitioner was received into such family. The petitioner, the mother, and the decedent continued to live at the St. Helen Apartments until April, 1907, when they moved to the Octavia Apartments, where they remained for six months, and then went into a house at 230 I street. They were living in the latter place when the decedent died

on November 25, 1908. The attending physician at the confinement of Miss Valencia testified that he was engaged by decedent considerably in advance of the birth of petitioner; that the decedent directed him to secure a nurse, and that the decedent paid all expenses.

According to the evidence, from the beginning of their housekeeping the decedent employed the servants and paid all the expenses of the household, and he would sometimes give orders to servants and to tradesmen. The bills for the household and other expenses were generally made out and paid in the name of "Tyler," the real identity of the members of the household, however, being known to some of those with whom they had dealings, also to many of their mutual acquaintances and friends. Miss Valencia was frequently introduced as the wife of the decedent by the name of "Tyler" and on occasions as "Mrs. Baird." According to a number of witnesses, he invited them in to see his "wife and baby." There is much testimony to the effect that the decedent habitually caressed, fondled, took care of, attended upon, and played with the child, gave directions to the servants concerning him, bathed him, and otherwise manifested a deep interest in its welfare. During the pregnancy of the mother the decedent expressed the hope that the child would be a boy. He called him "my boy," "papsy's boy," and "Davey," bought him toys, referred to himself as "pappy" and his "papsy," and "seemed to be proud of him and think a whole lot of him." He asked different persons how they liked the baby, if it looked like him, and seemed pleased when told that they resembled each other. On one occasion he remarked that some day petitioner would be president of the Baird estate. The decedent frequently discussed petitioner with neighbors, visitors, chauffeurs, café proprietors, bartenders, and others. He sometimes wheeled the child in a buggy in the neighborhood and in public parks, occasionally accompanied by the mother and the nurse, when, according to one of the servants, people would salute the decedent as "Baird" or "Dave." He also took the child on automobile trips and discussed plans for his education and for his future generally. The decedent had numerous pictures taken of the baby, some of which he had framed. Photographs of the child were found in the decedent's room at the Fairmont Hotel after his death. He and Miss Valencia were photographed together. He sent her cards and other communications while he was absent from San Francisco. A number of the decedent's personal effects, pictures, uniforms, trinkets, and souvenirs were found in Miss Valencia's possession after his death. He kept part of his wardrobe and other personal belongings in their various abodes, and sometimes when he had social engagements he would have her send his things to the hotel. When they went to the Alexander Apartments to live in the early part of 1906, he registered, according to the proprietress, under the name of "Baird." A "wedding ring" engraved "Dave to Dodie, 1907," was found in the decedent's safe deposit box following his demise. There is much evidence as to the proportion of his time that decedent spent with the mother and the child, how frequently the baby and the mother had their meals in cafés when he was not present, and how often he took his meals with them. Testimony was introduced to the effect that Miles T. Baird, a brother of the decedent, sometimes came to the apartment to see him after petitioner was born, that he brought the child toys and fondled him, and that on one occasion, at the Octavia Apartment, the decedent said to his brother, referring to petitioner: "Miles, he is a dandy. He beats your baby all hollow."

After the birth of petitioner, the decedent agreed to purchase the house at 230 I street by installment payments, directing that the deed be made out in the name of "Lydia M. Valencia," and which house was sold after he died, because of default in the payments. He paid for the furnishings in this house, which were also billed and insured in her name. The household telephone was in the name of "Mrs. D. V. Tyler." This was also true of the accounts for water, gas, and electricity. Miss Valencia testified that the decedent informed her on different occasions that he kept a room in a hotel, and it is not claimed on behalf of petitioner that, with the exception of Miles T. Baird, any relative of the decedent ever saw the child, or that he discussed it with them or any of them, or that it was ever received or introduced into the Baird family, or that any member thereof, save Miles T. Baird, ever visited or had any form of communication with the mother of the child. Benjamin H. Baird, a half-brother of decedent, testifying on behalf of the estate, stated that in the month of May, 1908, he asked decedent if he was the father of petitioner, and that he denied that he was.

The evidence on behalf of the estate shows that the decedent was about 28 years of age at the time of his death; that the estate left by his father was incorporated as the "Baird Estate," and that the decedent was the president thereof; that his relatives consisted of his mother, Veronica C. Baird, who was a widow, a sister, two brothers, John Rush Baird and Miles T. Baird, and two half-brothers, Benjamin H. Baird and Thomas R. Baird; that his brother, John Rush Baird, who is mentioned in the decedent's last will, died in December, 1905; that for a portion of the time from January, 1906, until his death the remaining relatives of the decedent

were in San Francisco; that with the exception of Benjamin H. Baird and Miles T. Baird, as already noted, the decedent never mentioned the existence of the child to any of them; that after the earthquake and fire he had a room and bath in a lodging house where his half-brothers lived, and that thereafter until he died he kept a room either in the Little St. Francis Hotel, the Palace Hotel, or the Fairmont Hotel; that part of that period his mother lived in the same hotel with him; many witnesses were examined and city directories and telephone directories, post office and business records were produced to prove the decedent's residence addresses, which included the hotels and lodging house already referred to, and did not include any of the abodes where he kept the mother and the child; that his sister was in San Francisco part of the time from January, 1906, until she moved to New York; that, according to the testimony of Benjamin H. Baird, the only members of the Baird family who were in California from April, 1907, to January, 1908, were the decedent and Thomas R. Baird, and that Miles T. Baird left the state for Australia in April, 1907, and did not return until after the decedent passed away; that with the exception of Miles T. Baird all of the remaining relatives of the decedent gave testimony at the trial, and, excepting Benjamin H. Baird, they all denied that the child had ever been mentioned by the decedent in their presence or in the presence of any of them, and, including Benjamin H. Baird, they all denied that the child was ever introduced into the Baird family, or that any of them ever saw him, that they ever visited any of the places where petitioner lived with his mother, or that any communication ever passed between them and the mother and the child; that the decedent never mentioned petitioner to any of his friends, business associates, or to any of the persons with whom he had dealings in connection with the Baird estate; that when his mother would be in San Francisco, following her annual trips to Europe, decedent was in the habit of going to her room at the hotel, dining with her, and often remaining with her until 10 or 11 o'clock at night; that his mother returned from Europe in May, 1908, and remained in San Francisco until his death; that the decedent was on terms of cordial and affectionate intimacy with his relatives; that when they were in San Francisco he was in constant association with them.

In this summary of the evidence we have not attempted to cover every phase thereof, nor the numerous inquiries on cross-examination, nor the many apparent contradictions and inconsistencies as shown by the voluminous record before us, for the reason, as already indicated, that we shall resolve every question of fact in favor of petitioner. It may, however, contribute to a more complete understanding of the evidence to mention that the decedent in his relations with the mother of the child led a life of reckless dissipation, being habitually under the influence of intoxicants, and otherwise showing great demoralization; that for the most part the persons who figured prominently in their illicit relationship (excluding neighbors and those with whom they had business dealings), and upon whose testimony the case of petitioner very greatly depends, came into the life of the decedent through such relationship, some of them of loose morals, and just the kind of characters it might be expected would be their mutual companions, associates, and friends. There are frequent references to lively automobile parties, the bill in one month for automobile hire amounting to over $600, and, according to the evidence only one man ever sharing with the decedent the expense of such entertainment; and to trips to the beach, to roadhouses, to cafés, and the like, on occasions the entire night being given over to that kind of diversion.

The findings of the court are to the effect that, at the time of and for more than one year immediately preceding the birth of petitioner, the decedent and Lydia M. Valencia continuously lived and cohabited together in the city and county of San Francisco without having been married, and that during all of that time the decedent had and maintained a family, consisting of himself and Lydia M. Valencia, together with domestic servants, and that while so living together the petitioner was born as a result thereof; that while so maintaining a family, petitioner was born into the family and household of decedent at the St. Helen Apartments, and that from the time of petitioner's birth until about April 1, 1907, the decedent maintained in the St. Helen Apartments a family and household, consisting of himself, the petitioner, and Lydia M. Valencia, and household servants; that during said period of residence at the St. Helen Apartments the decedent received petitioner into his family as his own child, and that petitioner resided with the decedent at the St. Helen Apartments as a part and member of decedent's family sleeping in the same apartments and eating at the same table, and that during said period at the St. Helen Apartments, petitioner was fed, clothed, and provided with the necessaries of life, was cared for and caressed by decedent, and was treated by him as a father would treat his own legitimate child; that at the Octavia Apartments petitioner was fed, clothed, and provided with the necessary comforts of life, cared for and caressed and was treated by decedent as a father would treat his legitimate child; that

decedent moved from the Octavia Apartments to the house at 230 I street where he resided until his death, "and maintained in said dwelling * * * a household and family, consisting of himself, petitioner, and said Lydia M. Valencia and household servants"; and "that * * * during the minority of the petitioner, the said David J. Baird received the petitioner into his family as his own child, and otherwise treated the petitioner as if petitioner were his legitimate child." In the light of the instructions it is to be implied that the jury made similar findings.

Section 230 of the Civil Code reads:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

[1] Four things are therefore essential to the adoption of an illegitimate child by its father: (1) He shall be its natural father; (2) he shall have publicly acknowledged himself to be the father; (3) he shall have received the child into his family; (4) he shall have otherwise treated it as his legitimate child.

[2] Did the decedent receive petitioner into his family? Referring to the word "family," as it appears in section 230 of the Civil Code, it was declared in Estate of Gird, 157 Cal. 544, 108 Pac. 499, 137 Am. St. Rep. 131, Chief Justice Angellotti writing the opinion of the court:

"In Estate of Bennett, 134 Cal. 323 [66 Pac. 371], this court said: 'The meaning which is to be given to the word is to be determined by the context, and also from a consideration of the subject-matter to which it relates. Every case must depend upon its particular circumstances.' Mr. Jarman says (Jarman on Wills, *941): '"Family" is not a technical word, and is of flexible meaning.'"

It was declared in Estate of De Laveaga, 142 Cal. 169, 75 Pac. 790, that the father of an illegitimate child cannot adopt it unless he has a family, or at least a home into which he must receive the child.

The appellant has cited and discussed a number of authorities, including Estate of Gird, supra, and Estate of Jones, 166 Cal. 108, 135 Pac. 288, to which we may add the recent case of Estate of McNamara, 183 Pac. 552, in support of the contention that the decedent was the head of a family composed of himself and the mother of the child, and that at petitioner's birth he was received into such family by the decedent, but the facts in those cases differ so widely from those in the case at bar that we do not think it is necessary to discuss them, for in no case has it been held that a family constituted as this "family" was, as shown by the uncontroverted evidence in the case, would come within the meaning of the statute. If this was a family, it was a clandestine family, using the word "clandestine" to describe the character of the family, rather than the relationship that existed between the father and the mother of the child. Thus, in Estate of Gird, supra, the court held in favor of the adoption, where the relations between the father and the mother were clandestine and the child and the mother went under the name of her husband. It is the attitude of the father toward and his conduct in respect to the child and not the character of his relationship with the mother, which is the true test in determining whether the child was received into the family of the father. It would be a violation of the letter and spirit of the statute to hold that "the father of an illegitimate child" has received it "into his family," where the existence of the "family" rests upon concealment and dissimulation well calculated to keep from his own relatives, who are living in the same community and with whom he is on terms of intimacy, all knowledge either of the child or of his "family."

In this case the couple masqueraded as man and wife under a fictitious name assumed by the father and mother and given to the child in order to keep the decedent's family in ignorance of the meretricious relationship and of the child. As we have seen, the decedent was on cordial and intimate terms with the members of the Baird family. He constantly canvassed the affairs of the Baird estate with them, had other interests in common with them, corresponded with his mother and sister, arranged for the schooling of his half-brothers, and one year made a trip to New York to meet his mother on her return from Europe so that he might journey to San Francisco with her and other members of the family. In short, the relations between the decedent and his relatives clearly appear to be such, considering their respective modes of living, as usually obtain between a bachelor son and his relatives with whom he is on terms of cordial and affectionate intimacy, and plainly suggest that the motive for his course of conduct towards petitioner was to spare the Baird family humiliation. We think this is true in spite of the testimony of several of respondent's witnesses, from which it might be inferred that the decedent seized every opportunity to proclaim his shame, going so far, according to the testimony of the attending physician, as to name the child "David Jennings Baird." This witness, who had known Miss Valencia and the decedent for several years before petitioner was born, stated that he obtained the data for the birth certificate from the decedent, who was reluctant to give

the information because "he wanted to keep it from his mother." It is worthy of mention that the birth certificate was not filed until February 14, 1907—more than two months after the birth of petitioner. This physician also stated that when he sent bills for his services to the decedent to the apartment or to the house he used the name "Tyler," and when to the Palace Hotel or the Fairmont Hotel, the name of "Baird." The evidence leads us to the conclusion that where the unmarried father of an illegitimate child lives in the same community and maintains constant relations with his own legitimate family, and at the same time, under an assumed name, maintains the illegitimate child clandestinely in another home with its mother, with whom he lives in illicit relations a great part of his time, he is not receiving the child as his own "into his family" within the meaning of section 230 of the Civil Code.

But, even if it be true from the testimony on behalf of respondent, that the decedent maintained an establishment at the places where the mother and the child lived which had something of the character of a family in the sense in which that term is used in some of the decisions, although clandestine with respect to his legitimate family, it cannot be denied, on the other hand, that he did not treat the child as if it were a legitimate child. A father of a legitimate child, under such circumstances, does not cause or allow it to be known by an assumed name. If he wanted the child to be deemed legitimate, he would have it known by his own name, he would naturally refer to it when associating with his own mother, sister, and brothers, and he would either take the child to see them or have them see the child. If he had been estranged from his own family he might not have done so, but that was not the case. When his relatives were in San Francisco he was associating with them as a member of the family during all of the time, yet he never in any sense treated the child as he would a legitimate child so far as they were concerned. It is a circumstance, proper to be considered in determining this question, that when the decedent discussed his will with I. I. Brown, whom he named as his executor, some time after the birth of petitioner, he made no change therein.

[3] Where the father of an illegitimate child has members of his own family living in the same community, with whom he is in almost constant association and maintains cordial relations, he does not treat the child as if it was a legitimate child, if he conceals its existence from such members of his real family, never has them visit the child or has the child visit them, or in any other manner acts toward the child with regard to his own legitimate relatives as any father reasonably would do if he intended to adopt the child as his own and treat it as his legitimate child. Such treatment is contrary to the sense in which section 230 of the Civil Code uses the phrase "otherwise treating it as if it were a legitimate child." The treating it as if it were legitimate is as essential to a legal adoption under that section as any of the other elements therein mentioned. Because of the want of such treatment we are of the opinion that there was no adoption.

Having reached this conclusion, it will serve no purpose to consider the numerous specifications of error in the rulings and in the instructions.

Judgment and decree reversed.

We concur: SHAW, J.; OLNEY, J.

182 Cal. 355

In re IMPERATRICE'S GUARDIANSHIP.

(S. F. 9163.)

(Supreme Court of California. March 2, 1920.)

1. GUARDIAN AND WARD ⊂=10—CUSTODY OF CHILDREN PROPERLY AWARDED TO GUARDIAN AS AGAINST NATURAL PARENT.

Where 14 year old boy nominated his own guardian under Code Civ. Proc. § 1748, and 13 year old boy expressed a preference for such guardian under Civ. Code, § 246, and where both disliked to return and live with their mother and stepfather, where their home environment had been bad, and where the estate of the deceased father of the children was about to be distributed, requiring appointment of a guardian of their estate, court's refusal to revoke order appointing person so preferred by the children guardian of the persons and estate of the two boys and younger sister and to award custody of children to the mother *held* proper.

2. GUARDIAN AND WARD ⊂=10—WELFARE OF CHILDREN IS THE CONTROLLING CONSIDERATION.

When resolving the question of guardianship of children, the court is controlled by what appears to be their best interest in respect to their temporal and moral welfare; and when a child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question.

3. GUARDIAN AND WARD ⊂=10—PARENT'S RIGHTS SUBORDINATE TO WELFARE OF CHILD IN AWARDING ITS CUSTODY.

Though primarily the parents of the child have the right by nature and statutory enactment to its custody, which right should be freely recognized in the absence of compelling reasons for its disregard, such right of the parent must give way to the health, safety, morals, and general welfare of the child.

Department 2.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

In the matter of the guardianship of John Imperatrice and others, minor children of Rosa Conte, formerly Rosa Imperatrice. From an order denying a motion for revocation of letters of guardianship granted to Beulah E. Miller, Rosa Conte appeals. Affirmed.

George E. Church, of Fresno, for appellant.

Thomas F. Lopez, of Fresno, for respondent.

KERRIGAN, Judge pro tem. This is an appeal from an order denying the petition of Rosa Conte for the revocation of an order theretofore made appointing one Beulah E. Miller guardian of the persons and estates of certain minor children.

In her petition the appellant, Rosa Conte, alleges that she is the mother of the three children therein named, and that their father, her former husband, is now deceased; that the latter left a small estate in which each of said children is entitled to share; that on the 27th day of March, 1918, the appellant was declared incompetent and committed to the Stockton State Hospital, where she remained as an inmate until the 17th day of March, 1919, when she was, by a certificate duly issued, restored to capacity; that the day after she was so restored to competency Beulah E. Miller, the respondent, after a hearing, was regularly appointed guardian of the persons and estates of said children. Upon these allegations the petitioner prayed that said order appointing respondent such guardian be rescinded and annulled, and that the said children be returned to her as their mother entitled to their custody.

The respondent, answering the said petition, admitted that the minors are the children of appellant, who was declared incompetent and later, as alleged, restored to capacity, and that she, the respondent, was appointed guardian of said minors. Continuing, said respondent alleged that the appellant is not a fit or proper person to have the care and control of said children, that her present husband is not a proper person to assist in the instruction or care of said children, and that if appellant should be given their care and custody and the control of their property, the latter, on account of appellant's incompetency and inability to care therefor, would come into the control of her said husband, who would improperly expend and waste it. She further alleged that she is experienced in the care and handling of children, and that in the exercise of the authority theretofore conferred upon her she had placed said children in proper homes with good environment, where they will receive proper care and education. She therefore prayed that her said letters of guardianship be not revoked.

[1] At the hearing had upon said petition and answer the appellant merely put in evidence the certificate of restoration to capacity, and rested, relying upon the rule that unless some good reason exists based upon what appears to be the best interests of the children she, as their surviving parent, is entitled to be appointed their guardian (21 Cyc. 34; Guardianship of Salter, 142 Cal. 412, 76 Pac. 51; In re Campbell, 130 Cal. 380, 62 Pac. 613). The difficulty at the bottom of appellant's case, however, is that the evidence in the record shows that it falls squarely within the exception to the above rule, according to which exception the welfare of the children must be given priority in certain cases over the otherwise natural right of the parent. According to the testimony of Ella M. Towle, a probation officer of the county in which the present matter arises, these children were neglected by their mother. Her testimony shows that in November, 1917, she found them ragged and dirty and two of them running the streets; that with the consent of their mother she placed them in the county orphanage. Another witness, Mrs. Rebecca M. Carter, matron of the county orphanage, testified that the children were extremely dirty and their heads full of lice. The children remained in the orphanage from December, 1917, to May, 1918. Two of them—boys, one 14 and the other 13 years of age—were called as witnesses upon the inquiry, and they both expressed their preference that Miss Miller act as their guardian, and stated that they would not like to return to the life they endured with their mother and stepfather; that under her supervision good homes were provided for them; that they were able to keep clean, were properly clothed, and could go to school regularly. These boys also testified that their former home environment was bad; that their stepfather had an ungovernable temper; that on one occasion, in the presence of the younger boy, he shook his fist at their mother and threatened to break her head, on another occasion in essaying to strike her he missed and hit the boy's sister, and on another occasion threw a knife at the witness.

This testimony, like all the other evidence in the case, was uncontradicted, and appears to have been given free from suggestion, nor was its force impaired by cross-examination. The respondent testified that the children had been boarding in homes under the supervision of the county welfare department, and any expenses incurred on their behalf had been borne by the county treasury. One of the boys being over 14 years of age, was permitted, subject to the approval of the court, to nominate his own guardian (Civ. Proc. § 1748); the other boy was 13 years old at the time of the trial, and showed himself to be of sufficient capacity to express an intelligent preference (Civ. Code, sec. 246),

As to the little girl, she was not called as a witness, and the record is silent as to her, except it appears that she is permitted to be with her mother from time to time and on such occasions assists in the housework. The mother of these children, unfortunately, is unable to give them the care and proper home environment necessary for their welfare, and if left with her and their stepfather disastrous results for the future of these children may reasonably be apprehended. In addition to what has been said, it also appeared upon the hearing of the petition that the estate of the father of the children is about to be distributed, giving rise to the necessity for the appointment of a guardian of their estate.

[2, 3] When resolving the question of the guardianship of children the court is controlled by what appears to be for their best interest in respect to their temporal and moral welfare; and when a child is of sufficient age to form an intelligent preference the court may consider that preference in determining the question. This rule requires no citation of authority. And while primarily the parents of a child have the right, by nature and statutory enactment, to its custody, which right should be freely recognized in the absence of compelling reasons for its disregard, yet whenever conditions are shown to be such, by reason of the mental and moral limitations or delinquency of parents, that to allow the child to continue in their custody would be to endanger its permanent welfare, this right of the parent must give way, its preservation being of less importance than the health, safety, morals, and general welfare of the child. 21 Cyc., p. 35.

The order is affirmed.

We concur: WILBUR, J.; LENNON, J.

182 Cal. 351

RISCHARD v. MILLER. (L. A. 5319.)

(Supreme Court of California. March 1, 1920.)

1. CONTRACTS ⇐320—BUILDING CONTRACTOR HELD ENTITLED TO RECOVER PRICE WITH DEDUCTION FOR SLIGHT DEFECTS.

Several defects in construction of a dwelling, all of which could, at a cost of not over $100, be easily remedied to conform to the building contract, *held* within the rule that where there has been no willful departure from a contract, and no omission of any of its essential parts, but the contractor has performed in good faith all its substantive terms, and omissions are so slight that they cannot be regarded as an integral or substantive part of the contract, and owner can be compensated by recoupment, the contractor can recover contract price, less such recoupment.

2. APPEAL AND ERROR ⇐1170(3)—THOUGH PLEADING ASKING SPECIFIC PERFORMANCE DID NOT AVER PRICE WAS ADEQUATE, JUDGMENT NOT REVERSED.

Cross-complaint for specific performance of part of building contract that owner shall, in payment of $1,250 of the price for building, convey a lot to contractor, is sufficient, at least to prevent a reversal, in view of Const. art. 6, § 4½, as to errors not resulting in miscarriage of justice, though not alleging the price fixed for the lot was adequate, or that the contract was just and reasonable; it showing that plaintiff valued the lot at the price fixed when he made the contract, and bringing suit to enforce contract being in effect an affirmation that it was just and reasonable.

3. SPECIFIC PERFORMANCE ⇐115—CROSS-COMPLAINT NEED NOT ALLEGE DEMAND FOR DEED, WHERE DEMAND WOULD HAVE BEEN FUTILE.

Cross-complaint for specific performance of the part of the building contract that owner shall, in payment of part of price for building, convey a lot to contractor, is sufficient, though not expressly alleging a demand for deed; it averring that the owner was notified that the building was completed, and that he refused conveyance, and the owner's action for damages on the ground that the building was not completed showing that a formal demand at time of cross-complaint would have been an idle ceremony, in which case averment of demand is unnecessary.

Department 1.

Appeal from Superior Court, Los Angeles County; E. P. McDaniel, Judge.

Action by Eugene Rischard against R. C. Miller. Judgment for defendant, and plaintiff appeals. Affirmed.

Ticknor & Carter, L. L. Riccardi, and J. W. Morin, all of Pasadena, for appellant.

J. H. Merriam, of Pasadena, for respondent.

SHAW, J. The plaintiff appeals from the judgment. The complainant alleges that the plaintiff and the defendant made a contract whereby the defendant undertook to construct a dwelling house on a lot belonging to the plaintiff, in accordance with certain plans and specifications, for the sum of $2,600; that the defendant had completed the building, but had failed to construct it according to the plans and specifications, whereby the plaintiff was damaged in the sum of $1,378.

The answer denies the allegations of the complaint concerning the failure to construct the building as provided in the plans and specifications. The defendant also filed a cross-complaint, alleging that by the terms of the contract sued on the sum of $1,250 of the contract price was to be paid to the defendant by the plaintiff 35 days after notice of completion, and that this payment was to be made by the conveyance from the plaintiff to the defendant of a lot adjoining that upon which the building was constructed, free and

clear of incumbrance, valued in the contract at $1,250; that the defendant had constructed the building in accordance with the terms of the contract, and gave notice of completion thereof to the plaintiff; and that plaintiff had refused to convey to the defendant, as the final payment thereon, the said lot, as he had agreed to do. Thereupon he prayed for a decree enforcing performance of the agreement to convey the said lot to him.

The court made findings in accordance with the allegations of the cross-complaint, and that, although in a few minor and trivial matters the building did not strictly and technically comply with the terms of the contract, the departure was not willful nor intentional on the part of the defendant, and that the defects were capable of being easily remedied to conform to the terms of the contract at an expense not exceeding $99.50. Thereupon the court concluded that the defendant was entitled to have the contract enforced in his favor, with an abatement of $99.50 on the contract price on account of the defects found to exist, by the conveyance of said lot by the plaintiff to the defendant, upon the payment by defendant to the plaintiff of the difference between the sum of $1,250, at which the lot was to be accepted as payment, and the amount found due and unpaid on the contract price. Judgment was given accordingly in favor of the defendant for specific performance.

[1] The plaintiff insists that the defects of construction found by the court were so serious and important to the performance of the contract that the case does not come within the rule which allows the enforcement of a contract by one party where it has been substantially performed by him, although not completely performed in accordance with its terms. In Connell v. Higgins, 170 Cal. 556, 150 Pac. 769, the court considered this question and quoted a passage from section 1607 of Elliott on Contracts, defining the meaning of the term "substantial performance," as applied to questions of this character. The rule there stated is that if there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, if the contractor has performed in good faith all of its substantive terms, or if the omission is so slight that it cannot be regarded as an integral or substantive part of the contract and the other party can be compensated therefor by a recoupment in the way of damages, the contractor may recover whatever is due upon the contract less such recoupment, especially in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work.

The defects stated in the findings are all of the character thus defined. On the foundation wall there was what is termed a "slight burning of the concrete" at one point, which could be removed at the cost of $25. There was a slight settling of the floor around a pillar in one of the rooms. Ten dollars would have paid for correcting the defect. The pieces of glass in a cabinet door were not of precisely the size specified in the contract. The change could have been made for $3.50. Half-inch water pipe had been used as laterals to connect the service pipe with half-inch openings in the faucets. Three-quarter inch was specified. The change could have been made for $25. The evidence showed that half-inch pipe was usual in such cases, and was as serviceable in all respects as three-quarter inch pipe. In one of the rooms No. 2 flooring had been used, instead of No. 1; but it was so clear of all imperfections that the plaintiff himself did not discover it at the time, although he was present when it was being laid. In one of the closets a hat cupboard was specified, and was not put in. It could have been put in for $5. A depression in the cement floor on the front porch could have been corrected for $1. These comprise all the defects in the findings for which the $99.50 was involved. The uncontradicted evidence would have supported findings much less favorable to the plaintiff than those made by the court. The defects did not to any appreciable extent affect the use or value of the house as a dwelling place.

[2, 3] The objection that the cross-complaint does not aver that the price fixed for the lot was adequate, or that the contract was just and reasonable to the plaintiff, is without merit, or at all events not sufficient to warrant a reversal. Const., art. 6, § 4½. It does show that the plaintiff himself valued it at the price fixed when he made the contract to convey it, and by himself suing to enforce the contract he in effect affirmed that it was just and reasonable. The objection that a demand for the conveyance was not alleged is also, and for like reasons, insufficient for reversal. It alleges that the plaintiff was given notice that the building was completed, and that he refused to convey the lot, as he had agreed to do. His own suit for damages on the ground that the building was not completed shows that a formal demand at the time the cross-complaint was filed would have been but an idle ceremony. In such a case an averment of a demand for a deed is unnecessary. Gray v. Dougherty, 25 Cal. 281.

We find no ground upon which the appeal can be sustained.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

45 Cal. App. 494

PEOPLE v. MILLER. (Cr. 483.)

(District Court of Appeal, Third District, California. Jan. 19, 1920. Hearing Denied by Supreme Court, March 18, 1920.)

1. LARCENY ⊜58—IDENTIFICATION OF AUTO TRACED TO DEFENDANT WITH THAT STOLEN SUFFICIENT.

Evidence of identity of auto, traced as coming from defendant, with that stolen, *held* sufficient.

2. LARCENY ⊜64(7)—EVIDENCE OF COMMISSION BY DEFENDANT SUFFICIENT.

Evidence, including recent unexplained possession, *held* sufficient to justify inference that theft of auto was committed by defendant.

3. CRIMINAL LAW ⊜720(5)—STATEMENT OF DISTRICT ATTORNEY AS TO ABSENCE OF CLAIM OF AUTO BY PERSON HAVING IT, AND TESTIFYING TO PURCHASE BEFORE THEFT, LEGITIMATE ARGUMENT.

Statement of district attorney, on prosecution for theft of auto, that there was no evidence that C. had ever demanded or sought to recover the car, C. being the person in whose possession it was found, and he having testified that he bought it before the alleged theft, was legitimate argument, it being proper to attack the witness' veracity.

4. CRIMINAL LAW ⊜1037(2)—MERE FORMAL OBJECTION TO STATEMENT OF DISTRICT ATTORNEY IN ARGUMENT DOES NOT REQUIRE REVIEW.

Dismissal, without comment, of assignment of error based on statement of district attorney in argument would be justified, defendant having made only a "formal" objection, and not having requested a direction that the jury disregard the statement.

5. CRIMINAL LAW ⊜721(6)—STATEMENT OF DISTRICT ATTORNEY AS TO DEFENDANT'S FAILURE TO PRODUCE WITNESS TO ACCOUNT FOR POSSESSION OF STOLEN CAR NOT COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.

Statement of district attorney that defendant produced no witness to account for his possession of the stolen car was not a violation of his right to have no comment on his failure to testify in his own behalf.

6. CRIMINAL LAW ⊜721½(2)—DISTRICT ATTORNEY'S COMMENT ON FAILURE TO EXPLAIN POSSESSION OF STOLEN CAR PROPER.

For district attorney to comment on defendant's failure to offer explanation of his possession of the stolen car is proper.

7. CRIMINAL LAW ⊜1166½(12)—EXPRESSION OF JUDGE RENDERED INNOCUOUS BY SUBSEQUENT CLEAR INSTRUCTION.

Expression of doubt by court as to whether or not failure of defendant to explain possession of recently stolen property raised a presumption of guilt was rendered innocuous by subsequent clear instruction that recent unexplained possession, by itself, was insufficient for conviction.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

D. O. Miller was convicted of theft, denied a new trial, and he appeals. Affirmed.

Ben F. Woolner, of Oakland, and W. C. Le Hane, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged, in an information in the superior court of Stanislaus county, with the theft of a light Buick automobile, the property of one J. W. Ross. He was convicted by a jury, and from the judgment sentencing him to the penitentiary, and from an order denying his motion for a new trial, an appeal has been taken. Some of the facts upon which respondent relies for a justification of the verdict are undisputed, and others follow as a fair inference from certain evidence appearing in the record. We are warranted by this record in stating the case as follows: On November 16, 1917, Ross had the car standing on the street near his office in the city of Modesto in said county of Stanislaus. When he went to get the machine, about 6 o'clock in the evening, he found it had been taken away. On January 27, 1918, the car was recovered from the possession of a man named Christiansen at Fresno. It had been delivered to said Christiansen by the defendant herein on or about the 24th day of November, 1917. After Ross learned of the finding of his car, he went to a garage used and operated by the defendant at Oakland, and there found and identified certain parts of the equipment which had been on his car when taken away and which had been removed therefrom. When the machine was recovered the engine number had been changed. Certain parts of the equipment had been removed and replaced by different equipment of similar mechanical character. About the time that the car was stolen defendant had been seen to drive into a garage at Riverbank, a town situated between Modesto and Oakland and about ten miles from Modesto, with a Buick automobile in his possession which answered the description of the machine taken belonging to Ross. When defendant was arrested for the theft he made no explanation of how he came into the possession of said machine; he did not claim that he had purchased it, nor did he state how long he had been in possession of it. In fact, the officer who arrested him testified that he made no statement concerning it whatever. Defendant was not called as a witness, and the only thing in the record tending in the slightest to rebut the inference of guilty possession was the statement of two witnesses that defendant said he had purchased the machine from a woman at Redding.

[1, 2] It is the claim of appellant that the evidence is insufficient to justify the conviction. The claim is based upon the contention, first, that there was no sufficient identification of the machine as the property of Ross which was stolen; and, second, that, if so, there was not sufficient evidence to justify the inference that defendant was the perpetrator of the crime.

There is no merit whatever in the first of these contentions. J. W. Ross told an apparently straightforward story, and pointed out the marks of identification by which he reached the conclusion that the machine was his property; and he declared, "and with all these identification marks I knew positively and absolutely that that was my car"; and, furthermore, in reply to the question, "You have no doubt of it?" he answered, "No question of doubt whatever." Something may be said in defense of the other claim, but a reading of the record convinces us that the verdict is sufficiently supported to withstand an attack on appeal. The possession of the property shortly after the commission of the crime is, of course, an important circumstance. Appellant's failure to offer any explanation when arrested could scarcely be of less significance in the minds of the jury than a confession of guilt. The jurors would naturally and reasonably conclude that if he had purchased the property or acquired possession of it honestly he would be swift to declare and explain the circumstances that vindicated his conduct. If he had purchased it from a woman in Redding or any one else, is there any one so unsophisticated as to believe that he would not have so declared and at least have made an effort to locate the vendor? His silence, when it would have been so easy for him to speak if innocent, is quite persuasive and convincing. Appellant claims that the incriminating force of this possession is materially weakened by the circumstance that it was not a "recent possession," since he was not arrested until more than two months after the theft. But this view ignores the fact that Christiansen himself testified that he purchased the machine from the defendant on November 24, 1917; and from the testimony of one Tony Lewis, who was working for defendant, it is a fair inference that appellant had the machine in his possession for at least a week before that. This would certainly bring it very close to the date of the theft. The jury had the right to conclude, also, that defendant had changed the number on the motor, and had removed certain portions of the equipment and replaced them with others, for the purpose of concealing the identity of the car, and that he was seen with the car, near the time of the larceny, about 10 miles from Modesto. Of course, the evidence is circumstantial and not as conclusive as in many cases, but we think it cannot be said that the verdict is legally unsupported.

The case of People v. Luchetti, 119 Cal. 501, 51 Pac. 707, seems to have been no stronger for the prosecution than this, and yet the Supreme Court upheld the conviction. We may compare the facts of the two cases to show their similarity. Therein the cow (the property alleged to have been stolen) was missing one evening, and the next morning she was sold by the defendant to a butcher. The recent possession of the stolen property was the principal evidence against the defendant, as in the case at bar. In that case the defendant, however, took the stand and testified that he obtained the cow from one Joe Riverio. He gave quite a plausible account of the asserted transaction. It was held, though, that the jury had a right to reject his story as a fabrication. The Supreme Court attached much importance to the fact that the defendant made no effort to secure the attendance at the trial of said Joe Riverio or to have him arrested. The case here is worse for the defendant, since he made no explanation, or did not attempt, either when arrested or at the trial, to excuse or justify himself. If we may believe that he stated to two of the witnesses that he purchased the machine from a woman in Redding, then it is entirely fair to assume that it was false, since he made no effort to verify it. In the Luchetti Case, the court quotes from the authorities as to the significance of the possession of the stolen property and says:

> "Appellant contends that having given a reasonable account of the circumstances attending his possession of the cow, that it removes the inference of guilt, and that therefore the verdict should have been in his favor. But whether the account he gave was either true or reasonable was for the jury to determine, and in such case we cannot disturb the verdict, unless we can say that his explanation of his possession was so clearly and evidently true that the opposite conclusion could only be reached by a jury under the influence of passion or prejudice. We think the jury rightly concluded that his story was fabricated, and therefore that he was guilty of the larceny."

When we recall the silence of the defendant herein and his failure to make any effort to show the honesty of his connection with the affair, we can readily understand the significance that the jury must have attached—and justly so—to the circumstance of his possession of the stolen property.

[3] Complaint is made of the conduct of the district attorney in his argument to the jury. One of the statements assigned as error was: "Now there is no evidence here that Mr. Christiansen has ever sought to recover this car; he never made a demand for the car." This was within the scope of legitimate argument. The district attorney had the right to attack the veracity of said

witness Christiansen. It is not claimed that there was any evidence that he had sought to recover the car or had made a demand for it. This was a circumstance tending to show his knowledge or belief that the car had been stolen from Ross. Thus would be shaken the credit to be attached to his statement that he purchased the car on November 3d, more than two weeks before the theft. Indeed, one can hardly read the testimony of Christiansen without reaching the conclusion that he was more anxious to shield the defendant than to tell the truth.

[4, 5] Another statement was: "And Mr. Miller has sat there during all this trial writing down all the evidence and telling his counsel what to do, and yet he did not produce one witness of any kind to tell you where that machine came from." Thereupon counsel for appellant said: "We make a formal objection to the statements of the assistant district attorney to the effect that Mr. Miller has been sitting here taking down all the evidence, and instructing his counsel, as prejudicial, and not before this court and nothing in the evidence to that effect, and assign it as misconduct." It is to be observed that appellant made only a formal objection, and he did not request the court to direct the jury to disregard the statement. We would be justified, therefore, in dismissing the assignment without comment, but it is clear that the only part of the statement of any importance relates to the failure of the defendant to produce any witness to account for the possession of the property, and this was not in violation of the rights of the defendant. In People v. Waugh, 30 Cal. App. 402, 158 Pac. 336, the district attorney called attention to the fact that defendant's possession of the stolen jewelry shortly after the robbery "was unexplained by any sworn testimony." This was held to be proper, the court stating that it "was not indicative of a purpose on the part of such official to use against defendant the fact that he did not take the stand in his own behalf. People v. Fitts, 4 Cal. App. 432 [91 Pac. 536]."

[6, 7] We may add, moreover, that the trial court did sustain appellant's objection, and, in effect, did direct the jury to disregard said statement. The only other similar criticism is based upon the condition of the record, as follows:

"Mr. Maddux thereupon proceeded with the closing argument on the part of the people: * * * Mr. Fowler: 'I object to the remarks of the district attorney, which is an inference that the defendant had to take the stand and explain his part of the transaction, which is a violation of his constitutional rights; and I assign it as prejudicial misconduct, and ask the court to instruct the jury to disregard the remarks of the district attorney.' Mr. Maddux: 'I have made no such inference.' The Court: 'I understand that he simply referred to the fact that he had not made that explanation.' Mr. Maddux: 'I made no such inference.' The Court: 'Read what Mr. Maddux said, Mr. Reporter.' Reporter: 'I was not taking his argument, Judge.' The Court: 'Well, take down the statement, Mr. Reporter.' Mr. Maddux: 'I did make the statement that it is incumbent upon him, when he was caught redhanded with this automobile in his possession, it was up to him to explain where he got that machine. That is what I said, and that is what I say now, and you can take a thousand exceptions if you like.' "

This was followed by a further discussion between counsel, Mr. Maddux insisting that he made no such statement as was imputed to him by counsel for appellant. The court finally said:

"The courts have differed very much on this question—as to the question of what burden may be on the defendant when he is found in the possession of recently stolen property. There seems to be a good deal of doubt, and there is some doubt in my mind whether a person under those circumstances is called upon to make an explanation—in other words, there is a presumption of guilt if he does not make an explanation."

After some further remarks by the court and counsel the court concluded as follows:

"I am somewhat in doubt as to what the real law is on that question in view of the various holdings, so I have taken the view of giving the benefit of the doubt to the defendant and to instruct the jury that it is a circumstance tending to establish guilt. It is a suspicious circumstance. Of course, if he explained it that would be a benefit to him; if he did not explain it, then it is a matter for the jury to take into consideration, with other circumstances, which may or may not tend to establish guilt. I think I shall so instruct the jury, but with that explanation I think it is not necessary for me to say anything further. The district attorney, as I understand it, is simply giving his view of the law."

The court subsequently instructed the jury as follows:

"You are instructed that the evidence of the recently unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty, even in a case of larceny. * * * In cases of larceny the mere unexplained possession of stolen property is not alone sufficient to warrant a conviction, but it is a circumstance tending to show guilt, that can be taken into consideration in determining the guilt of the accused person; and such unexplained possession and other evidence tending to show guilt justifies the jury in arriving at a verdict of guilty, if the same, taken as a whole, satisfy the minds of the jury beyond a reasonable doubt and to a moral certainty that the person accused is guilty of the larceny."

It may be stated that the jury was clearly instructed that the presumptions of law are in favor of the innocence of the defendant, and that the burden of proof is upon the people to establish the guilt of the accused

to a moral certainty and beyond a reasonable doubt before the jury can be justified in finding a verdict of guilty. We think it clear that the said statement of the district attorney was not intended, and could not be so understood by the jury, as referring to the failure of the defendant to take the stand; but that it referred to his failure to make any explanation of his possession of the property prior to the trial of the case. The situation is similar to that presented in the case of People v. Fitts and People v. Waugh, supra, wherein the question is fully considered and discussed. While the district attorney had no right to *use* against the defendant to his prejudice the fact that he had not testified as a witness, it was entirely legitimate to comment upon his failure to offer any explanation of his possession of the stolen property. The expression of the trial court, "In other words, there is a presumption of guilt if he does not make an explanation," might be deemed prejudicial if considered apart from the context. But when the whole sentence is read it is perfectly apparent that the court meant to express a doubt whether such presumption exists. But the expression of such doubt is rendered innocuous by the subsequent clear instruction of the court on the subject.

In conclusion we may state that the trial court was extremely careful to protect and safeguard all the rights of the defendant; that no errors were committed in the rulings during the progress of the trial; that the jury was fully and clearly instructed upon every phase of the issue involved; and, after a consideration of the entire record, we cannot say that the verdict was unjust.

The judgment and order are therefore affirmed.

We concur: HART, J.; ELLISON, P. J., pro tem.

45 Cal. App. 518

THRESHER et al. v. CLARK et al.

(Civ. 3117.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1920. Hearing Denied by Supreme Court March 18, 1920.)

ELECTION OF REMEDIES ⊂=15—PLAINTIFFS HAVING SECURED ENFORCEMENT OF RESTRICTIVE BUILDING PERMIT BY INJUNCTION CANNOT RECOVER FOR BREACH OF COVENANT.

Where plaintiffs secured compliance with a restrictive building permit by means of an injunction, they cannot resort to action at law for damages, for the proceeding in equity was an election of remedies.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by George P. Thresher and another against Wesley Clark and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Leon F. Moss, of Los Angeles, for appellants.

Meserve & Meserve and Hunsaker, Britt & Edwards, all of Los Angeles (W. E. Mitchell, of Los Angeles, of counsel), for respondents.

RICHARDS, J. This action was brought to recover the sum of $10,000 as liquidated damages for a breach of certain restrictive building covenants contained in a contract for the sale of a building lot, forming part of a tract of land known as Westmoreland Place, situated in the city of Los Angeles, Cal.

The facts are fully stated in the case of Miles v. Clark, 187 Pac. 167, decided by this court December 2, 1919. In that case plaintiffs herein were interveners, and they there sought and obtained the specific performance of the contract for a breach of which they are in this action seeking damages. This action was brought after the Miles suit was instituted. Upon its institution the defendants herein filed an amended answer in the Miles Case, in which they set up the contract here sued upon, and pleaded as a separate defense to the complaint in intervention that as the present plaintiffs had brought this action they had thereby elected to sue for damages, and had no right to seek the relief asked by their complaint in intervention in the Miles Case, viz. specific enforcement of that contract. Plaintiffs herein disposed of that defense by obtaining a finding from the court in that case that they had elected to pursue the remedies prayed for by them in their complaint in intervention in preference to any other remedies to which they might have been entitled in the premises.

In the case at bar the findings of the trial court are: (1) That none of the allegations of the plaintiffs' complaint are true; (2) that by reason of the pendency of the action of Miles v. Clark, and by reason of the findings therein, ever since the entry of said judgment the plaintiffs in this action are barred from further proceedings herein upon the cause of action for liquidated damages set out in their complaint.

Respondents urge that the judgment in this case should be affirmed:

(1) For the reason that there is no pretense in plaintiffs' pleading of their having suffered any actual damage; that neither the nature of the case made by the complaint, nor of the contract on which plaintiffs have sued, make it impracticable or extremely difficult to fix plaintiffs' actual damage, if there be any, and that therefore the case is not one permitted by the statute for liquidated damages;

(2) That in the action of Miles v. Clark, plaintiffs having obtained a judgment which

gives them all they would have obtained had the covenant, for the breach of which they sue herein, been fully kept and performed, they cannot have the fruits of the covenant and also damage for the loss of these fruits;

(3) That the nature of the contract is such that the $10,000 claimed is a penalty.

Whether the contract is one for liquidated damages or a penalty is immaterial, for, in either case, the plaintiffs waived their action at law when they elected to resort to equity to enforce their agreement. Under their pleadings they are not entitled to both remedies, and cannot, therefore, carry both actions to judgment and satisfaction. Having availed themselves of their equitable remedy and recovered judgment thereon they thereby foreclosed themselves from the further prosecution of this action. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 Pac. 425; Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 567

TURNER v. LOS ANGELES RY. CORPORATION. (Civ. 3182.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1920. Hearing Denied by Supreme Court March 25, 1920.)

STREET RAILROADS ⊂=114(9) — VERDICT FOR COLLISION WITH AUTOMOBILE HELD WARRANTED.

In an action for injuries by negligence in so propelling a street car that it struck plaintiff's automobile, stalled on the track in plain view of the motorman, evidence *held* to support verdict for plaintiff.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Robert E. Turner against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Geo. M. Harker and S. M. Bernard, both of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action for personal injuries, alleged to have been caused by the negligence of defendant in so propelling one of its street cars that it struck plaintiff's automobile while stalled on the track in plain view of the motorman in charge of the car. It is further alleged in the complaint that at the time the street car was being operated at a dangerous and unsafe rate of speed, and was not properly provided with suitable emergency brakes, or other appliances for stopping suddenly, should occasion arise. The defendant denied any negligence on its part, and pleaded contributory negligence on the part of the plaintiff as a further defense. The trial by jury resulted in a verdict for $500, for which amount judgment was entered, and the defendant appeals.

It admits that "the amount of the verdict is very small in comparison to the injuries sustained by the plaintiff," and presents for our consideration but "the single question as to the sufficiency of the evidence to sustain the verdict." It relies particularly upon the alleged contributory negligence of the plaintiff, and asserts that certain physical facts, which it seeks to have this court judicially notice, were not overcome by the evidence.

There is absolutely no merit in any of appellant's contentions. The new automobile, in which were the plaintiff, his wife, and two men, stalled on the track of defendant's car line at the bottom of a perceptible grade, about 9:30 o'clock at night. By direction and assistance of a police officer the automobile was moved a few feet to the side. A street car of defendant then passed safely, at a signal from some of the auto party, but going very slowly. The engine of the automobile could not be started by cranking, and plaintiff stepped on the running board to release the emergency brake, which was set, in order to allow the car to be pushed nearer the curb. As he did so, and before his hand reached the brake lever, another car of the defendant, coasting down the grade, at a rate of speed stated by some of the witnesses to be 30 miles per hour, collided with the automobile, and, striking the plaintiff, inflicted the injuries complained of. The front part of the street car cleared, but the rear step struck the rear left-hand hub of the automobile. The automobile had not moved after the first street car passed. The night was clear, the view of the motorman was unobstructed, the street car was equipped with a tungsten headlight in perfect order, and the tail light of the automobile was burning brightly. None of those working around the automobile heard the approaching street car, or any bell ringing until just before the collision.

The evidence is not only sufficient to support the verdict of the jury, but warrants a conclusion that at the time of the accident the car of the defendant was being operated in a manner amounting to a negligent disregard of the rights of persons using the street. Without further statement of the testimony of the various witnesses, suffice it to say that every question presented by the appeal was a matter solely for the consideration of and final determination by the jury,

at the trial of the cause. Gumpel v. San Diego Electric Ry. Co., 178 Cal. 166, 172 Pac. 605; O'Connor v. United Railroads, 168 Cal. 43, 141 Pac. 809.

The judgment is affirmed, with $100 added costs imposed upon the defendant for instituting a frivolous appeal.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

45 Cal. App. 491

CALIFORNIA PACKING CORPORATION v. KATO. (Civ. 2968.)

(District Court of Appeal, First District, Division 1, California. Jan. 16, 1920.)

ATTACHMENT ⟹8—ACTION FOR BREACH OF CONTRACT TO DELIVER TOMATOES IS NOT "ACTION ON EXPRESS CONTRACT FOR DIRECT PAYMENT OF MONEY," BUT IS "ACTION FOR UNLIQUIDATED DAMAGES."

An action to recover the difference between the price at which defendant agreed to sell tomatoes and the market price on day of delivery is an "action for unliquidated damages," not one on an express contract for the direct payment of money, and an attachment cannot be issued in such action under Code of Civil Procedure, § 538.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by the California Packing Corporation against S. Kato. From an order denying his motion to dismiss the attachment, defendant appeals. Reversed.

Sapiro, Neylan & Ehrlich, of San Francisco, for appellant.

Pillsbury, Madison & Sutro and Thomas, Beedy & Lanagan, all of San Francisco, for respondent.

WASTE, P. J. This is an appeal from an order denying a motion to dismiss an attachment. The action was brought by respondent to recover damages from the appellant by reason of a breach of his agreement to sell and deliver a crop of tomatoes. It is alleged in the complaint that under the terms of the contract between the parties the defendant agreed to sell and deliver, and plaintiff agreed to buy, when the same became ripe and ready for delivery, all tomatoes grown on a designated parcel of land. The price agreed to be paid was the sum of $15 per ton. The damage alleged is the difference between that price and the market price of the tomatoes on the day that appellant contracted to deliver them, and upon every day after that time to the filing of the suit, which market price is alleged to be $25 per ton.

The affidavit for attachment contains the averment that the defendant in the action "is indebted to plaintiff in the sum of two thousand dollars ($2,000) over and above all legal set-offs and counterclaims upon a contract for the direct payment of money, to wit, a contract by which the defendant agreed to pay plaintiff the difference between three thousand dollars ($3,000), the contract price of a certain crop of tomatoes, and five thousand dollars ($5,000), the market value of said tomatoes." It further shows that the contract was made, and was payable, in this state, and complies fully with section 538 of the Code of Civil Procedure, which prescribes what an affidavit for attachment must contain.

The defendant made a motion to dissolve the writ of attachment upon the ground that the same was improperly and irregularly issued, in that there is a fatal variance between the affidavit upon which it was issued and the complaint in the action, specifying two reasons: (1) That it appears upon the fact of the complaint in the action that the defendant is not indebted to plaintiff upon a contract, express or implied, for the direct payment of money; (2) that the action is one for damages only, and the damages are not liquidated.

Respondent insists that the action is one upon an implied contract for the direct payment of money, to wit, an implied contract to pay the buyer the difference between the contract price and the market value of the goods.

After this matter was submitted and first decided the decision of the Supreme Court in Willett & Burr v. Alpert et al. (Sup.) 185 Pac. 976, was handed down. A petition for a rehearing has since been denied. In that opinion the precise question presented by this appeal was considered and decided. We are unable to distinguish the nature of the transactions in the two cases. There the contract was to sell a large amount of railroad equipment. It was alleged in the complaint that the defendant delivered only 425 tons instead of 600 tons of rails, and that by reason of such failure the plaintiff had been damaged. An attachment was issued, the affidavit therefore being in the usual form, and, as in the case at bar, alleged that each of the defendants was indebted to the plaintiff in the sum of $6,562.50 upon an express contract for the direct payment of money.

A motion was made to dismiss the attachment, which was granted. One of the grounds of the motion was that the writ of attachment was irregularly issued in that the claim sued upon "was not an indebtedness due from defendant to plaintiff upon a contract, express or implied, for the direct payment of money, but that, on the contrary, said alleged claim set forth in plaintiff's complaint herein is for an alleged breach of contract upon a claim for unliquidated damages."

After an exhaustive examination of the question thus presented, and a study of the authorities cited, many of which have been

presented for our consideration, the court upheld the lower court's ruling. The heart of the decision is contained in the following quotation:

"To recapitulate, it is plain in the present case that there is no express contract for the direct payment of money; it is also plain that there is no implied contract unless the law creates the fiction of one for the purpose of permitting an action upon a common count; and, finally, it is a well-settled rule that an action upon a common count will not be permitted in such a case as this, where there is an express contract to do something else than pay money, and damages are sought because of the failure of the defendant to do that something else. It follows that the present action is not one in which the statute authorizes the issuance of an attachment. To hold otherwise would be simply to wipe out the statute and permit an attachment in every action for damages for a breach of contract, regardless of whether or not the contract be one for the direct payment of money."

The order appealed from is reversed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

45 Cal. App. 553

PEOPLE v. MORALES. (Cr. 691.)

(District Court of Appeal, Second District, Division 1, California. Jan. 26, 1920.)

1. CRIMINAL LAW ⊂=369(2), 371(12)—EVIDENCE OF OTHER OFFENSES ADMISSIBLE TO ESTABLISH MOTIVE.

Evidence of other offenses committed both before and after that charged is admissible against defendant where it tends to establish a material fact in the particular offense charged or a motive therefor.

2. CRIMINAL LAW ⊂=371(1) — EVIDENCE OF OTHER OFFENSES ADMISSIBLE TO PROVE SPECIFIC INTENT.

Evidence of other offenses committed both before and after that charged is admissible against defendant where a specific intent is a material ingredient of the offense charged.

3. CRIMINAL LAW ⊂=369(1)—EVIDENCE OF OTHER OFFENSES ADMISSIBLE IN CASES OF SEXUAL CRIMES.

Evidence of other offenses committed both before and after that charged is admissible against defendant in the case of sexual crimes to prove the inclination or lascivious disposition of defendant.

4. CRIMINAL LAW ⊂=369(6) — INTOXICATING LIQUORS ⊂=233(2) — EVIDENCE OF SUBSEQUENT SALES AND POSSESSION OF LIQUOR INADMISSIBLE IN PROSECUTION FOR SELLING.

In a prosecution for selling alcoholic liquors in no-license territory, evidence for the prosecution that defendant, three days after the alleged commission of the offense, had sold some drinks, and also, still later, had sold and offered to deliver a number of half pint bottles of the same kind of liquor, and that, still later a raid was made on his premises, and a number of bottles of whisky found, was inadmissible.

5. CRIMINAL LAW ⊂=1186(4)—ADMISSION OF EVIDENCE OF SUBSEQUENT OFFENSES PREJUDICIAL.

In a prosecution for selling alcoholic liquors in no-license territory, where defendant denied under oath that he had sold the whisky as charged, the improper admission of evidence that after the date of the offense charged defendant had sold certain drinks, etc., was prejudicial in such a degree as to deprive defendant of a fair trial, so that conviction must be reversed despite Const. art. 6, § 4½.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Jose Morales was convicted of selling alcoholic liquors in no-license territory, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order reversed.

Miguel Estudillo and Walter C. Davison, both of Riverside, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

JAMES, J. Defendant has appealed from a judgment directing that he pay a fine in the sum of $600 or suffer the alternative of imprisonment until the fine be satisfied in the proportion of $2 for each day that he shall be so imprisoned. An appeal is also taken from an order denying a motion for a new trial.

Appellant was accused of having, on the 22d day of June, 1919, in certain "no-license territory," sold, furnished, distributed, and given away alcoholic liquors. These acts, under the provisions of the statute known as the Wylie Law, constitute a high-grade misdemeanor. The principal evidence showing that appellant had on the day charged committed the alleged crime was that furnished by two detectives, who testified that two pints of whisky were delivered to one of them, for which $6 was paid for each pint. The defendant testified and denied that he had sold the whisky as charged. Over the objection of defendant, the prosecution was permitted to show that the appellant, on the 25th of June, three days after the alleged commission of the offense charged, had sold some drinks of whisky, and that on July 12th he had sold and offered to deliver a number of half pint bottles of the same kind of liquor. Evidence was also admitted showing that a raid was made on the premises of appellant on the 14th of July, 1919, and that a number of bottles of whisky were found upon the premises. When testimony as to the subsequent sales of the whisky was offered, appellant's counsel made objection on the ground that such testimony was incompetent,

irrelevant, and immaterial. Counsel for the people evidently assumed the testimony was competent; for he stated to the court, when confronted with the objection, that he was offering it "on the ruling that prior or subsequent evidence may be shown to prove the probability or improbability of the offense." The trial judge agreed with the prosecutor that the testimony was admissible, although he instructed the jury that it was not "evidence of the authenticity of the offense of the 22d, but because of the rule that permits such testimony." That this testimony, if incompetent, in view of the denial made by the defendant that he had sold any liquor to the detectives, was highly prejudicial, cannot be doubted. Had the evidence referred only to the alleged transaction occurring on June 22d, the jury might have been left with a reasonable doubt as to the guilt of the defendant. But, with evidence of repeated sales accumulated before it, it is quite natural that such doubt would be dissipated. Evidence of other offenses committed, both before and after that charged against a defendant, is sometimes admissible. The cases, however, in which such proof may be made have been classified by the California courts.

[1] We find that such evidence is admissible where it tends to establish a material fact in the particular offense charged, or a motive therefor. People v. Lane, 101 Cal. 513, 36 Pac. 16; People v. Hatch, 163 Cal. 368, 125 Pac. 907; People v. Walters, 98 Cal. 138, 32 Pac. 864.

[2] It is admissible also where a specific intent is a material ingredient of the offense charged. People v. Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667; People v. McGlade, 139 Cal. 66, 72 Pac. 600; People v. King, 23 Cal. App. 259, 137 Pac. 1076; People v. Zimmerman, 11 Cal. App. 115, 104 Pac. 590.

[3] It is admissible also where sexual crimes are charged, to prove the inclination or lascivious disposition of a defendant. People v. Koller, 142 Cal. 621, 76 Pac. 500.

The charge here involved does not fall within either classification adverted to; in fact, in similar cases it has been directly held to the contrary. See People v. Clark, 28 Cal. App. 670, 153 Pac. 719; People v. Dial, 28 Cal. App. 704, 153 Pac. 970. In the case first cited a reversal of the judgment was ordered because of the admission of such improper testimony, and it was there held that a miscarriage of justice had resulted in consequence of such error. In the latter case the judgment was not reversed because of the provisions of section 4½ of article 6 of the Constitution; the court observing that no evidence was offered by the defendant, except the testimony of one witness, which did not refer to the particular act there charged.

[4, 5] The record in this case, as has already been observed, shows that the defendant denied under oath that he had made the alleged sale. We think that the case cannot properly be brought within the saving grace of the constitutional provision. The errors complained of, in our opinion, were prejudicial to such a degree as to have deprived the defendant of a fair trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 520

PEOPLE v. VELARDE. (Cr. 689.)

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1920.)

1. COUNTIES ⊂⊃20½—SUBJECT TO GENERAL LAW BOARD OF SUPERVISORS CAN EXERCISE ALL LOCAL POLICE POWER.

By Const. art. 11, § 11, giving a county police power, within its limits and subject only to general laws, its board of supervisors is vested with right to exercise the entire police power of the state.

2. INTOXICATING LIQUORS ⊂⊃10(2) — ORDINANCE THAT LIQUOR TRANSPORTED INTO OR THROUGH COUNTY BE LABELED HAS SUBSTANTIAL RELATION TO PROHIBITION.

Provision of a county ordinance inhibiting transportation into or through the county of liquor without a label showing its kind and quality and the names and addresses of consignor and consignee, does not clearly appear to have no substantial relation to the primary purpose of the ordinance, to prohibit liquor traffic in the county, and so cannot be said to transcend the legislative power.

3. INTOXICATING LIQUORS ⊂⊃10(2) — COUNTY ORDINANCE HELD NOT EXERCISE OF POLICE POWER BEYOND BOUNDARIES.

County ordinance, inhibiting transportation of liquor into or through county unless bearing a certain label, is not an attempted exercise of police power beyond the county's limits.

4. COUNTIES ⊂⊃55—POLICE ORDINANCE NEED NOT EXPRESSLY EXEMPT MUNICIPAL CORPORATIONS.

If a county, in the exercise of its police power, cannot extend its jurisdiction over incorporated cities and towns therein, a police ordinance thereof need not expressly exempt them.

5. CONSTITUTIONAL LAW ⊂⊃87 — INTOXICATING LIQUORS ⊂⊃17—POLICE ORDINANCE NOT INVALID FOR INCIDENTAL IMPAIRMENT OF PROPERTY VALUE.

A county ordinance, the primary purpose of which is to prohibit liquor traffic in the county, is not unconstitutional, in so far as it inhibits transportation of unlabeled liquor into or through the county, though there be an incidental impairment of property value in liquor transported by the owner and intended for his own use.

6. COUNTIES ⊂=55—LIQUOR ORDINANCE HELD GOOD IN PART, THOUGH INVALID IN PART.

Validity of the part of a county ordinance inhibiting transportation of unlabeled liquor into or through a county, and providing a penalty therefor, is not affected by another part, as to sale to addicts to inordinate use, being invalid, because covered by the general law providing a different penalty.

7. CRIMINAL LAW ⊂=1036(1)—OBJECTION, ON APPEAL, THAT ORDINANCE WAS ADMITTED WITHOUT PROOF OF PUBLICATION, TOO LATE.

An ordinance having been admitted without objection, it is too late to object for the first time on appeal that there was no preliminary proof of its publication.

8. CRIMINAL LAW ⊂=351(9)—OFFER OF BRIBE FOR RELEASE FROM ARREST ADMISSION OF GUILT.

Evidence that defendant offered money to the person arresting him to let him go is admissible.

9. INTOXICATING LIQUORS ⊂=222—INFORMATION NEED NOT ALLEGE VIOLATION OF COUNTY ORDINANCE WAS OUTSIDE MUNICIPAL CORPORATION.

Though a county ordinance inhibiting transportation of unlabeled liquor into or through a county has no application in an incorporated city or town, the information for violation thereof need not allege the offense was outside such a city or town; but it is enough that it is in the language of the ordinance.

10. CRIMINAL LAW ⊂=304(6)—JUDICIAL NOTICE OF COUNTY BOUNDARIES.

Judicial notice will be taken that a well-known spot in a county is outside an incorporated city or town.

11. CRIMINAL LAW ⊂=1215—FINE AND IMPRISONMENT AND ALSO ENFORCEMENT OF FINE BY FURTHER IMPRISONMENT NOT AUTHORIZED BY COUNTY LIQUOR ORDINANCE.

Under an ordinance providing that one convicted of violation thereof shall be fined in not exceeding $600, or imprisoned for not more than seven months, or both, the court cannot punish by both, and also enforce payment of the fine by further imprisonment till the fine is paid.

12. CRIMINAL LAW ⊂=1215—CODE AUTHORIZING JUDGMENT FOR FINE TO DIRECT IMPRISONMENT TILL PAID INAPPLICABLE TO JUDGMENT FOR FINE AND IMPRISONMENT.

Pen. Code, § 1205, authorizing a judgment that defendant pay a fine to also direct that he be imprisoned till the fine be satisfied, does not apply where the judgment is for both a fine and imprisonment.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Pablo Velarde was convicted of violation of a county ordinance, and appeals. Modified and affirmed.

Miguel Estudillo, of Riverside, and R. A. Moore, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Loyal C. Kelley, of Riverside, for the People.

FINLAYSON, P. J. Upon an information, filed in the superior court of Riverside county, defendant was convicted of a violation of section 5 of an ordinance of that county, whereby it is provided that—

"It shall be unlawful for any person * * * to carry, haul, transport, furnish, deliver or ship into the county of Riverside or through, over or across any portion of said county * * * any intoxicating liquor without having placed upon each package and consignment thereof a mark or label showing the true name and quantity of each kind of liquor therein contained, and the names and addresses of the consignor and consignee, * * * and all such packages shall be so marked and labeled before leaving the place of business of the person * * * so furnishing, shipping or delivering the same, provided, however, that this section shall have no reference to interstate commerce passing through the county."

The information charges that defendant "did * * * carry and transport a quantity of intoxicating liquors through, over, and across the county of Riverside, without having placed on each package and consignment" the mark or label required by the ordinance. Defendant was found guilty as charged. He was sentenced to the county jail for the period of two months, and, in addition, to pay a fine of $500, and, if in default in payment of the fine, to "serve out this sentence in the county jail at the rate of $2.00 per day."

Prohibition of the liquor traffic within the county is the primary purpose of the ordinance. Section 1 thereof declares that the sale, gift, or delivery of alcoholic or intoxicating liquors within the boundaries of the county, outside of municipal corporations, is prohibited. Section 5, the provisions of which defendant is charged with having violated, evidently was intended to facilitate the enforcement of the prohibitory provisions contained in section 1. Defendant attacks the constitutionality of section 5 upon a number of grounds, none of which, we think, is tenable.

[1, 2] The board of supervisors has the power to provide that no package or consignment shall be brought into or transported through the county unless the prescribed label shall have been placed thereon before leaving the place of business of the person furnishing the package of liquor, even though, as here, that place be in another county, namely, the city of Los Angeles. Section 11, article 11, of the Constitution reads:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Thus there is vested in every county police power by direct grant under the Constitution. The power thus conferred is as broad as that

vested in the Legislature itself, subject to these two exceptions: That it is local to the county or municipality, as the case may be, and is subject to general laws. The board of supervisors of Riverside county was therefore vested with the right to exercise within its jurisdiction "the entire police power of the state, subject only to the control of the general laws." In re Isch, 174 Cal. 180, 162 Pac. 1026. See, also, Ex parte Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987. That the county, in the exercise of its police power, may prohibit the selling of intoxicating liquors within its jurisdiction is undoubted. It also is well established that when a county, asserting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make that action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which, in the legislative judgment, is regarded as essential to the accomplishment of the primary purpose of the enactment.

With the wisdom of the exercise of the legislative judgment the court has no concern; and, unless it clearly appear that the ordinance has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the law-making body—a notion foreign to our constitutional system. Purity Extract, etc., Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 84. Clearly, if a mark or label, such as is required by this ordinance, be put upon every package or consignment of intoxicating liquor that is brought into or transported through or across the county, it will greatly facilitate the enforcement of the ban which section 1 of the ordinance places upon the sale of intoxicating liquors within the county. Experience has shown that the ingenuity of man is such that it is almost impossible to draft a prohibition law so broad in its scope that some method cannot be devised for evading it; and no doubt it was deemed necessary to prohibit intoxicating liquors from being brought into or transported over or across the county without the prescribed mark or label in order that the real purpose of the ordinance, the prohibition of the liquor traffic within the county, might be attained. It is obvious that, if the consignor is required to put the mark or label on the package at his place of business, wherever it may be, it will greatly facilitate the detection, and therefore the prevention, of "bootlegging" and similar illicit liquor sales. If a person should be found traversing the county with packages of intoxicants which, on inspection, appeared to be labeled as required by the ordinance, his bona fides could readily be ascertained by instantly telephoning or telegraphing to the consignor's place of business, even though it were outside the county, and thus the authorities could ascertain whether the liquor really was intended for a bona fide sale and delivery to some person at some place where such sale and delivery would be legal—that is, legal at the time when this information was laid, which was prior to the operation of the Eighteenth Amendment and the recent sweeping national prohibition legislation.

There is nothing unreasonable or oppressive about the ordinance or in the penalties provided for a violation of its provisions.

[3] The ordinance is not an attempted exercise of police power beyond the county's limits. The purpose of that part of the ordinance under which defendant is charged is to prevent the transportation of intoxicating liquor across the county unless it be marked with a certain prescribed label. It operates only upon an act done within the county, namely, the act of carrying or transporting through or across the county any intoxicating liquor that has not been marked or labeled in the prescribed manner. If a person bringing intoxicating liquor into the county does not choose to place the prescribed label upon the packages, the result merely is that he cannot bring the liquor into or transport it across any part of the county. The ordinance, therefore, has no extraterritorial operation, and there has been no attempt to give it any such effect. State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399.

[4] It is not essential to the validity of section 5 that it should expressly exclude incorporated cities and towns from its operation. For the purpose of this decision we shall assume that none of the police power that the Constitution has directly granted to the county can be exercised within the limits of any incorporated city or town in the county, irrespective of whether any city or town has or has not exercised its police powers in such a manner that the regulations of the two political entities necessarily must conflict if each be enforced—an assumption, however, that runs counter to what seems to be an intimation in Ex parte Mansfield, 106 Cal. 403, 39 Pac. 775, to the effect that a county ordinance, passed in the exercise of the county's police powers, is inoperative within the limits of a city or town in the county when, and only when, its enforcement would annul or supersede some regulation of the city or town made in the exercise of its police powers. But, notwithstanding the assumption we have thus made in favor of appellant, a county police regula-

tion is not void merely because the ordinance does not expressly exempt from its operation the territory of all the incorporated cities and towns within the county. If, as appellant's counsel assume, the county, in the exercise of its police powers, never can extend its jurisdiction over territory embraced within the limits of any incorporated city or town, nevertheless it is not necessary to the validity of the ordinance that it shall expressly exempt from its operation that over which it can have no jurisdiction. A failure thus to expressly exempt from the ordinance territory over which, according to appellant's contention, the county cannot exercise its police powers, is not evincive of an attempt to assert the county's authority over such territory.

[5] There is no merit in the contention that section 5 is unconstitutional merely because it may operate to prohibit the untrammeled transportation through or across the county of liquor that is the property of the person so transporting it, intended for his own personal use, and not for sale or illegal disposition within the bounds of the county. If the liquor be the personal property of a person, intended for a legitimate use by him, the requirement of section 5 does not for that reason deprive him of any constitutional right. It is well settled that, in legislating in behalf of public morals, health or safety, the state, or a county, by reason of its police power, may enact laws or ordinances that incidentally impair property value. Here the impairment of property value, if any there may be, is most certainly not the primary object of the ordinance. If there is any such impairment of property right, it is solely because it is a necessary incident to the main purpose. As a means of preventing the illegal sale of liquor within the county, outside of municipal corporations, the county has the right to prescribe any reasonable regulation as a condition to the exercise of the right to bring liquor into or transport it across any part of the county, even though such liquor be owned by the person bringing it into the county and it be intended for his own personal use. Crane v. Campbell, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304; Barbour v. Georgia, 146 Ga. 667, 92 S. E. 70, 2 A. L. R. 1095, affirmed 249 U. S. 454, 39 Sup. Ct. 316, 63 L. Ed. 704; Ex parte Zwissig, 42 Nev. 360, 178 Pac. 20; State v. Brown, 40 S. D. 372, 167 N. W. 400; Fitch v. State, 102 Neb. 361, 167 N. W. 417.

[6] Nor is there any merit in the contention that the ordinance is void by reason of an asserted conflict between the penalty provided by the ordinance for a violation of section 9 thereof and the penalty provided by the state law for a violation of the act to prevent the sale of intoxicating liquor to persons addicted to the inordinate use thereof. Stats. 1915, p. 49. Assuming, for the purpose of this decision only, that, as contended by appellant, section 9 of the ordinance and the general law enacted by the state Legislature to prevent the sale of intoxicating liquors to persons addicted to the inordinate use of such liquors cover the same matter, and assuming, also, that for this reason there is a conflict between the penalty provided by the ordinance and that provided by the general statute for the same offense, and that for this reason section 9 of the ordinance is void, nevertheless such conflict, if any there be, cannot affect the validity of the section under which defendant has been prosecuted—section 5. A county ordinance, like a legislative statute, may be good in part and upheld, while a part may be illegal and void; and if there are several provisions of an ordinance, some of which are void and others valid, and a penalty is provided applying to each offense separately, the ordinance may be enforced as to the offenses respecting which it is valid, just as if the void parts never had been incorporated therein. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Mansfield, supra. For these reasons we are satisfied that that part of the ordinance under which defendant was prosecuted is a valid and constitutional by-law of the county of Riverside.

[7] At the trial the district attorney offered in evidence a copy of the ordinance. Defendant made no objection to the offer. Thereupon the ordinance was introduced in evidence. It is now claimed, for the first time, that there is a failure of proof, in that there was no evidence of publication of the ordinance. Doubtless the ordinance was not admissible in evidence until the prosecution had first made preliminary proof of its publication, and of any other fact that might be a necessary prerequisite to the existence of an operative ordinance. But, without objection, it was received in evidence as an ordinance that had been duly adopted and had become operative. It is too late now to raise the point that its adoption was not attended by every act necessary to make it operative as an ordinance of the county. The failure to object to its introduction must be construed as an admission that it was competent evidence, and that all essential prerequisites to make it an existing and operative by-law of the county had been complied with. Flora v. Lee, 5 Ill. App. 629.

[8] Appellant complains that the court erred in permitting the introduction in evidence of a shotgun that was in his automobile at the time of his arrest. Witnesses for the prosecution testified about the shotgun, but it was not introduced in evidence. There is, therefore, no basis for the objection. It likewise is claimed that the court erred in permitting a witness for the prosecution, one of the arresting officers, to testify that, soon after the arrest, defendant offered the

witness $200 if he would let him go. Such evidence, like evidence of flight, is admissible as an admission tending to show consciousness of guilt. It is not to be supposed that one who is innocent, and conscious of the fact, will resort to bribery. State v. Case, 93 N. C. 545, 53 Am. Rep. 471; Turpin v. Commonwealth, 140 Ky. 294, 130 S. W. 1086, 30 L. R. A. (N. S.) 794, 140 Am. St. Rep. 378; 16 C. J. 556.

[9, 10] It was not necessary that the information should specifically allege that the offense was committed outside of an incorporated city or town. It followed the language of the ordinance, and that was sufficient. The evidence showed that the offense was, in fact, committed in the county of Riverside and outside of any incorporated city or town. Defendant, while actually violating section 5 of the ordinance, was arrested at a spot on a well-known highway, about a mile and a half east of Wineville. The court will take judicial notice that that place is not within the limits of any incorporated city or town. A careful examination of the record convinces us that defendant had a fair and impartial trial, free from any prejudicial error.

[11, 12] There is, however, one part of the judgment appealed from that is manifestly void. That is the portion ordering the retention of defendant in custody until he pay the fine. There is nothing in the ordinance itself that authorizes any such method for enforcing payment. Nor is there any statute giving the court power to impose the alternative of imprisonment in default of payment of the fine, where, as here, the fine is coupled with a sentence of imprisonment. The penal clause of the ordinance provides that a person convicted of a violation of any of its provisions shall "be fined in the sum of not more than $600, or be imprisoned in the county jail of Riverside county for not more than 7 months, or be punished by both such fine and imprisonment." When the county legislative body has said that imprisonment shall not exceed a certain term, it ought not to be held that, after the court has imposed both a fine and a term in jail, it can imprison beyond the maximum period provided by the ordinance. And yet that is precisely what could be done if it were held that, under this ordinance, the court could punish by both fine and imprisonment, and likewise enforce payment of the fine by further imprisonment until the fine should be paid. See the reasoning of Mr. Justice McFarland in Ex parte Wadleigh, 82 Cal. 521, 23 Pac. 190. Nor can this part of the sentence be upheld under section 1205 of the Penal Code. That section does not apply to cases in which the judgment is for a fine coupled with a sentence of imprisonment. Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372; People v. Brown, 113 Cal. 35, 45 Pac. 181.

The judgment is modified, by striking out that part thereof which provides that, in default of payment of the fine, the defendant "serve out this sentence in county jail at the rate of $2.00 per day." As thus modified, the judgment is affirmed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 505

Ex parte HUNTER et al. (Cr. 498.)

(District Court of Appeal, Third District, California. Jan. 19, 1920.)

1. HABEAS CORPUS ⇐85(1), 96 — EVIDENCE PRESUMED SUFFICIENT; ALLEGATIONS OF PETITION UNDER WHICH MINORS WERE HELD.

In habeas corpus proceedings to obtain the release of female minors from the custody of the juvenile probation officer, it must be assumed that ample evidence was presented to justify the finding and commitment, and allegations of the petition under which the minors were detained should not be criticized with the same degree of severity after a full hearing has been had, with ample opportunity for all parties in interest to present whatever evidence they might desire, as would be proper if it were tested before any trial was had or any evidence introduced.

2. INFANTS ⇐16 — PETITION SUFFICIENTLY SHOWED PARENTS WERE INCAPABLE OF EXERCISING PROPER CONTROL AND THAT MINORS WERE LIABLE TO FALL INTO EVIL WAYS.

A petition charging that minors were neglected and delinquent children, in "that they are both of school age and have not been attending the public schools of the said county of B., and that they have been keeping undesirable company with men, to wit, two Hindu men, going about from place to place in automobiles with such men," etc., *held* to sufficiently charge that their parents were incapable of exercising proper parental control, and that the minors were leading an idle life, associating with undesirable persons in a manner likely to induce lewd and immoral practices, and that their home was an unfit place for their habitation, comfort, discipline, and development, justifying their commitment under Sts. 1915, p. 1225.

In the matter of the application of Ruby H. Hunter and Pearl M. Hunter for a writ of habeas corpus prayed to be directed to the superior court of Butte county for release of female minors from the custody of the juvenile probation officer. Writ denied.

W. E. Davies, of Marysville, for petitioners.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

BURNETT, J. The application was made by the parents of said Ruby H. Hunter and Pearl M. Hunter for a writ of habeas corpus to secure their release from the custody of the probation officer of Butte county. The contention is that, by reason of the insufficiency of the petition against them in the juvenile court in which said commitment was made, said juvenile court had no jurisdiction to commit said minors to the custody of said probation officer. Said petition, in its charging part, alleged:

"That said Ruby H. Hunter and Pearl M. Hunter are neglected and delinquent children, in this, that they are both of school age, and have not been attending the public schools of the said county of Butte, and that they have been keeping undesirable company with men, to wit, two Hindu men, going about from place to place in automobiles with said Hindus, and associating with them at various and different times, and that one of said Hindus had a desire to marry one of said girls, made application to the county clerk of Butte county for a marriage license to marry her, and was refused such license by the said county clerk, and that Ruby H. Hunter and Pearl M. Hunter, in company with their father, John Hunter, and their brother, Robert Hunter, then went to Sacramento and made application for a license to marry and were refused such license, and that the parents, both of them, do not and cannot exercise the proper parental control and management of the said two minor children, that the said two minor children are of the age of 17 years, and have only gone so far as the third grade in the grammar schools of the county, and that they are both sound and healthy, physically and mentally."

The matter came on regularly for hearing before the superior court of said county, sitting as a juvenile court, and, all the parties in interest being present, the evidence was heard, and, after due consideration, the court found that the parents of said minors were incapable of exercising proper parental control over said Ruby H. Hunter and Pearl M. Hunter, and that they and each of them were at said time, and now are, in need of such proper parental control, that by reason of the neglect of the said father and mother the home of said minors was and is an unfit place for them, "and that the said Ruby H. Hunter and Pearl M. Hunter for a period of time prior to the said 15th day of December, 1919, were and neither of them were properly disciplined, controlled, and managed, and that they and each of them were leading a very neglectful and careless life and in danger of being led astray or induced into immoral or lewd lives, and, if not properly cared for, managed, controlled, and disciplined, were and each of them were in great danger." It is further found that said minors for two months had been keeping company and going about the country with two Hindu men, taking rides with them about the country, and attending picture shows, that their education had been neglected, that they were not required to attend school, that said minors were in great need of proper care and training and parental control, and that the parents were neglectful of the education of said minors, and made little effort to manage and control them; that as a result of these facts said Ruby H. Hunter and Pearl M. Hunter "were and now are in danger of leading and living a life of immorality." The court thereupon committed said minors to the detention home of said Butte county, directing "that they be safely cared for and maintained until the further order of this court and said Ruby H. Hunter and Pearl M. Hunter are to continue to be and remain wards of the county until they and each of them obtain the age of 21 years, unless otherwise ordered by this court."

It is not disputed that, by virtue of the provisions of the Juvenile Court Law (Stats. 1915, p. 1225), the findings of the court were and are sufficient to justify the commitment of said minors to said detention home. In this connection we may call attention to the fact that said Juvenile Court Law applies to the following persons under the age of 21 years, to wit: One "who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control and who is in need of such control" (section 1, subd. 2); and one "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life" (section 1, subd. 11).

[1] It may be further stated that we must assume that ample evidence was presented to the court to justify said finding and said commitment. Under such circumstances, after a full hearing with ample opportunity for all parties in interest to present whatever evidence they might desire, it is apparent that the allegations of the petition upon which the proceeding was based should not be criticized with the same degree of severity as would be proper if it were tested before any trial was had or any evidence introduced. Indeed, as a matter of substantial justice, it is fair to say that by reason of the alleged defects in said petition no prejudice has resulted to petitioners, since they are now held by a commitment issued out of a court of competent jurisdiction and based upon sufficient findings, which, in turn, we must assume, were the product of a full and fair investigation and trial in a case authorized by said Juvenile Court Law.

[2] Moreover, while said petition is somewhat defective in all of its material allegations, and some of its averments are entirely without pertinent significance, yet we cannot say that it appears therein that the court had no jurisdiction to inquire into the ques-

tion whether said minors should be committed to the custody of said probation officer. In fact, by fair intendment it does appear that their parents were incapable of exercising over said minors proper parental control, that said minors were leading an idle life, associating with undesirable persons in a manner likely to induce lewd and immoral practices, and their home was an unfit place for their habitation, comfort, discipline, and development. No further comment upon said petition is deemed necessary.

Of course, it is a serious matter to deprive parents of the care and companionship of their minor children, especially their daughters, but we must assume that the court acted for the best interests of the girls as well as of the community. It may be added that it is to be hoped that within a short time it may be found safe and advisable to return said minors to the custody of their parents. This the lower court has the authority to do, but no warrant has been shown herein for us to interfere with that discretion, or to disturb the commitment.

The writ is discharged and the petitioners remanded.

We concur: HART, J.; ELLISON, Presiding Judge pro tem.

45 Cal. App. 547

PEOPLE v. HARRIS. (Cr. 688.)

(District Court of Appeal, Second District, Division 1. California. Jan. 26, 1920.)

1. CRIMINAL LAW ⊜586, 1144(7)—CONTINUANCE A DISCRETIONARY MATTER; APPELLATE COURT MUST ASSUME THAT GRANT OF CONTINUANCE WAS IN ACCORDANCE WITH REQUEST.

Application for continuance was addressed to the sound discretion of the trial court, and in the absence of counsel's requesting a further continuance than that granted, the appellate court must assume, nothing appearing to the contrary, and in the absence of any objection made to the extent of the postponement of trial, that the order made was in accordance with defendant's request.

2. JURY ⊜116 — EXCUSING OF JURORS BY COURT NOT GROUND FOR CHALLENGE TO PANEL.

Where challenge to the entire panel of jurors in a burglary case was based on the action of the trial court in excusing two jurors of its own motion, no such ground for challenge existing under Pen. Code, § 1059, the challenge was properly denied.

3. CRIMINAL LAW ⊜614(1), 1151—NO REVERSAL WHERE NO ABUSE OF DISCRETION IN FIXING TIME FOR BURGLARY TRIAL AFTER CONTINUANCE.

It cannot be said that the trial court abused its discretion in fixing the time of defendant's trial for burglary for July 25th, trial having first been set for July 9th, and continuance having been granted to July 22d, and, without such abuse being made to appear, the appellate court cannot interfere with the trial court's action.

4. CRIMINAL LAW ⊜1144(8)—WHERE CHALLENGES NOT EXHAUSTED, APPELLATE COURT MUST ASSUME THAT DEFENDANT WAS ACCORDED ALL RIGHTS.

Where defendant did not exhaust all of his peremptory challenges, the appellate court must assume that he was accorded every right to which he was entitled in relation to the choice of a lawful jury.

5. JURY ⊜109, 133 — DEFENDANT CANNOT COMPLAIN OF ERRONEOUS REJECTION OF JUROR EITHER AFTER OBJECTION OR ON COURT'S OWN MOTION.

If a juror not possessing the requisite qualifications is allowed to sit against the objections of defendant, it constitutes ground for reversal, but he is in no position to complain either because the court erroneously rejects a juror challenged for cause, or, acting on its own motion, excuses a juror without just cause.

6. JURY ⊜109 — DEFENDANT IN CRIMINAL CASE NOT ENTITLED TO HAVE EXCUSED JURORS SIT.

Defendant charged with burglary had no vested right to have certain excused jurors, though qualified, sit in the trial of his cause.

7. CRIMINAL LAW ⊜1166½(6)—DEFENDANT TRIED BY COMPETENT JURORS CANNOT COMPLAIN TWO OTHERS WERE EXCUSED.

Where it appears that defendant was tried for burglary by 12 competent, fair, and qualified jurors, he cannot complain that the trial court, acting within its discretion, rejected or excused two other qualified jurors, even though no cause existed for such action.

8. CRIMINAL LAW ⊜406(3)—INCRIMINATING STATEMENTS BY DEFENDANT IN JAIL NOT MADE UNDER PROMISE OF REWARD ADMISSIBLE.

In a prosecution for burglary, where a witness testifying as to incriminating statements made by defendant in jail stated in positive terms that he held out to defendant no hope of reward, and said nothing from which defendant could have drawn such an inference, his testimony as to defendant's statements was admissible; defendant's admissions not having been made under promise of reward.

9. CRIMINAL LAW ⊜351(9) — ESCAPE AND FLIGHT AFTER ARREST WITH ASSAULT ON OFFICER ADMISSIBLE.

In a prosecution for burglary, evidence of defendant's escape and flight from jail after his arrest, and that, when apprehended a few hours later on, in resisting the officer, he tried to cut the latter's throat with a razor, was proper as tending to show consciousness of guilt.

10. BURGLARY ⊜37 — BAG OF BURGLAR'S TOOLS FOUND IN POSSESSION OF DEFENDANT'S MISTRESS HELD ADMISSIBLE.

In a prosecution for burglary, the trial court properly admitted in evidence the bag of bur-

glar's tools which, while not in defendant's actual possession, was in the apartment of a woman with whom he was unlawfully living, and to whom he telephoned an order to deposit the same in a parcel room, which she did, and received a check, found under the carpet of the apartment by officers, who thus obtained the bag.

11. CRIMINAL LAW ⊂=655(1)—COURT'S THREAT IN PRESENCE OF JURY TO GAG OBSTREPEROUS DEFENDANT NOT ERROR.

Where defendant, on his trial for burglary, frequently interrupted witnesses, calling one a "God damned liar," the court's threat, pursuant to its duty to maintain order, to have defendant gagged, though in the presence of the jury, was not error, since if necessary to orderly proceedings, the court would have been justified in actually adopting such means, instead of threatening them.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Lewis B. Harris was convicted of burglary and grand larceny, and from the judgment, and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Guy Eddie, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. Upon an indictment charging him therewith, defendant was convicted of the crimes of burglary and grand larceny. He appeals from the judgment which followed and from an order of court denying his motion for a new trial.

The accusation is based upon the alleged act of defendant in feloniously entering the banking room of the First National Bank of Artesia and unlawfully taking therefrom certain moneys, bonds, and other personal property belonging to the bank.

[1, 2] At his arraignment, on May 19, 1919, defendant entered a plea of not guilty, and, with his consent, his trial was set for July 9th following. On July 3d defendant, in person and without the presence of counsel, appeared in court, and at his request the time of trial was continued to July 22d. On July 19th he, with new and different counsel, appeared in court, and, upon the ground that such counsel required more time to prepare for the trial, moved for a further continuance, which motion was granted, and the time of trial fixed for July 25th. The contention of appellant seems to be that, although he did not ask it, the court should have postponed the trial to a later date than the 25th of July. The application for the continuance was one which addressed itself to the sound discretion of the court, and, in the absence of counsel requesting a further continuance than that granted, we must assume, for aught that appears to the contrary and in the absence of any objection made to the extent of the postponement, that the order made was in accordance with defendant's request. At all events, it cannot be said the court abused its discretion in fixing the time of trial for July 25th, and, without such abuse being made to appear, this court cannot interfere with the action taken. People v. Ponchette, 30 Cal. App. 400, 158 Pac. 338; People v. Goldenson, 76 Cal. 341, 19 Pac. 161.

The indictment alleged the offense was committed on or about March 29, 1919. In his opening statement the district attorney stated that the evidence would show that the crime was committed on March 25, 1919. Thereupon counsel for defendant moved for a continuance upon the ground that he did not have witnesses present to prove where the defendant was on March 25th. This motion was denied without prejudice to counsel's renewal of the motion if it were found necessary for him to secure such witnesses; in response to which counsel expressed himself as satisfied with the ruling. The fact that such application was not made, although the trial continued for a period of two weeks, is indicative of the fact that no reason existed for renewing the motion.

[3-7] It appears that at the beginning of the trial, and "before any of the names in the jury box of jurors regularly in attendance in department 18 had been drawn, and while the roll of the trial panel whose names were in the jury box was being called by the clerk, on reaching the names of Ida M. Bruns and W. E. Grosh, the court excused said two jurors from further attendance as jurors." Thereupon counsel for appellant interposed a challenge to the entire panel, based upon the action of the court in excusing the said jurors of its own motion, which challenge, since no ground existed therefor under the provisions of section 1059, Penal Code, was properly denied. Nevertheless appellant insists that his substantial rights were, in some indefinite way, prejudiced by virtue of the action of the court, and assigns the same as ground for reversal. We perceive no merit in the contention. Defendant was entitled to be tried by a lawful jury, and since, as shown, he did not exhaust all of his peremptory challenges, we must assume that in this respect he was accorded every right to which he was entitled. If a juror not possessing the requisite qualifications is allowed to sit against the objections of a defendant it constitutes ground for reversal, but he is in no position to complain, either because the court erroneously rejects a juror challenged for cause, or, acting on its own motion, excuses a juror without just cause. In People v. Arceo, 32 Cal. 40, it is said:

"Thus, it appears, in many instances, parties not positively disqualified under the law, yet, in fact, not qualified or fitted to discharge the duties of jurors in the given case, and in some cases where there was really no sort of objection, courts have discharged them in the exercise of their discretion, and their action has been affirmed on appeal."

In discussing a like point, where the court of its own motion discharged an entire panel of 12 jurors, the court, in People v. Murray, 85 Cal. 350, 24 Pac. 666, said:

"The court had the undoubted right to discharge them, or any of them, at any time, without giving any reason for such discharge, and without the existence of any reason. The only difficulty apparent in this case is that the jurors were discharged for what might, under some circumstances, be an insufficient reason. But as no reason was necessary, the fact that an insufficient one was assigned as the ground of the order can make no difference."

To the same effect is People v. Searcey, 121 Cal. 3, 53 Pac. 359, 41 L. R. A. 157. Since defendant had no vested right to have the excused jurors sit in the trial of his case (Asevado v. Orr, 100 Cal. 300, 34 Pac. 777), and it appearing without question that defendant was tried by 12 competent, fair, and qualified jurors, he is in no position to complain that the court, acting within its discretion, rejected the two jurors. Conceding no cause existed for such action, the effect thereof is precisely the same as though the court had granted a challenge for insufficient cause.

While appellant claims the evidence is insufficient to justify the verdict, his counsel directs our attention to facts and circumstances, clearly established by the testimony of witnesses for the state, from which it would seem impossible for impartial and rational minded men to arrive at any conclusion other than that expressed by the jury in the verdict rendered; indeed, instead of the evidence being weak and unsatisfactory, as suggested by appellant, it would, in our opinion, be difficult to conceive of a stronger chain of incriminating circumstances than that presented by the evidence.

Many of the court's rulings in admitting and rejecting testimony are assigned as error. As to some of these, even though the alleged errors in the ruling were conceded, no possible prejudice could, in view of the conclusive character of the evidence, have resulted from the rulings.

[8-10] One of appellant's chief complaints is that the court erred in permitting the witness Frampton to testify to a conversation had with defendant in the county jail, wherein the latter made incriminating admissions. It is claimed that such admissions were made under a promise of reward. There is no merit in this contention, for the reason that the witness testified in positive terms that he held out no hope of reward, and said nothing from which defendant could have drawn such an inference. On the contrary, the statements are shown to have been made freely and voluntarily by defendant, prompted, perhaps, by the hope that his proposed return of part of the stolen property would, under a plea of guilty, obtain for him favorable consideration in the punishment to be imposed. For the same reason, the court did not err in admitting like testimony of witness Hatton. Evidence of defendant's escape and flight from the jail after his arrest, and the fact that when apprehended a few hours thereafter he, in resisting the officer, tried to cut the latter's throat with a razor, was clearly proper as tending to show consciousness of guilt. People v. Flannelly, 128 Cal. 87, 60 Pac. 670; People v. Crowley, 13 Cal. App. 325, 109 Pac. 493. Neither did the court err in admitting in evidence the bag of burglar's tools which, while not in defendant's actual possession, was in the apartment of a woman with whom he was unlawfully living and to whom he, by telephone, communicated an order, directing her to take the same and deposit it in a parcel room, which she did, receiving a check therefor, which was found under the carpet of the apartment by the officers, who thus obtained possession of the bag. People v. Winters, 29 Cal. 658.

[11] During the course of the trial the defendant, by his obstreperous conduct and abusive language, constantly interfered with the orderly proceeding thereof, and, notwithstanding the repeated orders of the court admonishing him to keep quiet and cease interrupting the witnesses, he continued his interruptions and abuse, in one instance calling the witness on the stand "a God damned liar," and upon the court saying to him, "We will suspend the trial until you keep still," he replied, "I don't care if you suspend it until doomsday." During another outbreak of defendant, the court ordered the bailiff to see that he was seated and, defendant continuing his interruptions, the court said: "Put a gag on him. Gentlemen, we are going to have order." Whereupon defendant's counsel asked that the jury be excused, to which the court replied: "I will not excuse the jury when the defendant brings upon himself a scene like this." The conduct of the defendant and the scenes enacted by him were such that the court was forced to order a recess for 15 minutes. Although the order of the court to put a gag on defendant was not carried out, appellant assigns the language of the court as prejudicial misconduct. It was the right of the defendant to be present at his trial, and this right, notwithstanding his obstreperous conduct, was accorded him. It is the duty of a judge in the administration of justice to preserve the order of the court and see to it that all persons whomsoever, including the defendant himself, indulge in no act or conduct calculated to obstruct the administration of justice. In the case of State v. Allen, 45 W. Va. 65, 30 S. E. 211, where the court

had under consideration the question of the power of the trial court to restrain the violence of a defendant on trial by shackling him, it was said, in justifying the action, that it was a matter for the discretion of the trial court, in the exercise of which, however, the court should not resort to such extreme measure unless rendered necessary to curb the prisoner's violent and obstreperous conduct or to prevent his threatened escape. While in this case the threat of the court to have the prisoner gagged was not carried out, nevertheless, if necessary to the orderly proceedings of a court, the trial judge would be justified in adopting such means as a last resort to control an obstreperous defendant, by reason of whose conduct the trial could not proceed without such action.

There are other alleged errors, including the action of the district attorney in discussing the evidence, none of which, however, other than those discussed, requires any consideration. In most cases they are puerile and absolutely without merit; indeed, the record taken as a whole is, in our opinion, free from any prejudicial error and the character of the evidence such as to leave no doubt whatsoever as to the defendant's guilt.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 541

TITUS v. WOODS et al. (Civ. 2078.)

(District Court of Appeal, Third District, California. Jan. 23, 1920. Hearing Denied by Supreme Court March 22, 1920.)

MORTGAGES ⊂=435 — GUARANTOR PROPERLY JOINED AS DEFENDANT IN ACTION TO FORECLOSE MORTGAGE.

Regardless of Code Civ. Proc. § 726, as to docketing of judgment for balance against defendants personally liable where proceeds of sale in foreclosure are insufficient, where assignor of mortgage and note guaranteed payment of note, it was properly joined with the makers in action to foreclose mortgage.

Appeal from Superior Court, Orange County; W. A. Sloane, Judge.

Action by Lucy M. Titus against Richard S. Woods and others. Judgment foreclosing mortgage, and the Guarantee Mortgage Company of San Diego appeals. Affirmed.

Sweet, Stearns & Forward, of San Diego, for appellant.

Wirt Francis and Ralph E. Jenney, both of San Diego, for respondent.

BURNETT, J. The action was brought to foreclose a mortgage made by the defendants Richard S. Woods and Mary C. Woods to appellant, Guarantee Mortgage Company of San Diego, to secure the payment of a promissory note of $1,250 and interest, dated March 29, 1912. The complaint alléges that the note and mortgage were assigned by appellant to the plaintiff by an instrument in writing on the 17th day of July, 1912, and "that at the time of the assignment of said note and mortgage as aforesaid the said defendant Guarantee Mortgage Company of San Diego for a valuable consideration guaranteed the payment of said promissory note." To the complaint the appellant demurred on the grounds:

"That it did not state a cause of action against the appellant; that there is a misjoinder of parties defendant in that the appellant was improperly made a party thereto and improperly united as a defendant with the makers of the mortgage as well as with the other defendants; that there is a misjoinder of causes of action in the complaint in that a cause of action against appellant as a guarantor is improperly united with one for the foreclosure of the mortgage; that a cause of action against the appellant on a contract of guaranty was improperly united with a cause of action against the makers of the promissory note;" and that the complaint was uncertain and ambiguous for certain reasons therein enumerated.

The demurrer was overruled, and appellant declined to answer. Judgment of foreclosure was rendered August 29, 1917, in which the clerk of the court was ordered to docket a judgment for any deficiency that might remain unpaid of the indebtedness secured by the mortgage after the sale of the mortgaged land. The mortgaged property was sold, a deficiency reported by the commissioner, and deficiency judgment was docketed against appellant on October 10, 1917. From these judgments the appeal has been taken.

We understand that the only ground of demurrer upon which appellant really relies as possessing merit is that, as a guarantor of the payment of said note, it was improperly joined with the makers thereof in the suit to foreclose the mortgage. The argument is that the liability of appellant was based upon an entirely different obligation from that of the makers of the note; it having been held by the Supreme Court of this state "that there is no privity or mutuality or joint liability between the principal debtor and his guarantor"; in other words, the appellant as a guarantor made an entirely independent contract upon which he was liable without regard to the foreclosure of the mortgage as against the principal debtors. Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Adams v. Wallace, 119 Cal. 67, 51 Pac. 14; Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620.

The character of the obligation of a guar-

antor is also carefully considered in the case of Cooke v. Mesmer, 164 Cal. 332, 128 Pac. 917, an action brought against the guarantors of the payment of certain notes, and the court said:

"It is thoroughly settled that an action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do."

We may add that the same principle appears in the provisions of Civil Code, § 2806 et seq.

From the foregoing it would follow, of course, that an action could be brought against the guarantor without joining the maker or any other party to the note as a defendant, and it is urged by appellant that a guarantor has the right to insist that he be sued alone. Many authorities are cited in support of the claim, but to make proper application of the doctrine therein announced, not only the peculiar facts of each instance, but also certain statutory provisions of the various jurisdictions, must be considered. For example, in Cottrell v. New London Furniture Co., 94 Wis. 176, 68 N. W. 874, the Supreme Court of Wisconsin held that the guarantor of a mortgage note was improperly joined with the maker in the foreclosure suit for the reason that the case was simply a guaranty of "the collection of the note" and therefore the guarantor did not become liable on his contract of guaranty until the guarantee had "exhausted all the remedies which the law gives him for the collection of his debt from the principal debtor without avail. This means the prosecution of a suit against such principal debtor to judgment and execution." It was further held that in the foreclosure of the mortgage it was improper to enter a deficiency judgment against said guarantor, for the reason that the statute in that state permitted such judgment only against the party personally liable for the debt, and that the guarantor was not thus personally liable, but his obligation did not arise until the remedies against the mortgagor had been exhausted. The difference between the obligation of the guarantor in that case and in this leaves the decision without much value herein. Other citations could be easily distinguished, although some, like Walsh v. Van Horn, 22 Ill. App. 170, involve a situation closely analogous to this.

On the other hand, respondent finds comfort in the statement of the rule by the leading text-writers. For instance, in 2 Jones on Mortgages, section 1710, this is declared:

"A personal judgment for a deficiency may be had against one who in assigning a mortgage has made a guaranty of it."

Again, in section 1432:

"But where the court has power to decree the payment of any deficiency there may be after the sale of the property as well against a third person as against the mortgagor, then a mortgagee who has assigned his mortgage and guaranteed the payment of it or any other person who has become a guarantor or surety of the debt is a proper though not a necessary, party to a suit to foreclose the mortgage."

Pomeroy in his Code Remedies (4th Ed.) § 231, treats at length the subject of necessary and proper parties to foreclosure proceedings and says:

"Those persons who own or have an estate in the land to be sold under the decree, and those who in the original creation of the debt or by any subsequent assumption of it are debtors to the mortgagee, and therefore liable to a personal judgment for a deficiency, have an interest in the controversy adverse to the plaintiff, and are beyond doubt necessary parties, if the plaintiff desires to obtain all the relief which the law affords him, namely, of sale and personal judgment for deficiency."

The learned author concludes that the doctrine is universally established that—

"All who are personally liable for the debt secured by the mortgage may generally be united as defendants, and must be made defendants if the plaintiff seeks to obtain a decree affording him all the relief which the court can grant."

In Wiltsie on Mortgage Foreclosure (3d Ed.) § 253, it is said:

"An assignor of a mortgage who in the assignment or by a separate instrument guarantees the payment or collection of the mortgage is personally liable to his assignee, and may be made a defendant to an action for foreclosure, for the purpose of recovering against him a judgment of deficiency. In those states where no provision is made for the recovery of a personal judgment in an action to foreclose a mortgage such a guarantor cannot, of course, be made a party to the action; the only remedy against him is a separate action at law. * * * In actions at law a distinction is made between a guaranty of payment and of collection; but in the equitable action of foreclosure, if a party is in any way liable for the debt, he can be made a defendant."

It is no doubt true that in equity the rule as to proper parties is more liberal and comprehensive than prevails at law. It arises, of course, from the purpose of equity to avoid a multiplicity of suits and to settle for all time, as far as possible, any controversy as to the subject-matter of the action. In view of this principle, a guarantor of the mortgage debt might be made very properly a party to the foreclosure, even though the practice might be otherwise if the action were purely one at law.

This consideration, as well as the provisions of the statute and the terms of the particular guaranty, must be kept in view in consulting the various decisions on the subject.

In this state there seems to be no direct adjudication of the question before us, al-

though it has been held that the liability of a general guarantor is substantially the same as that of an indorser, and that it is proper to join the latter in an action with the maker of the note. Riggs v. Waldo, 2 Cal. 485, 56 Am. Dec. 356; Reeves v. Howe, 16 Cal. 152; Eastman v. Turman, 24 Cal. 382; Jones v. Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Loustalot v. Calkins, 120 Cal. 688, 53 Pac. 258; Hubbard v. University Bank of Los Angeles, 125 Cal. 684, 58 Pac. 297. It is true, however, that in the Loustalot Case, supra, the court said:

"Upon an examination of the authorities from other states having statutory provisions substantially similar to the one found in our Code, we find those authorities preponderating to the effect that a guarantor and the maker of a promissory note may not be joined as parties defendant; but that question is not directly before us, and we pass it by for that reason."

But the court held that section 383 of the Code of Civil Procedure should be given a liberal construction so as to include the indorser Calkins. The language of said section is:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

If the liability of the indorser and the guarantor is substantially the same, there would seem to be as much reason for including and classifying one as the other among the parties to the note.

Be that as it may, we feel satisfied that, by implication at least, section 726 of the Code of Civil Procedure authorized the plaintiff to include appellant as a party defendant. Said section provides that, if the proceeds of the sale in foreclosure "are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this Code for such balance against the defendant or defendants personally liable for the debt." Of course, judgment could not be docketed against a person liable for the debt unless he was made a party defendant; and since appellant herein, as guarantor, was clearly liable for the debt, does not the quoted language warrant the course that was pursued in joining said parties?

But, regardless of the terms of the statute, it seems clear that, in an action to foreclose, the guarantor of the note is a proper party, for the reason that he is interested in the account to be taken in the suit of the amount due, the payment of which he has guaranteed. He is certainly vitally interested also in the foreclosue sale in which the proceedings may result, that it shall be lawfully and properly conducted, and that the property shall be sold for as much as possible in order that his own liability may be minimized or averted. Jarman v. Wiswall, 24 N. J. Eq. 267. Indeed, as a matter of practical importance, it is rather a favor than otherwise, in a case like this, to join the guarantor with the maker of the note. He is thus afforded an opportunity to aid the plaintiff in securing, if possible, the payment of the entire indebtedness from the principal debtor. On principle there would seem to be greater reason for not joining a surety, since he has a right to insist that the creditor exhaust his remedies against the original debtor. But since in the first instance the guarantor herein could have been sued alone for the entire debt, it is at least true that no prejudice has resulted from said ruling of the court.

The judgments are affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

45 Cal. App. 569

FOX-WOODSUM LUMBER CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND. (Civ. 2529.)

(District Court of Appeal, Second District, Division 1, California. Jan. 27, 1920. Hearing Denied by Supreme Court March 25, 1920.)

SCHOOLS AND SCHOOL DISTRICTS ⊂⊃81(2)—CLAIMS AGAINST CONTRACTOR HELD NOT FILED WITHIN 90 DAYS AFTER COMPLETION OF CONTRACT.

In action by materialman upon bond given by contractor building schoolhouses pursuant to Deering's Gen. Laws 1915, *held*, that claims constituting the subject of the action were not filed within 90 days after completion of contract; the time of completion being the date the buildings were turned over to board of trustees and accepted as finished, though the contractor was required 60 days later to replace certain temporary fixtures.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Fox-Woodsum Lumber Company against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals. Reversed.

A. L. Abrahams, of Los Angeles, P. B. D'Orr, of Atlanta, Ga., and Joe Crider, Jr., and Chas. W. Fricke, both of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

SHAW, J. Robert P. McMullen was the contractor for the construction of certain schoolhouses for the Tropico school district,

and pursuant to the provisions of Act No. 2895, entitled "An act to secure the payment of the claims of materialmen, mechanics, * * * employed * * * upon * * * municipal, or other public work" (Deering's Gen. Laws, 1915, p. 1467), caused defendant, as surety, to execute the bond specified therein. Plaintiff and its assignor furnished materials used in the doing of the work by the contractor, for the payment of which this action was brought on the bond. Judgment went for plaintiff, from which defendant has appealed.

The act, as it then read, provided that—

"Any materialman * * * whose claim has not been paid by the contractor * * * shall, within ninety days from the time such contract is completed, file with the * * * body by whom such contract was awarded, a verified statement of such claims, together with a statement that the same had not been paid"

—and that upon so doing such claimant may at any time within six months sue to recover upon the bond.

The sole contention of appellant is that the claims constituting the subject of the action were not filed within 90 days after the completion of the contract, without which, respondent properly concedes, the judgment should be reversed.

The court found "that on the 29th day of January, 1915, and within 90 days after the completion of said buildings, said plaintiff filed with the board of trustees of the Tropico school district a verified notice in writing," so required, wherein the amount of such claims was specified and which in all respects complied with the provisions of the statute. In our opinion, this finding is, as claimed by appellant, not supported by the evidence. It conclusively appears that, except as to the installation of certain plumbing fixtures required by the specifications, the buildings called for by the contract were fully completed on September 30, 1914, at which time other fixtures than those specified were installed, and upon the contractor depositing with the treasurer of the board his certified check for $152 as security for his furnishing, when procurable, the fixtures specified in lieu of those installed, the board filed in the office of the recorder of Los Angeles county its unqualified written acceptance of the work and thereupon took possession of said buildings and from thence on used and occupied the same for school purposes, and 30 days after acceptance paid to the contractor the balance in full of the contract price. On December 5, 1914, the contractor replaced the temporary fixtures called for by the specifications, at which time, rather than on September 30th, the trial court concluded the buildings were completed. As shown by the record, McMullen's only obligation to install the specified fixtures was that contained in his contract. He was unable to procure these and he thereupon deposited with the treasurer his certified check for $152, which, together with the fixtures so installed, were, by agreement, substituted for those called for by his contract. In the absence of a covenant on his part so to do—and we agree with respondent there was none—it was optional with him whether he installed other fixtures or forfeited his check, which was exacted in lieu of such compliance with his contract. Under the circumstances, and without further compliance, he could have enforced payment of the balance due upon his contract. That this was the construction placed upon the transaction is made manifest by the fact that the school board, in recognition of his being entitled thereto, and long before the specified fixtures were installed, paid to McMullen the full contract price. That the parties to the contract might have agreed upon the substitution of other fixtures in lieu of those specified admits of no question, and, in effect, that is precisely what they did, requiring the contractor to forfeit the difference in price, provided he was unable to procure the ones called for by his contract, or, if he could obtain them, declined to exercise his option to install the same. Upon respondent's argument, carried to its logical conclusion, the buildings could not be deemed completed until the installation of the fixtures specified, although years might elapse.

The buildings were completed on September 30, 1914, when the board, vested with full power to do so, formally accepted the same, took possession thereof, and occupied them for school purposes. Otherwise, and if such acts were not conclusive evidence of completion, such action could only be established by a judgment of court.

Not only for the reasons given, but under the statutory rules governing the rights of laborers and materialmen in analogous cases involving the right to enforce mechanics' liens, which we think applicable (section 1187, Code Civ. Proc.; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 196, 20 Pac. 419), the judgment should be reversed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 556

NEWBURY et al. v. LINEBERGER et al. (Civ. 2477.)

(District Court of Appeal, Second District, Division 1, California. Jan. 26, 1920.)

1. APPEAL AND ERROR ⟸501(3)—EVIDENCE NOT REVIEWABLE WHERE RECORD CONTAINS NO SPECIFICATION DIRECTED TO INSUFFICIENCY.

No question of the sufficiency of the evidence to sustain the findings can be considered on appeal, where the record contains no specifications of any kind directed to insufficiency of the evidence to support the findings, although the bill of exceptions contains the evidence received at the trial.

2. TRIAL ⟸396(5)—FINDING OF REASONABLE SUM FOR SERVICES PROPER THOUGH COMPLAINT ALLEGED AN AGREED SUM.

Where complaint, in addition to alleging an agreement to pay a specified sum, averred that such sum was the reasonable value of the services rendered, court did not err in finding for plaintiffs a less amount as the reasonable value of the services rendered, based upon evidence introduced at the trial to which defendant made no objection; no miscarriage of justice being shown to have resulted.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by E. C. Newbury and C. E. Newbury, copartners, doing business under the name and style of Newbury & Newbury, against W. L. Lineberger and J. Selvyn Lineberger. Judgment for plaintiffs, and defendants appeal. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellants.

Eugene C. Campbell, of Long Beach, for respondents.

CONREY, P. J. Action to recover the amount of a commission alleged to be due on a contract to pay for services rendered by the plaintiffs in procuring for the defendants a tenant to whom the defendants made a lease of real property.

[1] With one exception, all of the points urged by appellants consist of claims that the evidence is insufficient to support certain findings of fact. The bill of exceptions contains the evidence received at the trial, but the record contains no specification of any kind directed to insufficiency of the evidence to support the findings. This being so, no question of sufficiency of the evidence to sustain the findings can be considered on this appeal. Regoli v. Stevenson (Sup.) 176 Pac. 158; Carter v. Canty (Sup.) 186 Pac. 346, decision filed December 26, 1919.

[2] Appellants further contend that the complaint counts upon an express agreement for the payment of a specified sum; that the findings of fact negative the allegation of an agreement to pay that amount; and that the court's finding that the amount awarded is a reasonable sum for the services rendered is not responsive to any allegation contained in the complaint; for which reasons appellants claim that the judgment should be reversed. The complaint, in addition to alleging an agreement to pay a specified sum of $1,116, averred that such sum of $1,116 is the reasonable value of the services rendered. The court, besides finding that the defendants did not expressly agree to pay the stated sum, further found that the sum of $792 is the reasonable value of the services performed under the contract by which it is found that the defendants did employ the plaintiffs to perform said services. This finding establishing the reasonable value of the services performed is based upon evidence introduced at the trial, to which evidence it does not appear that any objection was made. It cannot be seen that the defendants were misled in any way, or that any miscarriage of justice has resulted from the judgment rendered.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

45 Cal. App. 559

PARAMORE et al. v. COLBY. (Civ. 2672.)

(District Court of Appeal, Second District, Division 1. California. Jan. 26, 1920.)

VENDOR AND PURCHASER ⟸314(1)—IN ACTION AT LAW TO RECOVER INSTALLMENT PLAINTIFF NEED NOT ALLEGE THAT CONTRACT WAS FAIR; "SPECIFIC PERFORMANCE."

An action for the amount of certain installments due and unpaid as part of the purchase price provided in a contract of sale of real property is not an action for "specific performance" of the contract, under Civ. Code, § 3391, but is an action at law, and it is not necessary to allege or state facts showing that the contract is, as to the defendant, fair, just, and reasonable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Specific Performance.]

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Harriet H. Paramore and another against Hayward Colby. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 174 Pac. 677.

Victor T. Watkins, of Los Angeles, and Sims & Church, for appellant.

Groff & Van Etten, of Los Angeles, for respondents.

Faulkner & Faulkner, of San Francisco, amici curiæ.

CONREY, P. J. In this action the plaintiffs recovered judgment for the amount of certain installments due and unpaid as part of the purchase price provided in a contract of sale of real property. Appellant contends that such action is necessarily an action to compel specific performance of the contract; that, therefore, the complaint does not state a cause of action because it does not contain any allegations of fact showing that the contract is as to the defendant fair, just, and reasonable. Civ. Code, § 3391. It appears to be settled law that such an action, brought merely to recover money due on the contract is an action at law. Ehrhart v. Mahony, 170 Cal. 148, 148 Pac. 934; Samuel v. Allen, 98 Cal. 406, 33 Pac. 273. The decisions relied upon by appellant (such as O'Hara v. Wattson, 172 Cal. 527, 157 Pac. 608, and Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17) do not hold and do not necessarily imply that an action at law to recover such installments due cannot be maintained. In such action at law it is not necessary to allege or to state facts showing that the contract is as to the defendant fair, just, and reasonable. The complaint in this case stated a cause of action. Amaranth Land Co. v. Corey (Sup.) 186 Pac. 765, decided January 8, 1920.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

45 Cal. App. 351

CRAIG v. SHEA (two cases).
(L. A. 5504; Civ. 3160.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1919. Opinion of Supreme Court Denying Hearing, Feb. 27, 1920.)

1. FRAUD ⊂=20—CONTRACT DEEMED OBTAINED BY FRAUD ONLY WHEN IT WOULD NOT HAVE BEEN MADE APART THEREFROM.

By express provision of Civ. Code, § 1568, consent to a contract is deemed to have been obtained through fraud only when it would not have been given had such cause not existed.

2. FRAUD ⊂=18—MISREPRESENTATIONS NEED NOT HAVE BEEN SOLE CAUSE OF CONTRACT.

To recover damages for misrepresentations inducing a contract, the representations need not have been the sole cause of the contract, but must have been of such nature, weight, and force that without them the contract would not have been made.

3. FRAUD ⊂=58(4)—EVIDENCE HELD TO SHOW WALNUT GROVE BUYER DID NOT RELY ON REPRESENTATIONS AS TO AGE OF TREES.

In an action for damages to the purchaser from false representations by the vendor's agent in selling a walnut grove, evidence *held* to show that purchaser did not rely upon statements as to the ages of the trees, and never attached any importance to such statements of the agent until he learned he had been deceived.

On Petition for Hearing in Supreme Court.

4. APPEAL AND ERROR ⊂=1084—SUPREME COURT WILL NOT EXPRESS OPINION AS TO PART OF OPINION OF DISTRICT COURT OF APPEAL NOT ESSENTIAL TO DECISION.

On application for hearing in the Supreme Court, after decision by the District Court of Appeal, the Supreme Court will express no opinion as to a portion of the opinion of the District Court of Appeal not essential to its decision.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Emogene A. Craig, executrix of the last will of J. H. Craig, deceased, against R. P. Shea. From judgment for plaintiff defendant appeals. Reversed.

Mulford & Dryer, of Los Angeles, for appellant.

Hugo D. Newhouse, of San Francisco, for respondent.

WOOD, Judge pro tem. This is an appeal from a judgment awarding $3,750 damages for false representations made by the agent of defendant upon the sale of a 30-acre walnut grove. Mr. Craig died after the entry of judgment, and the executrix of his will has been substituted as plaintiff.

There is no dispute as to the representations made by the agent of defendant. It is alleged in the complaint, and the plaintiff testified at the trial, that he purchased the property believing and relying upon such representations, which were:

"That 15 acres of the grove was planted to trees of the age of 12 years, and the remaining 15 acres to trees of the age of 18 years; that the gross income of the orchard would be from 12 to 18 per cent. upon $30,000."

Prior to coming to California Mr. Craig had been for many years the assistant controller of the United State Steel Corporation. His business did not bring him in contact with outside people, and while he had made some investments in real estate he had always acted through the advice of an attorney. He arrived in Los Angeles from New York City in April, 1914. At that time he was 62 years of age, in poor health, suffering from rheumatism, accompanied with severe pains in his legs, and was unable to walk more than a few feet at a time. Previously he had written to his daughter-in-law in Los Angeles to see if she could find a walnut grove for him. She had communicated his wishes to Neil Durflinger, who was employed under some form of contract, sharing commission in the office of Mr. Mesick, a real estate agent.

Within two or three days after his arrival in Los Angeles city he, his wife and his daughter-in-law were taken in an automobile by Mr. Mesick and Mr. Durflinger to see the grove in question, which is located about 13 miles from the city. On the way Mr. Mesick told plaintiff that he was going to show him one of the prettiest ranches in Southern California. He also made the statements as to the ages of the trees, and some time during the day the one as to income. The party remained at the grove about 15 or 20 minutes. The plaintiff walked out and examined two of the trees, and drove about the place. He was charmed with its appearance. In his language:

"It was certainly a pretty looking ranch, and it is to-day. I had never seen a walnut ranch bearing, and we stood around in amazement looking at those trees. They were very large and fine looking, in blossom, with the leaves just budding out, and there was a nice fence in front with roses at every post."

The same evening, in response to his invitation, Mr. Mesick called upon Mr. Craig, at which time the latter requested the agent to submit an offer of $25,000 to Mr. Shea, and at Mr. Mesick's suggestion he gave him his check for $1,000 as an evidence of good faith. His offer was accepted the following day and the transaction thereafter closed. Mr. Mesick received a commission from the defendant upon the sale, but had no previous authorization from Mr. Shea to sell the property. The latter had purchased it in 1913, expecting to make it his home. Some three months before the sale to plaintiff he changed his mind, and spoke to Mr. Mesick, with whom he had been on "intimate friendly terms for years," about finding a purchaser for $30,000. He told Mr. Mesick that the trees were 12 and 18 years old. He made no statement of any kind in reference to income from the property, and he testified at the trial that he obtained his information as to the age of the trees from the former owner of the property. Mr. Shea and Mr. Craig never met until some time after the sale was consummated.

The trial court found that the trees were of the age of 28 and 42 years respectively, instead of 12 and 18 years, as represented, and that the property would have been worth $3,750 more than its actual value if the trees had been of the ages as represented.

Plaintiff produced four witnesses of experience in walnut growing who testified that hard-shell nut trees of the age of 42 years produce no income, and they variously estimated that the 15-acre tract would have been of a value of from $200 to $500 greater with walnuts of the age of 18 years. On the other hand, there were eight witnesses for the defendant, of many years' experience in the walnut industry, five of whom were appraisers for banks making loans upon property in the locality. They testified that the age of trees will not diminish the production or lessen the value of this land with its deep, rich alluvial soil. As trees grow larger the limbs interlace and overlap, so that it then becomes necessary to remove some of the trees to let in the sunlight and air, which increases the production per tree to the extent that it does not lessen the output from an acre.

In confirmation of this theory it appears that in 1911 there was an injurious and drastic pruning of the orchard by one of the witnesses, who testified that a hard-shell tree had no value after it reached the age of 40 years. At that time one of the defendant's witnesses expostulated with the wielder of the pruning implements, and told him that it would take 5 years for the trees to recover. This pruning is characterized by counsel for both appellant and respondent as no less a crime than that of "murder." It was also shown that the year 1914 was a poor year for hard-shell nuts all over the county.

The value of the crop of the entire orchard for each of the years 1913 and 1914 was less than two-thirds of the amount that plaintiff's witnesses estimated it should be from 15 acres of soft-shell trees, such as composed the younger grove. Mr. Gooch, who for nearly 25 years up to 1912 was president of the Walnut Growers' Association, and who handled and inspected the nuts that came from this property during all that time, testified, without contradiction, that it always produced good average crops.

Having shown that there is a difference of opinion among walnut growers themselves as to the materiality of the statements as to the age of the trees, we approach the vital question as to whether the evidence shows that the plaintiff was in fact influenced by such statements or considered them to be material.

The court did not find that the plaintiff placed any reliance upon the representation as to income, but it did find "that he was induced to purchase the property because he relied upon the statements as to the ages of the trees."

[1] "By express provision of our Civil Code, consent to a contract is deemed to have been obtained through fraud 'only when it would not have been given had such cause not existed.' Section 1568." Elliott v. Southern Pacific Co., 145 Cal. 441, 448, 79 Pac. 420, 423 (68 L. R. A. 393).

[2] In order for plaintiff to recover, the misrepresentation "need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say 'without it the contract would not have been made.'" Colton v. Stanford, 82 Cal. 399, 23 Pac. 28, 16 Am. St. Rep. 137. See, also, Oppenheimer v. Clunie, 142 Cal. 319, 75 Pac. 899, and Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 Pac. 240.

[3] The only evidence to support the finding is the following testimony of plaintiff:

"Question: What statements were made to you as to the physical condition of the property by either Mr. Mesick or Mr. Durflinger? Answer: It is my recollection that Mr. Mesick stated to me that it was one of the prettiest ranches in Southern California he was going to show me, and the trees on it were 18 and 12 years old. They told me they were walnut trees. During the same day he stated to me that the revenue would be from 12 to 18 per cent. on the price asked, which was $30,000. * * * Other than my visit to the ranch and the conversation with Mr. Mesick and Mr. Durflinger I did not make any other independent investigation of the property. I purchased this property relying upon the statements of Mr. Durflinger and Mr. Mesick."

The plaintiff further testified that he did not examine the soil. He thought that his attention was called to it as not being gritty or having any sand in it; that he did not ask about the age of the trees; that he knew nothing about walnut trees, whether they were good at 15 years or 40 years, whether one at 40 was as good as one at 20 years, and nothing of the relation of the age to income qualities. He was dissatisfied, as far as the revenue was concerned, after he harvested the crop about the last of October or the early part of November. He distinctly remembered that somebody had said prior to Christmas that the trees were older than 18 and 12 years; that they were too large for the reported age. After hearing these rumors he did not commence to investigate. He really did not believe it so. He did not remember if he said in the latter part of the year that he would commence action against Mr. Shea for damages. He might have done so. If he did, it would have been on the ground of revenue then. About the 20th of January or 1st of February following he made a payment of $4,375 on account of the purchase price. Either before or after Christmas the neighbors told him the trees were 25 years old; some said 30 years. He had no idea for a long time and did not know that it was because of the age of the trees that the ranch would produce no revenue. About March 11, 1915, he went to see Mrs. McLean, a former owner of the property, to get confirmation as to whether or not these trees were older, and she denied that she had made a statement about the age of the trees to Shea. Plaintiff could not tell just when he became convinced that he had been "buncoed" out of the revenue because of the age of the trees. While he made no inquiry as to the age of the trees, yet it appears that he did ask the agent what return he would get on his investment.

Considering this evidence with the view of upholding the finding of the trial court, is there a reasonable inference that plaintiff would not have made the contract but for the statements as to the ages of the trees? The plaintiff did not so state. All the inferences seem against it. If the agent or any other person had stated that the income diminished after the age of 40 years, or at any other age, an inference might be drawn that the plaintiff relied upon the false statements of the agent. His own testimony shows that he never had the slightest interest in those statements, even after he heard they were false, until some one told him it was the age of the trees that caused his lack of income. Under the circumstances disclosed by the evidence it is unreasonable to suppose that a man who regarded the character of the soil with such utter indifference, who was lost in admiration of the trees and the beauty of the place, and who had no information or opinion about the relation of age to income, did regard as of any consequence these statements as to age. He saw the trees in health, in blossom, and in bud. That signified fruit, irrespective of age, unless other causes intervened. He inquired about income, but not about the ages of the trees, or any other causes that might affect the income. The conclusion seems inevitable that Mr. Craig did not rely upon the statements as to ages of the trees, and that he never attached any importance to these statements at the time of the purchase, or after he learned that he had been deceived in the ages of the trees, until the relation of age to income was suggested. Then, and not until then, did he become interested.

The evidence does not meet the requirements of the authorities cited.

It is proper for us to say that we understand that, in the event of another trial, the question of the effect of the false statements as to income will not arise, without evidence indicating that the owner authorized such statements, as it seems to be conceded that the case of Samson v. Beale, 27 Wash. 557, 68 Pac. 180, contains a correct exposition of the law to the extent that it holds that false representations made by the agent, not authorized by the owner, will release the purchaser from his contract, but will not bind the owner in damages.

Plaintiff should be permitted to amend the complaint. It is unnecessary to lengthen the opinion by pointing out the defects, for they were discovered by counsel at the time of drawing his findings.

The judgment is reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. [4] The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied altogether without reference to the matter contained in the next to the last parapraph of the opinion dealing with the liability of an owner on account of unauthorized false representations on the part of the agent. This portion of the opinion is not essential to the decision and we express no opinion in regard thereto.

All concur.

45 Cal. App. 514

CRAIGLOW v. WILLIAMS et al.
(Civ. 3175.)

(District Court of Appeal, Second District, Division 2, California. Jan. 20, 1920.)

1. EVIDENCE ⟸43(1)—TRIAL JUDGE BOUND TO TAKE JUDICIAL NOTICE OF FILES OF OWN COURT.

Trial judge is bound to take judicial notice of files of his own court.

2. CHATTEL MORTGAGES ⟸291—ONLY ONE ACTION FOR ENFORCEMENT OF DEBTS SECURED BY MORTGAGE.

Under Code Civ. Proc. § 726, there can be but one action for the enforcement of a debt secured by a mortgage on personal property.

3. PLEADING ⟸284—SUSTAINING DEMURRER TO SUPPLEMENTAL COMPLAINT LEFT ORIGINAL COMPLAINT AND ANSWER STANDING.

Sustaining a demurrer to a supplemental complaint left the original complaint and answer standing, and the issues there presented to be disposed of.

4. CHATTEL MORTGAGES ⟸255—STATUTE PROVIDING THAT THERE BE BUT ONE ACTION FOR ENFORCEMENT OF DEBT DOES NOT APPLY TO SURETY.

Code Civ. Proc. § 726, providing that there can be but one action for a recovery on a debt or for the enforcement of any right secured by a mortgage on any real or personal property, applies only to the primary debtor, and does not apply to one who signed a note secured by a mortgage as a surety.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by W. E. Craiglow against C. J. Williams and others. From an adverse judgment, plaintiff appeals. Reversed.

J. T. Reed and E. P. Sample, both of San Diego, for appellant.

Sam Ferry Smith, of San Diego, for respondents.

THOMAS, J. This is an action brought to recover the sum of $2,100, with interest, upon a promissory note made, executed, and delivered by defendants to plaintiff, and for the foreclosure of a chattel mortgage executed by the defendants Williams to secure the payment of said note. Summons and complaint were duly and legally served upon all defendants. Defendants Williams defaulted. The defendant Sterne interposed a demurrer to the complaint, which was overruled, after which he served and filed his answer herein. After entry of the default of the defendants Williams, a decree of the court was entered, wherein it was found that the defendants Williams were personally liable to the plaintiff for the principal, interest, attorney's fees, and costs of suit, and the mortgaged property was ordered sold and the proceeds thereof applied to the payment of said indebtedness. The property was accordingly sold, leaving a deficiency of balance still due the plaintiff of $1,796.70.

It will be observed that the plaintiff proceeded with the action, took judgment of foreclosure, and made a sale of the mortgaged property, without trying any of the issues raised by the answer of the defendant Sterne. Thereafter the plaintiff served and filed a "supplemental complaint," setting out the default of the defendants Williams, the finding of personal liability against them, and each of them, as to the said principal indebtedness already set forth, including the deficiency, and asking for judgment against the defendant Sterne for the amount of such deficiency. Defendant Sterne interposed a demurrer to this "supplemental complaint," and at the same time filed an answer thereto. This demurrer was sustained, without leave to amend, and thereupon judgment was ordered and entered in favor of the defendant Sterne, and against the plaintiff for costs. This appeal is from the order sustaining the demurrer and the judgment so entered.

Appellant contends that he does not know upon what theory the trial court based its decision, "unless it conceived all the defendants in the action to be joint obligors, and that hence only a joint judgment, instead of a joint and several judgment, could be rendered," and then argues that, if the latter, clearly under the provisions of section 579 of the Code of Civil Procedure defendant Sterne could be proceeded against and a judgment rendered against him after default of the defendants Williams, and, if the former, the entry of a default judgment against the defendants Williams for a deficiency, as already stated, was null and void, and should have been so treated by the court.

[1, 2] The trial judge is bound to take judicial notice of the files of his own court and, by the "supplemental complaint" on file, notwithstanding the sustaining of a demurrer thereto, it appears in this case that the whole matter has proceeded to judgment and a sale of the mortgaged property, and consequent ascertainment of the deficiency, before the answering defendant had any opportunity to try the issues involved. By the terms of section 726, Code of Civil Procedure, it is provided that—

> "There can be but one action for a recovery of a debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter."

The following cases are cited by respondent as supporting this contention, and with which we agree: Gnarini v. Swiss American Bank, 162 Cal. 181, 121 Pac. 726; Crisman v. Lanterman, 149 Cal. 651, 87 Pac. 89, 117 Am. St. Rep. 167; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Woodward v. Brown, 119 Cal.

283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; McKean v. German-American Bank, 118 Cal. 334, 50 Pac. 656; Toby v. Oregon, etc., Ry. Co., 98 Cal. 490, 33 Pac. 550; Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Brown v. Willis, 67 Cal. 235, 7 Pac. 682.

[3, 4] An examination of the promissory note, set out and referred to in the complaint, however, will disclose that it is in form a joint note, not joint and several. In the answer of defendant Sterne it is set forth, among other things, that "this defendant alleges that he executed said note as surety, and not otherwise," etc. Only for this fact the judgment might have been sustained. The defendant having, by his own verified pleading, shown that he was surety, and not a primary debtor, we think it was error to enter judgment "that the plaintiff take nothing by this action," etc. It would seem, although we do not so hold, that the original answer of the defendant Sterne was overlooked at the time judgment was entered; for, even though the court sustained the demurrer to the "supplemental complaint," still the original complaint and answer stood, and the issues there presented were still undisposed of.

"A supplemental complaint is not an amendment to a pleading, and is not so classified in the Code; but it is only authorized for the purpose of bringing before the court facts material to the case occurring after the former complaint or answer, and leaves the former pleading intact." Giddings v. Seventy-Six L. & W. Co., 109 Cal. 116, 41 Pac. 788.

To dispose of the case thus presented, without trial of the issues involved, it would seem to us, was prejudicial to the rights of defendant Sterne.

"The rule in this state as to section 726 clearly is that this section applies to the primary debtor and was enacted for his benefit; that it does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract existing between the two obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations." J. I. Case T. M. Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647; Murphy v. Hellman, etc., Bank, 185 Pac. 485, and cases there cited; Martin v. Becker, 169 Cal. 301, 146 Pac. 665, Ann. Cas. 1916D, 171; Kinsel v. Ballou, 151 Cal. 760, 91 Pac. 620.

For this reason the judgment cannot be sustained. Lest we may be misunderstood in this matter, it should not be implied that the plaintiff should have judgment on the issues framed by the pleadings; and we purposely refrain from indicating, to say nothing of expressing, our views on that phase of the case, leaving it an open question, to be ascertained and disposed of by the court at the next trial of this action, if any there be.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 241

STINSON CANAL & IRRIGATION CO. v. LEMOORE CANAL & IRRIGATION CO. et al. (CRESCENT CANAL CO., Intervener).

STINSON CANAL & IRRIGATION CO. et al. v. PEOPLE'S DITCH CO. et al.

(Civ. 1911, 1912.)

(District Court of Appeal, Third District, California. Dec. 24, 1919. Hearing Denied by Supreme Court Feb. 19, 1920.)

1. WATERS AND WATER COURSES ⊜143—NO RIGHT TO DIVERT MORE WATER THAN NECESSARY.

One actually diverting water under a claim of appropriation for a useful or beneficial purpose cannot by such diversion acquire any right to divert more water than is reasonably necessary for such use or purpose.

2. APPEAL AND ERROR ⊜994(3)—CREDIBILITY OF WITNESSES A MATTER FOR TRIAL JUDGE.

The credibility of the various witnesses was to be determined by the exercise of a wise discretion on the part of the trial judge, and is not a matter for the court on appeal.

3. EVIDENCE ⊜574—TESTIMONY BASED ON OBSERVATION OF HIGHER QUALITY THAN EXPERT OPINION.

Testimony of farmers from nearly every section of the irrigation districts in question, and their superintendents, ditch tenders, and others, who testified from their observation, experience, and knowledge as to the character of soil, excessive irrigation, etc., was of a higher quality than the mere opinion of an expert.

4. WATERS AND WATER COURSES ⊜152(8)—PERSUASIVE EVIDENCE THAT AMOUNT OF WATER DIVERTED WAS NEEDED.

That defendants for many years used a certain quantity of water is persuasive evidence that such quantity was actually needed for the purposes for which it was used.

5. WATERS AND WATER COURSES ⊜152(7)—EVIDENCE AS TO CONDITION OF SOIL YEARS BEFORE SUIT TO DETERMINE PRIORITY OF RIGHTS INCOMPETENT.

In suit involving priority of rights to divert water for irrigation and other useful farm purposes, where examination of soil by witness was made years before suits were brought, his report as to the condition of the soil should not have been admitted, without some showing that the essential conditions had not materially changed.

6. TRIAL ⊜98—MOTION TO STRIKE INCOMPETENT TESTIMONY SHOULD HAVE BEEN GRANTED WITHOUT IMPOSING CONDITION.

The court, in ruling on appellants' motion to strike out testimony of respondents relating to time subsequent to the beginning of the ac-

tion, should not have imposed condition that motion would be granted, if appellants would consent to have all such testimony stricken out, including their own.

7. EVIDENCE ⊂560 — DEFENDANTS ENTITLED TO INTRODUCE EXPERT EVIDENCE AFFECTING WEIGHT OF TESTIMONY OF PLAINTIFFS' WITNESS.

Defendants should have been allowed to introduce testimony of their expert witness that plaintiffs' witness, whose testimony as to the condition of the soil had been admitted, had taken the poorest sections of the irrigation districts in question from which to select his samples.

8. APPEAL AND ERROR ⊂1046(5)—IRREGULARITIES PREVENTED FAIR TRIAL TO APPELLANTS AND REQUIRED NEW TRIAL.

In view of erroneous rulings with reference to admission and exclusion of evidence, and trial court's remarks, which naturally would prevent witnesses for appellants from giving a candid and complete statement concerning the subject-matter in question, a new trial will be granted; the evidence seeming to preponderate in favor of the right of appellants to a larger supply of water than was accorded them.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by the Stinson Canal & Irrigation Company against the Lemoore Canal & Irrigation Company and others, in which the Crescent Canal Company intervened, and action by the Stinson Canal & Irrigation Company and another against the People's Ditch Company and another. The two cases were tried together, and from the judgments rendered, and from orders denying motions for new trial, defendants appeal. Reversed.

E. C. Farnsworth, of Visalia, L. L. Cory, of Fresno, and H. Scott Jacobs, of Hanford, for appellants.

Frank H. Short, W. A. Sutherland, and M. K. Harris, all of Fresno, for respondents.

BURNETT, J. These two cases, and another, Cuthbert Burrel Co. et al. v. People's Ditch Co. et al., 188 Pac. 85, were tried together, and there is but one bill of exceptions in all three cases. It was agreed, at the oral argument herein, that these two could and should be treated in one opinion, since they involve the same general issues as to the rights of the Stinson Canal Company and the Crescent Canal Company. The trial of the cases consumed a period of 26 days, and the record embraces over 2,400 printed pages. The transcript and the briefs contain conclusive evidence of the stupendous amount of labor on the part of counsel in the trial and in the presentation of the cases on appeal. It may be added that it has been no small task to examine the voluminous record, and it is scarcely less difficult to determine to what controverted points specific attention should be given in this opinion. The embarrassment of the situation may be suggested by the statement that there are over 400 assignments of error, and 150 of these are argued with apparent sincerity and confidence by the able and distinguished counsel for appellants. If the opinion is not to be unduly prolonged, most of these points, of course, must go without recital, exposition, or discussion. Indeed, few of them possess merit, and it is considered necessary to notice only two or three controverted points.

Speaking generally, it may be stated that in the first action the complaint alleges that plaintiff is the owner of a canal which leads out of a certain slough, called Boggy slough, connected with Kings river, in Fresno county, and that plaintiff has the right to divert from this slough 165 cubic feet per second of the waters of said Kings river, and to use the same for irrigation and other useful purposes; that plaintiff has used this water continuously for 15 years; that the defendants claim an interest in these waters adversely to plaintiff, but without right; that about the 1st of March, 1905, by means of a certain ditch constructed by defendants, they wrongfully diverted from the river, and ever since have continued to divert a large quantity of water, about 85 cubic feet per second, which belongs to plaintiff, and which, otherwise, would have flowed down the river into plaintiff's ditch, and have been diverted and used by plaintiff.

The Crescent Canal Company filed a complaint in intervention, by which it appears that said company owns a canal which heads in the lower North fork of Kings river and runs across the country in Fresno county in a general westerly direction for about 20 miles, and that it is the owner of a right to divert, by means of this canal, 213 cubic feet of water per second and to use the same for irrigation and other purposes; that for more than 20 years it has diverted this amount of water "openly, peaceably, continuously, and uninterruptedly, under claim of right against defendants and the whole world"; that defendants claim a right to this water adversely to intervener, but without any right thereto. Defendants, in their answer to plaintiff, alleged that they have a prior right to use and divert from Kings river 600 cubic feet of water per second; that they are the owners of a large ditch—which is described—that was constructed in 1873, and that, by means of this ditch, the said Lower Kings River Water Ditch Company, from October, 1873, to October 18, 1902, appropriated and used for irrigation, and other useful purposes, said amount of water; that on the latter date said company granted and conveyed unto the Lemoore Canal & Irrigation Company its said ditch and the right to di-

vert from said Kings river said quantity of water; that ever since said date said grantee has appropriated and diverted from said river, except when unlawfully prevented by other parties, the said 600 cubic feet of water per second; and that said grantee has been the owner of said ditch and the right to appropriate and divert from Kings river said quantity of water. There is also a suitable allegation of title by prescription to said amount of water and that plaintiff's cause of action is barred by the statute of limitations. The answer to the complaint in intervention is of a similar nature, and the prayer is, likewise, that the intervener take nothing, and that it be adjudged that appellants are entitled to 600 cubic feet of water per second, and that they have a prior right to said water. The complaint in this action was filed on April 26, 1905, the answer thereto was filed on November 9, 1905, the complaint in intervention was filed on December 3, 1906, and the answer to this on March 9, 1909. It may be stated that there is really only one appellant in this action, to wit, the Lemoore Canal & Irrigation Company.

On October 1, 1906, the second action was brought, the Stinson and the Crescent Company uniting in the complaint. This pleading, in its averments, is similar to the other complaints hereinbefore alluded to, and as to the defendants it alleges that within two years last past they have "unlawfully, without right, and against the wishes of plaintiffs, entered upon Kings river above plaintiffs' said points of diversion, and by means of dams and obstructions placed in the river, and by means of large ditches leading therefrom have wrongfully and without plaintiffs' consent appropriated and diverted from said river through their respective ditches a large quantity of water, to wit, about 400 cubic feet of water per second and have deprived plaintiffs of the waters of said river." The prayer was for an injunction to restrain the defendants from diverting said water or any portion thereof. The defendants filed a joint answer in the case denying the material allegations of the complaint and alleging as affirmative matter that ever since 1873 the People's Ditch Company has been and is now the owner of a large ditch constructed to convey part of the water of Kings river for the purpose of irrigation and other useful purposes from the head of its ditch into the county of Kings; that said company is the owner of the right to so divert 600 cubic feet of water per second, and that it has, ever since March, 1874, so appropriated and diverted from said river, except when unlawfully prevented by other parties, said amount of water when there was a sufficient quantity flowing in the river; and that it has been continuously used for said purposes. In said answer appears a similar claim of the Last Chance Water Ditch Company to 600 cubic feet of water per second. It is also disclosed that the stockholders of both these canal companies have been and are the "owners of large quantities of agricultural and horticultural lands in Kings county which have been and are now used by said stockholders for raising agricultural and horticultural crops and domestic stock, and that these lands, in order to be successfully cultivated, so as to produce crops, require irrigation, and without irrigation they will not produce crops, and without water said stockholders will be unable to keep or maintain live stock upon their lands." It was averred that this right to said 1,200 cubic feet of water is superior to any of the rights of plaintiffs, or either of them, and, furthermore, that defendants have a prescriptive title to this water by reason of adverse use thereof for more than 5 years.

The cases were tried in 1913—8 years after the first complaint was filed—and judgment was rendered in January, 1914. A motion for a new trial in each case was made, and it was denied on March 6, 1916. On the 3d day of April following, the appeal was taken.

In the first case, the court found that the defendant, the Lemoore Company, as successor in interest to the defendant, Lower Kings River Company, is entitled to divert from Kings river, at the head of its canal, 250 cubic feet of water per second; that the plaintiff, the Stinson Company, is entitled to divert from said river 165 cubic feet per second, and the intervener, the Crescent Company, is entitled to divert 213 cubic feet per second from said river; that the right of the Lemoore Company is superior and prior to the right of either the Stinson or the Crescent Company to the extent of said 250 feet, but no more; and it was decreed that defendant, the Lemoore Company, be enjoined from diverting any greater quantity of water than said 250 cubic feet, or in any manner from interfering with the additional flow of the waters of said river or any of its branches or channels to the head of the respective canals of the plaintiff and the intervener to the full extent and quantity of the said 165 and 213 feet, respectively.

In the second case, the court found that the defendant, People's Ditch Company, was entitled to divert and appropriate 360 cubic feet of water per second from said river, and the Last Chance Company 250 cubic feet per second, and that each of these rights is superior and prior to the rights of plaintiffs or either of them. The finding as to the right of appropriation by the Stinson and the Crescent Company was the same as in the other case, confining them to said 165 and 213 feet, and providing that their rights are prior and superior to the rights of the defendants to divert any water in excess of the said 360 feet by the People's Company and the 250 feet by the Last Chance Com-

pany. The defendants were therefore restrained and enjoined from diverting water in excess of said amounts.

Thus we see that respondents were awarded the amount of water which they claimed, but its appropriation was made subject to the prior right of the Lemoore Company for 250 cubic feet per second, of the People's Company for 360 feet, and of the Last Chance for 250 feet. Appellants, however, were dissatisfied with the decision of the trial court as to the number of feet of water to which they were and are entitled, and hence their appeal.

An important, and indeed vital, question in the case, is whether the evidence does not compel the conviction that appellants are entitled to more water than was awarded them, or, conversely, whether there was any substantial showing to support the conclusion of the court that their prior right should be limited to the number of feet which we have mentioned. This consideration resolves itself into the two elements: First, the number of cubic feet which was appropriated by appellants; and, second, the number of feet that was necessary for the purpose to which the water was devoted, or, in other words, the extent of the "duty of water" required by the situation of said appellants. It is conceded that these are the elements involved in the inquiry, and, moreover, it cannot be disputed that, as to both considerations, appellants made an impressive showing. Many farmers, and others who were familiar with the construction and operation of appellants' canals, testified to facts strongly supporting the inference that for many years the asserted amount of water was appropriated and used. This was supplemented and aided by actual measurements of the flow in said canals, which were made by various experts, who testified to the results of their investigations.

As to the quantity of water needed for appellants' purposes, quite a number of competent witnesses testified that the full amount claimed was actually needed and was reasonably necessary for the proper irrigation of the lands covered by the several water systems of appellants and for the use of their stock. In their brief they set out at length this evidence, contrast it with what they are pleased to call the "very weak and unsatisfactory showing" of respondents, and they declare themselves "at a loss to see why or under what theory the trial court allowed plaintiff, Stinson Canal & Irrigation Company, 165 feet of water per second, with only about 8,000 acres of land under cultivation, or why the court granted the Crescent Canal Company 213 cubic feet of water per second, with only about 10,000 acres," while appellants were allowed only 860 cubic feet with some 135,000 acres of land to be supplied with water.

To this assertion, respondents answer:

"Appellants' only difficulty in connection with this branch of the case seems to have resulted from a failure to appreciate that the amount of water awarded to the respective parties in second feet do not at all, of themselves and without a consideration of their relation to acre feet, indicate anything as to the correctness of the judgment. Obviously the duty of water must be resolved upon a consideration of the needs of the lands in question in acre feet, even though to produce a given result in acre feet the second foot unit of measurement must be adopted. It is therefore the effect of the judgment in producing acre feet for the respective parties which is to be considered and not the number of second feet allotted to them respectively."

Indeed, it can be said, with fairness to respondents, that they do not seriously dispute the contention of appellants as to the amount of water appropriated and used by them for many years; but they seek to justify the judgment on this very ground that the lands thus irrigated required no more water than the court allotted to them. In fact, they quote the testimony of their own witnesses to show that appellants were greatly favored in that their canals were so located and constructed as to enable them, for many years, to enjoy the prior appropriation and use of a much larger volume of water than was awarded them by the lower court, and also larger than was available for the use of respondents.

Respondents insist that the court's award is justified upon the theory of the duty of water and the beneficial use upon appellants' lands, and they decline to consider specifically any question as to the size and capacity of the ditches of the respective parties or the quantity of water diverted by these ditches and distributed to the lands of the various irrigating systems.

In support of their contention that the needed and beneficial amount of water was awarded, they claim, in the first place, that the number of acres of land actually irrigated by appellants has been exaggerated by the latter; and, in the second place, conceding that the extent of the irrigated area has been correctly represented by appellants, nevertheless, the finding of the trial court that the amount awarded to them is sufficient for the beneficial use to which it is and has been applied, is supported by credible evidence.

As to the area of the land actually irrigated, there is room for some diversity of opinion; but it is deemed unnecessary to quote the evidence in that respect.

[1] Concerning the amount of water required by each irrigated district—whatever its extent—in other words, how much water could be devoted to a beneficial use, it is deemed proper to notice more particularly the contentions of the parties. As to the legal principle involved in the question, it is not disputed that it is the settled law of this state:

"That one actually diverting water under a claim of appropriation for a useful or beneficial purpose cannot by such diversion acquire any right to divert more water than is reasonably necessary for such use or purpose, no matter how long a diversion in excess thereof has continued, and that there is no such thing as the acquirement by such appropriator of a title by prescription in so far as the excessive diversion is concerned." California, etc., Co. v. Madera, etc., Irr. Co., 167 Cal. 78, 138 Pac. 718.

The rule is very clearly stated also in Hufford v. Dye, 162 Cal. 153, 121 Pac. 403, as follows:

"It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes. Beyond that his appropriation or diversion of more than can be applied by him gives him no right to the excess and this is subject to appropriation by any other person who may use it for similar beneficial purposes."

On this branch of the case, to support their theory, respondents relied largely upon the testimony of certain experts, among whom the most important are I. Teilman, W. C. Hammatt, and F. E. Twining. The first had been engaged in distributing and supervising the distribution and use of water for irrigation under several different systems in the valley, and had made a special study of the subject of the duty of water; he was familiar with the canals of the Lemoore Company and the People's Company, and the crops irrigated therefrom; and he had recently made a detailed examination of those systems and the lands subject thereto. He testified as to the amount of water required by the orchards, vineyards and alfalfa throughout these districts, and concluded that a duty of water of one acre foot would be sufficient. It was also his opinion that too much water had been used on the lands of appellants, thereby causing "the country to be water-logged." Ascribing the duty of water indorsed and advocated by this witness, it would be a reasonable inference that the court awarded to appellants, the Lemoore and the People's Company, as much water as they could use to advantage on the land.

W. C. Hammatt had been a civil engineer for 20 years and he was experienced regarding the use of water for irrigation purposes; acting for respondents, he had investigated the territory under the three canal systems of appellants. He described, in detail, his investigations, and concluded that, "taking it all together," water to the depth of one foot would be sufficient for the irrigation of the whole territory. His opinion, also, it may be said, supports the theory of respondents that appellants are accorded all the water they actually need for irrigation. However, it may be well to note that his knowledge of the territory was acquired by this witness in a two days' automobile trip in which he traveled 180 miles, and as to his examination of the soil he testified:

"My examination there was the same as the others, merely a superficial examination of the soil conditions; kicked up a little dirt, and picked it up in my hands, and threw it away again."

His examination was rather hurried and incomplete, one would think, to form the basis for an opinion of much value as to the needs of some 135,000 acres of land. But, of course, we cannot say how much weight it was accorded by the learned trial judge.

F. E. Twining, an analytical chemist, made an extensive examination of the territory covered by the irrigation systems of appellants, analyzing some 70 samples of soil. He testified at great length, and the written report of his investigations was received in evidence. The report covers 30 pages of the transcript, and constitutes a comprehensive review of the character and condition of the various soils of the irrigated territory. The following quotation will afford some indication of the nature of this report:

"(17–21) badly incrusted all around. South between 1 (18–21) and 6 (18–22) 1 S. W. 12 Sample section 1 N. E. Cor. 7 Gov. map good —Hanford sand South of this to Hanford with exception of 2 or 3 spots, in Fancher sandy loam. Fancher sandy loam—covers a considerable area near the center of and small areas throughout the Hanford district. This soil contains enough clay to bind the soil grains, and if cultivated in a wet condition often bakes and forms clods. In much of this area the water table is kept very close to the surface during the irrigating season, and certain small areas and depressions have become water-soaked, resulting in drowning out of crops and accumulation of alkali. The soil does not contain much alkali, but over-irrigation, especially subirrigation, is, however, always dangerous, as the soluble salts become concentrated on the surface and become injurious or even prohibitive to plant growth. This has occurred in many places throughout the area."

Of course, we cannot say with certainty, but we think it probable that the report and testimony of this witness were considered by the trial court of great, if not of decisive, importance.

These witnesses were met by expert witnesses on the part of appellants, who gave a different account of the said territory, as to the character of the soil and other conditions, and who expressed the opinion that the land had not been excessively irrigated. In the matter of experts, therefore, there was a sharp conflict and the not unusual antagonism. It must be admitted, however, that as

to actual knowledge of the care, cultivation, and development of the land through a long period of years, the advantage was all upon the side of appellants. Farmers from nearly every section of the said irrigation districts testified as to the land which they knew had been irrigated by the respective canals of appellants; also their superintendents, ditch tenders, stockholders, and irrigators, the presidents and directors of the various systems, testified from their observation, experience, and knowledge; and, if credit be given to this mass of testimony, the conclusion would almost inevitably follow, not only that appellants used, through a long period of time, the amount of water which they claimed, when it was available in Kings river, but that they irrigated substantially the said number of acres, to wit, 135,000, and that said water was applied to a beneficial use and that it all was reasonably necessary for irrigation and the other purposes to which it was devoted.

[2, 3] It is true that the credibility of these various witnesses was to be determined by the exercise of a wise discretion on the part of the trial judge, and it is not for us to say that their statements should have been accepted at their full face value; but it is at least apparent that this class of testimony is of a higher quality than the mere opinion of an expert. It is the difference between practice and theory, between experience and mere observation or examination. There is this, also, to be said: That it is not at all probable that a number of farmers would use, for many years, for the purpose of irrigation, an amount of water that would destroy or impair the value of their land. Of course, they would not willingly do so; and it is hard to believe that, in these days of intelligent and scientifically directed agriculture, these men, who have located and built up a thriving community, would make such a grievous mistake as to cause deliberately their lands to become water-logged and depreciated for all the purposes of husbandry.

[4] The very fact that they used for so many years a certain quantity of water is, indeed, very persuasive evidence that such quantity was actually needed for such purposes. It is not conclusive evidence of that fact, but it is a circumstance of impressive significance. The evidence having shown, therefore, that appellants diverted and used for many years a larger quantity of water than is awarded in the judgment, the strong probability is that it was all needed. The value of such use as evidence of the need for the water is apparent, and we may add that it is so recognized by the Supreme Court in the California Pastoral, etc., Co. Case, supra, wherein it is said:

"In determining how much of the water in fact used had been reasonably necessary for the purpose for which it was used, we believe that a court should be liberal with the appropriator to the extent, at least, that it should not deprive him of any portion of the amount of water that he had in fact used for the period necessary to gain title by prescription unless it is clearly and satisfactorily made to appear that he has used more than was reasonably necessary. The presumption would appear to be in his favor, for ordinarily one would not take the pains to use upon any land more than was reasonably necessary under all the circumstances."

It may be added that the thriving orchards, vineyards, and alfalfa fields throughout the district and the number of prosperous farmers therein argue strongly that the water has been at least beneficially appropriated. Again, a portion of the waters—how much does not appear—has been used for stock, which seems to have been overlooked by respondents, and in estimating the amount of water that must be diverted at the head of the canals to irrigate suitably the lands of appellants, allowance does not seem to have been made by the experts for respondents for the amount which must be considered—varying from 30 to 50 per cent.—for seepage and evaporation before the water reaches the land to be irrigated.

These things have been mentioned, not for the purpose of holding that the testimony of the experts is necessarily insufficient to support said finding, but to emphasize the importance of the rulings made by the trial court in reference to these witnesses. We may take the instance of the witness Twining as the most striking. After stating that he had made analyses of the soils of this territory at various times and the last "in February of this year," he was asked this question:

"In February of this year, and will you describe in a general way just what you did in making those soil surveys?"

A general objection was made to the question, and also—

"that any such examination made at that time of the condition of the soil would not show or tend to show the condition of the soil at the time of the commencement of any of these actions, and it does not prove or tend to prove any issue in the case."

[5] This examination by the witness was made years after the suits were brought, and before his report was admitted in evidence there should have been some showing that the essential conditions had not materially changed. Indeed, it is a fair inference from the report itself that there had been an important change, at least as to the presence of alkali near the surface of the ground, caused, as he claimed, by excessive irrigation. Respondents seek to justify the ruling on the ground that both sides offered such evidence on the promise that it would be shown that the conditions remained essentially unchanged, and that appellants, espe-

cially, almost at the outset of this case, declared:

"We will connect that, and show that the same conditions existed prior to the suit as in 1909."

The conditions, though, to which appellants referred, related to the amount of water actually used, the number of acres irrigated, and the kind of crops produced. In fact, the witness Boland was not permitted to testify as to the character of crops that were grown and produced upon the land and the number of acres of those crops at a time subsequent to the beginning of the actions. In reply to the question of the court, "When was this?" appellants stated:

"He made an examination this year and four years ago; this for the purpose of showing the lands are irrigated and what the water is used for. We expect to connect that, and show that the same character of crops were produced before the commencement of the action."

The court replied:

"I don't like that, because that simply multiplies the evidence almost indefinitely, and this is a very questionable method of procedure. Besides, those things are subject to constant change anyway."

Furthermore, in response to a statement by appellants that the only way to make it relevant would be to show that the conditions had not changed, the court said:

"That would be impossible. I am solicitous to keep out any irrelevant and immaterial testimony, because it occupies so much time."

[6] When a motion was subsequently made by appellants to strike out the testimony of respondents relating to the time subsequent to the beginning of the action, the court stated it would be granted, if appellants would consent to having all such testimony stricken out, including their own. We think this condition should not have been imposed.

But assuming that the court did not commit prejudicial error, or error at all, in overruling said objection to the testimony, appellants attempted to have portions of Twining's said report stricken out on the ground, apparently, that they constituted mere argument and hearsay. The record as to this shows the following:

"Mr. Farnsworth: If the court please, this statement of the witness, in addition to containing a tabulation of samples, and the depths, and what he found as to alkali, contains, I notice on a very cursory examination, many statements and arguments of this witness, and I desire to object to it on that ground. We didn't see this thing, and understand from counsel's statement that it was simply a tabulation with reference to that matter, and we have had this—it appears from a cursory examination in the two or three minutes recess.

"The Court: I think I understand you. It is my understanding that it contains simply was he—

"Mr. Sutherland (interrupting): It was expressly identified as a transcript of the witness' notes. Now the notes contain statements as to the character of the soil, whether sandy loam or whatever it might be, and that is included as a very proper part of the record.

"The Court: Well, proceed with the cross-examination.

"Mr. Farnsworth: Sir? I was going to say, we haven't had a chance to examine that thing, and we have had to examine it under a disadvantge under those circumstances—that we haven't had a chance to look at these different matters that are tabulated.

"Mr. Sutherland: You can look at them one by one as you examine the witness.

"Mr. Farnsworth: Well, there are 81 of them, you state, and over different sections. We haven't had a chance to compare them.

"The Court: Well, he has testified to a certain number of them. Proceed."

It is true that appellants made no formal motion to strike out any specific portions of this report, nor did they expressly ask the court for time to examine it; but the court precluded any such action on the part of appellants by summarily ordering them to proceed with the cross-examination. This was a matter of importance, and appellants were entitled to greater consideration than they received. It was proper, undoubtedly, for the witness to refer to the report to refresh his memory (section 2047, Code Civ. Proc.), and as a mere tabulation of his analysis of the various samples there was no valid objection to its admissibility, but it contained much extraneous matter that should have been excluded.

[7] An attempt was made also by appellants to prove by one of their expert witnesses that Mr. Twining had taken the poorest sections of the irrigated territory from which to select his samples. The court sustained an objection to this line of examination. We think appellants should have been allowed to make the showing for whatever it was worth, as affecting the weight and significance of the deductions to be made from the witness Twining's examination of the character of the soil.

Some other rulings of the court are subject to criticism, but we shall pass them without specific mention.

[8] Whatever mistakes were made in the various rulings of the court might be regarded as without prejudice, were it not that the evidence seems to preponderate so strongly in favor of the right of appellants to a larger supply of water than was accorded them, and that the nervous condition of the trial judge was apparently so impaired as to make it difficult for him to consider with due care and patience the contentions and evidence of appellants. This latter phase of the subject has been stated by one of the counsel for appellants as follows:

"Now, in that connection, we think we were not given a fair trial. We are satisfied in our

own minds that is fact. Judge Church was the trial judge. No one has a greater admiration for Judge Church than myself. * * * I had no reason to believe he was in the slightest degree prejudiced against these companies, simply because they appropriated water and used it in Kings county. I didn't think that would affect his judgment, and I don't know consciously that it did; but I do know that when we came to the trial of this case we were met, with the very first witness we produced on the stand, with an antagonism that we were not able to overcome. There was not a witness we produced on the stand but that was interrogated, cross-examined, and in a measure intimidated, by the conduct of the court. Now, I don't mean that he was intentionally prejudiced, or that he was taking sides; but there must have been some unconscious bias, to which we are all more or less subject, because we are human, that some way or other affected Judge Church in the trial of this case, because I say that the record shows throughout that we did not get an impartial trial."

The zeal of counsel, as often happens, "because we are human," has led him to overstate the case; but a reading of the record shows no inconsiderable cause for complaint. In the cross-examination of this witness, Twining, at one point, the court said:

"It seems to me that any further questions of this nature are obviously meant for mere delay, and I don't want to hear any more of them, because I will make the same ruling."

Again:

"If there are a lot of statements which you don't know anything about, ask him, but make it as brief as possible, and not ask him a thousand questions, when one or two would be sufficient."

Further:

"I have tried to conduct this case with some degree of expedition, but it is impossible to do so."

While Louis Hansen, a witness for appellants, was being cross-examined the following occurred, as shown by the transcript:

"Q. How did you learn the section lines of that section? A. Why there is a road on 17 and 18—

"The Court: Strike out the answer. Do you know what the question is? Mr. Hansen, do you know what the question is? A. No.

"The Court: Read the question, then. (Question read.)

"Mr. Harris: Section 17, right there (showing on the map). A. Yes, sir; I see something on that map, there was no road opened on the north side—

"The Court: Come back and take your seat, then; the court will know if you are answering the question or not."

Several other answers the court of its own motion struck out, and after the witness had stated that he knew the west line of a certain section the record shows the following:

"Q. How did you know? How did you find out? A. That is something I can't hardly explain to you. The county road goes—

"The Court: Say that you don't know, then. A. All right; I will. I did know, in fact, though."

The court struck out several other answers of this witness, and concluded by lecturing all the witnesses to be perfectly frank and candid, and not try to make out a case for either side. When John Rea, a witness for appellants, was on the stand, he was asked—

"if there was anything to interfere, in passing along the road, with your view, so you could determine with your knowledge of the land how much of the land was actually irrigated from the People's Ditch?"

An objection was made to the question and the court said:

"I will confess frankly to you that I don't think there is anything of value in any answer or question of that kind."

In sustaining an objection to another question the court, among other things, said:

"We can't try this case entirely upon hearsay evidence. * * * There ought to be a fair, candid presentation of the matter and nothing else, by a fair, candid witness throughout, so that the court might finally, in determining these matters, determine it in a way that it would, in some sense, do justice to the people concerned, all of them; that is the only interest that ought to be had by anybody, and it is the only interest that the court has—not to see one party get an advantage of some other party by hook or crook, or something of that kind, but to have a fair and candid presentation, so that we know it is such and feel that it is, * * * and therefore I get a little irritated when I find that people are willing to say, or any one is willing to say, most anything. I don't like that kind of testimony at all. It is not that kind that ought to come into courts."

In another instance, when an objection was made by respondents to a question on the ground that it called for a conclusion the court said:

"That is a case with nearly every question; with nine cases out of ten they have called for conclusion or opinion."

Again, when another witness stated that he was acquainted with the location of the canals, the court:

"What do you mean by that—speaking acquaintance, bowing acquaintance?"

To another witness for appellants the court said:

"Don't be trying to make out a case."

At another point:

"Certainly there ought to be some method of shortening the work. It is so tedious that we can hardly keep awake. There is not enough variety to keep up interest here."

There was, indeed, some excuse for the impatience of the trial judge. It does seem that the trial was unduly prolonged, and it was no doubt true, as the court said:

"Well, I guess we are having our nerves tried a little too much by the strain of the continuous hearing of this case. I find my own nerves, I have to confess, are considerably tried, and I don't know but what I have to apologize to you, all of you."

But it must be said that great interests were involved, and it is not surprising that counsel were alert and anxious to present every consideration that they deemed important. It may be added that they seem to have been extremely courteous throughout to the trial judge, and they hardly deserved the reprimand that was frequently administered. While said remarks of the court are not to be deemed so serious as if the cause had been tried before a jury, and while some of them were undoubtedly of a jocular nature, and all were well intended, the natural effect upon the witnesses for appellants of the frequent interruptions and lectures would be to interfere with and prevent a candid and complete statement of the knowledge of the witness concerning the subject-matter of his testimony.

The appropriate attitude of the trial judge is, of course, a matter of general knowledge, and it requires no extended consideration. We may cite, however, in this connection, Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483, and Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742. In the former it was held that the court placed an improper restriction upon the plaintiff in the conduct of her case. It was said:

"We think that the attitude of the trial judge in restricting counsel in his examination of the plaintiff as to the matter adverted to was error of a prejudicial kind. The case of Pratt v. Pratt, 141 Cal. 247 [74 Pac. 742], is in point."

In this latter case the trial judge virtually threatened to prejudge the testimony of the defendant as a witness, and intimated that unless the daughter was withdrawn as a witness he would regard "the fact of her having contradicted the mother in the father's interest as a matter seriously discrediting the latter's testimony." It was held that this was a prejudicial irregularity, preventing a fair trial to the defendant. This case is not so flagrant, but the strictures were so severe as to discourage a full presentation of the evidence. The trial judge, learned and incorruptible as he is, failed to maintain his usual judicial poise, and this fact being considered in connection with the other circumstances to which attention has been directed, it seems that the interests of justice demand a new trial.

The judgment and order in each case are reversed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

45 Cal. App. 795

CUTHBERT BURREL CO. et al. v. PEOPLE'S DITCH CO. et al. (Civ. 1913.)

(District Court of Appeal, Third District, California. Jan. 26, 1920.)

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by the Cuthbert Burrel Company and others against the People's Ditch Company and others. Judgment for plaintiffs, and certain defendants appeal. Reversed.

E. C. Farnsworth, of Visalia, L. L. Cory, of Fresno, and H. Scott Jacobs, of Hanford, for appellants.

Frank H. Short, W. A. Sutherland, and M. K. Harris, all of Fresno, for respondents.

PER CURIAM. The action arises out of conflicting claims to the use of the waters of Kings river. Plaintiffs had judgment and the appeal is by defendants the People's Ditch Company, the Last Chance Water Ditch Company, the Lemoore Canal & Irrigation Company, and Lower Kings River Water Ditch Company, from said judgment. The defendants Lake Land Canal & Irrigation Company and the Union Water Ditch Company have not appealed.

This action and two others (Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co. et al., etc., Interveners, and Stinson Canal & Irr. Co. and Crescent Canal Co. v. People's Ditch Co. et al.) were consolidated in the court below and tried together. An opinion reversing the judgments and orders in the other cases was filed in this court on the 24th day of December, 1919. See 188 Pac. 77.

The object of this action by the plaintiffs was to establish the riparian character of their lands (described in the complaint) and to obtain injunctive relief against the alleged acts of the defendants in interfering with the riparian rights of plaintiffs.

The complaint, by appropriate averments, sets up the riparian rights of the plaintiffs, alleging that their lands (described in the complaint), are situated and border upon and along Kings river, a natural water course, and upon and along certain branches of said river; alleges that the use of water from said river and its tributaries and branches is necessary for the purpose of properly farming said lands, and that the defendants are and have been for a long period of time taking from said river and diverting to and upon their lands larger quantities of water than are necessary for their legitimate uses or quantities far in excess of the amounts which they (defendants) can or ever have put to a beneficial use and are thus interfering with the rights of plaintiffs as riparian owners.

The People's Ditch Company and the Last Chance Water Ditch Company filed an answer

to the complaint, denying certain allegations thereof and affirmatively alleging: That the People's Ditch Company, since 1873, and the Last Chance Water Ditch Company, since 1874, have been the owners, respectively, of large water ditches, for the purposes of irrigation, watering of live stock, etc., and that each of said defendants has appropriated and diverted from Kings river 600 cubic feet of water per second. The beneficial use of such water was alleged, as was also the open, notorious, and adverse possession thereof.

The Lemoore Canal & Irrigation Company also filed an answer, setting forth that, in 1902, it purchased from Lower Kings River Water Ditch Company all its property, including canals, ditches, and the right to appropriate 600 cubic feet per second of water, which ditches and water right had been owned by the latter company since 1873.

Appellants contend that the following findings of the court are not supported by the evidence: (1) That Kings river is a natural water course where it crosses the lands of plaintiffs and that plaintiffs' lands are riparian. (2) That the People's Ditch Company has diverted and put to a beneficial use only 360 cubic feet of water per second. (3) That the Last Chance Water Ditch Company has diverted and put to a beneficial use only 250 cubic feet of water per second. (4) That the Lower Kings River Water Ditch Company and its successor, the Lemoore Canal & Irrigation Company, have diverted and put to a beneficial use only 250 cubic feet of water per second.

As is stated in the opinion in Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co., etc., 188 Pac. 77, there is but one bill of exceptions in all three cases. With the exception of the testimony addressed to the question of the riparian character of the lands of plaintiffs, the evidence is precisely the same in this as in the other cases—that is, upon the question of the quantity of water necessary for the purposes of the defendants and that which they claim they have for many years diverted from Kings river and used upon their lands for a beneficial purpose, the evidence is the same in this action as in the other cases. The findings as to the quantity of water to which the defendants were found by the court to be entitled are the same in all three cases. The rulings upon the evidence of which the defendants complain in this action, with the exception of those with respect to the evidence bearing upon the question of the riparian character of the lands of plaintiffs, are precisely the same as those made in the other actions. Indeed, the rulings here complained of, with the exception above indicated, are the very same rulings and refer to evidence bearing upon the question (as vital in one action as in the others) of the quantity of water which the defendants claimed the right to divert from Kings river, and which they claimed they had for many years prior to the institution of these actions so diverted, upon their lands and put to a beneficial use. The criticism made by defendants of the manner in which the case was tried below is as applicable to this as to the other actions, since the said criticism grows out of and is founded upon precisely the same rulings and the same alleged hostile or impatient attitude of the trial judge towards witnesses introduced by the defendants to support the claims of their answers.

In view of the foregoing situation, what is said and the conclusion arrived at in the opinion of this court in Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co. et al., and Stinson Canal & Irr. Co. v. People's Ditch Co. et al., supra, are applicable to this case. In those cases, the plaintiffs, as appropriators, claimed the right to divert a certain quantity of water from Kings river to and upon their lands, and alleged that the defendants were wrongfully interfering with that right. It was not claimed in those actions, nor is it claimed here, that the defendants were not entitled to take water from said river for their purposes, but that they were and had been so diverting water in quantities far in excess of the amounts necessary for their purposes, or which had been or could be put by them to a beneficial use, and that in so doing they had impaired and were impairing the right of the plaintiffs to take the amount of water necessary for the proper irrigation of their lands and such other necessary uses as are incidental to the business of farming. In those cases, then, the vital question involved was as to the amount of water which each of the contending litigants was entitled to divert from Kings river to be used for a beneficial purpose. So, in the case now before us, as above stated, aside from the question of the riparian character of the lands of plaintiffs, the vital question was as to the respective quantities of water necessary for a beneficial purpose the parties hereto were entitled to take from said river. And it is as to the testimony addressed to that proposition as it affected all three of the cases that the complaints are made by the defendants of the rulings, and of the manner generally in which the case was tried, and upon which complaints we predicated our judgment of reversal in the other cases.

It follows that, upon the authority of the opinion in Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co. et al., and Stinson Canal & Irr. Co. et al. v. People's Ditch Co. et al., 188 Pac. 77, the judgment and the order herein must be reversed; and it is so ordered.

45 Cal. App. 123

TOWER v. WILSON (SOLINSKY, etc., Intervener). (Civ. 2644.)

(District Court of Appeal, First District, Division 1, California. Dec. 19, 1919. Opinion of Supreme Court in Bank Denying Hearing, Feb. 16, 1920.)

1. APPEAL AND ERROR ⟸1011(1)—FINDINGS ON CONFLICTING EVIDENCE WILL NOT BE DISTURBED.

Findings by the trial court on conflicting evidence will not be disturbed on appeal.

2. TRIAL ⟸397(5)—RELATIVE TO WHAT FINDINGS SHOULD BE MADE, COMPLAINT HELD TO STATE CAUSE OF ACTION FOR MONEY HAD AND RECEIVED.

Where the first count of plaintiff's complaint sought to recover from defendant a sum of money on the theory of quantum meruit, it appearing that defendant transferred to plaintiff a half interest in a mining claim for $175,000, although defendant had acquired claim for about $60,000, *held*, that the second count, which was nothing more than a specific rehearsal of the probative facts relied on to support the cause of action and did not allege that plaintiff was in any wise damaged, or that the value of the one-half interest in mining claim was less than the amount paid for it, was one for money had and received, and hence findings disposing of the first were sufficient to dispose of the second count.

3. TRIAL ⟸393(1)—FINDINGS ON MATERIAL ISSUES NEED NOT FOLLOW THE PLEADINGS.

Findings by the trial court on material issues need not follow the pleadings; but, if the truth or falsity of each material allegation not admitted can be demonstrated from the findings, they are sufficient under the Code.

4. TRIAL ⟸397(5)—THERE NEED BE NO SPECIFIC FINDINGS ON ALLEGATIONS IN THE ANSWER WHICH WERE UNNECESSARY.

Where the answer was sufficient without averments of affirmative matter, the findings which otherwise disposed of the issues are sufficient, though they did not dispose of the affirmative matter.

5. TRIAL ⟸404(5)—ULTIMATE FINDING OF FACT THAT DEFENDANT WAS NOT INDEBTED TO PLAINTIFF HELD TO DISPOSE OF ENTIRE CONTROVERSY.

The ultimate finding, in an action on quantum meruit for money had and received, that defendant was not indebted to plaintiff, *held* to dispose of the entire controversy and to conclude the same.

6. TRIAL ⟸404(3)—FINDINGS SHOULD BE CONSTRUED TO SUPPORT JUDGMENT.

The finding of an ultimate fact should be construed to support the judgment, and facts necessary to support the judgment should be inferred from the ultimate finding when such inference is warranted.

7. BROKERS ⟸34—BROKER IN PARTICULAR TRANSACTION DOES NOT OCCUPY CONFIDENTIAL RELATION AND OWE TO CLIENT THE DUTIES OF AN AGENT WITH RESPECT TO TRANSACTION OUTSIDE BROKERAGE TRANSACTION.

The fact that defendant was plaintiff's broker in stock and grain transactions did not create any confidential relation or relation of agency which would require the broker to disclose to plaintiff, to whom he sold a half interest in a mining claim, the amount which he paid therefor, and hence the failure of the broker to disclose that fact would not give rise to an action.

8. PLEADING ⟸236(7)—DENIAL OF PLAINTIFF'S REQUEST TO FILE AN AMENDMENT IN AN ACTION FOR MONEY HAD HELD NOT ERROR.

In an action by plaintiff, who claimed that defendant, occupying confidential relation, misrepresented to him the amount for which a mining claim could be purchased, and that defendant was bound to account for the excess received, *held*, that it was not an abuse of discretion to refuse to allow plaintiff at the conclusion of the trial to set forth an amendment inconsistent with the original complaint which raised new and distinct issues.

9. SET-OFF AND COUNTERCLAIM ⟸29(2)—DEFENDANT, IN ACTION FOR MONEY HAD ARISING OUT OF SALE OF INTEREST IN MINING CLAIM, MAY COUNTERCLAIM FOR AMOUNT FOR WHICH PLAINTIFF WAS LIABLE AS STOCKHOLDER IN MINING CORPORATION TO WHICH THE MINE WAS TRANSFERRED.

In an action by plaintiff who acquired a half interest in a mining claim from defendant, and who asserted that defendant misrepresented the price at which the mining claim could be acquired, *held*, that defendant could, under Code Civ. Proc. § 438, recover by way of cross-complaint an amount due from plaintiff on account of plaintiff's ownership of stock of a mining corporation to which the two had transferred the mining claim; the counterclaim arising out of the same transaction.

Opinion of Supreme Court in Bank Denying Hearing.

10. APPEAL AND ERROR ⟸931(9)—NO PRESUMPTION ON APPEAL THAT FINDINGS OF FACT WERE WAIVED UNLESS THERE ARE NO FINDINGS SHOWN.

An assumption that findings of fact were waived as to matters claimed not to be covered by the findings of fact actually made and filed cannot be indulged in, there being no such presumption except in the absence of any purported findings.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Albert E. Tower against J. C. Wilson, in which F. J. Solinsky, as trustee in bankruptcy of the defendant, was permitted to intervene. Thereafter the defendant died, and Mabel C. Wilson, his administratrix, was substituted as defendant. From a

judgment against plaintiff and in favor of the intervener, who filed a counterclaim, plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, A. L. Shinn, of San Diego, and U. S. Webb, of San Francisco, for appellant.

Robt. B. Gaylord and Morrison, Dunne & Brobeck, all of San Francisco, for respondent Solinsky.

Drown, Leicester & Drown, of San Francisco, for respondent Mabel C. Wilson, administratrix.

Metson, Drew & Mackenzie, W. H. Metson, and Samuel M. Shortridge, all of San Francisco, for defendant John C. Wilson.

WASTE, P. J. This is an action brought to recover the sum of $148,750, the difference between the sum of $175,000 plaintiff paid for a one-half interest in certain mining property, and one-half of the amount alleged to have been the actual price of the same, and claimed to be a secret profit, made by J. C. Wilson, confidential agent of plaintiff, in the purchase of a mine to be operated as a joint adventure. After the trial, and before judgment, defendant John C. Wilson was duly adjudged a bankrupt, and F. J. Solinsky, as trustee of said bankrupt, was permitted to intervene in the action. Wilson thereafter died, and Mabel C. Wilson, administratrix of his last will and testament, was substituted as defendant in the action in the place and stead of her deceased husband. Judgment was thereafter entered that plaintiff take nothing by the action, and that F. J. Solinsky, as such trustee, have and recover from plaintiff upon a counterclaim, based upon a stockholder's liability, established to the satisfaction of the court, the sum of $32,718.57, together with interest and costs. From this judgment plaintiff appeals.

The original complaint filed in the action was in assumpsit to recover the sum of $142,500, money had and received by said John C. Wilson, for the use and benefit of plaintiff. Prior to the trial plaintiff filed his third amended complaint, containing two causes of action. The first count, following the original complaint, is in assumpsit, to recover the sum of $148,750, together with interest, for and on account of money had and received. In the second count it is alleged that during the month of February, 1909, said John C. Wilson was employed by plaintiff as, and became, his general agent and broker; that Wilson, as such agent and broker of plaintiff, transacted a large amount of business for plaintiff, buying and selling shares of capital stock of various corporations listed upon the New York stock exchange; that the relations existing between plaintiff and Wilson were close, intimate, and confidential; and that at all of said times plaintiff had and reposed in him great trust and confidence, and acted and relied upon his advice without seeking, or obtaining, any independent counsel; that, during the month of November, 1909, Wilson represented to plaintiff that there was a valuable mine, located in Mariposa county, for sale, and which could be purchased for $350,000; that Wilson proposed and advised that plaintiff and he purchase said mine for their joint use and benefit, for the said sum, each to pay one-half of the purchase price, the mine, when bought, to be conveyed to a corporation, to be organized, the capital stock of which would be equally divided between plaintiff and Wilson; that plaintiff, believing in, and relying upon, the said representations made by Wilson, and having confidence in him, made no independent investigation for the purpose of ascertaining the truth, or falsity, thereof, agreed to the said proposal; that the representations were false and untrue, and so known to defendant Wilson in that he knew said mine could be purchased by him for a sum not exceeding the sum of $60,000; that plaintiff paid defendant the sum of $175,000, one-half of the alleged purchase price of the said mine, to enable Wilson to purchase the mine after adding thereto a like amount; that Wilson thereupon purchased the mine, paying therefor the sum of $52,500 only, which sum he paid out of the $175,000 paid by the plaintiff, and no part of the purchase price of the mine was actually paid by Wilson.

Upon the trial, by leave of the court, amendments to the third amended complaint were filed by plaintiff, in which it is alleged that at the time the representations were made, and thereafter, Wilson concealed from plaintiff the fact that the said property could have been purchased for the sum of $52,500. The amendment also sets forth that it was not until June 1, 1912, that he learned that Wilson had purchased the property for less than $350,000. In the answer filed by Wilson, all material averments contained therein were specifically denied. As an affirmative defense it was alleged that Wilson was the holder of a duly executed and recorded agreement for the purchase of the mine, in possession of the property, developing and working the same; that prior to the 1st day of December, 1909, he had expended large sums of money in development of the mine, which, "as defendant believed," was of the value of $350,000 and upwards; that he offered to sell plaintiff one-half interest in the mine for the sum of $175,000, and was informed, and believed, that plaintiff had made his own investigation of the value of the mine, and as to the desirability of his purchasing a one-half interest therein; that he (Wilson) made no representations to plaintiff which were not wholly true, and which he did not himself believe to be true; that he informed plaintiff of the existence of his option to purchase the mine; and that plaintiff, being ful-

ly advised, "voluntarily accepted defendant's proposition."

By way of counterclaim against plaintiff, Wilson also alleged the incorporation of the Oro Rico Mines Company, the issuance of 1,500,025 shares, the ownership of 750,005 shares by plaintiff; that said corporation became indebted to Wilson in the sum of $90,059.61 of moneys theretofore expended for the use and benefit of the corporation, no part of which had been paid; and that, by reason of plaintiff's stockholder's liability, he was indebted to Wilson in the sum of $45,429.34.

The uncontradicted facts are that defendant was engaged in the general stock and bond business in San Francisco. Acting as his manager, and in charge of his business, was B. A. Wilbrand, who had full authority from defendant Wilson to deal with the patrons and clients of the brokerage business to the same extent as his principal. Plaintiff, before coming to San Francisco, was president of a corporation engaged in the business of mining iron ore, connected with another company engaged in extracting the ore from the mine just referred to, and with a railroad related to the other two corporations. Prior to leaving New York, he appears to have dealt extensively in securities listed on the New York stock exchange. He came to San Francisco with a letter of introduction, from an eastern stock-broking firm, to Wilson, which he presented to Wilbrand soon after his arrival. Shortly thereafter, he met Wilson, and took up the matter of investment in stocks, becoming a constant visitor at Wilson's office, where he was in frequent consultation with Wilson and Wilbrand, being supplied with special information by them. Within a short time he opened an account with Wilson. Plaintiff's relations with Wilson gradually became more friendly, and, within a short time, he did all his business, soon amounting to a large sum, with Wilson's office directly. Wilson bought and sold stocks and securities, and in the grain market, being limited only by the condition of Tower's general account, basing his dealings upon his own judgment, and without advice from plaintiff.

Further undisputed facts are that Wilson was the owner of an agreement, or option, duly recorded in Mariposa county, where the property was located, for the purchase of a mine from A. H. Ward, for the sum of $60,000, with the right to enter upon and develop the property, which he had done. It consisted of some nine claims on the "mother lode." He had paid nothing for the option, but had loaned the owner of the mine $2,500, evidenced by a promissory note, and secured by a mortgage covering an undivided three-quarters interest in the property. As the final outcome of the deal between the plaintiff and Wilson, in December of 1909, plaintiff signed, and delivered to Wilson, his promissory note for $175,000. Wilson and wife thereupon executed to plaintiff a deed for an undivided one-half of the mining property. Wilson transferred, from plaintiff's account with himself, the sum of $25,000, which he credited on the note. He paid Ward $25,000 in cash, returned to him the note for $2,500, and gave him his own note for $25,000, making in all a payment of $52,500, the total amount paid, in consideration for which Wilson received a deed to the mining claims. In April following, a corporation, the Oro Rico Mines Company, of which plaintiff was one of the incorporators, and of which he became president, was formed to take over the property. Of its 2,000,000 shares of capital stock, a certificate for 1,500,000 shares was issued to Wilson, the consideration being the title to the mining property, which Wilson thereupon conveyed to the corporation. This certificate was canceled and two certificates in lieu thereof were issued, one for 750,000 shares was delivered to plaintiff, and one for a like number to Wilson. The corporation took over the operation of the mining property theretofore carried on by Wilson. He had already advanced $7,446.36 in that work, which the company agreed to repay. Both plaintiff and Wilson thereafter advanced large sums to the corporation, to enable it to carry on the mine. The excess of the amount advanced by Wilson for that purpose, over the sum contributed by plaintiff, formed the basis of the counterclaim set up by Wilson in this action, on which the judgment was granted to his trustee in bankruptcy.

The details of the transaction, which culminated in the execution and delivery of the note for $175,000 to Wilson, are sharply conflicting. According to the testimony of the plaintiff, in November, 1909, Wilson broached the project and informed him that he knew where they "could get" a mine, located in Mariposa county, out of which, if they could get it, they could make a lot of money; that "they would go half and half," the sum of $175,000 to be contributed by each. Plaintiff suggested the price was large, whereupon Wilson explained that he could take his time in paying for it, and that, if plaintiff would go in on the deal, he (Wilson) would furnish the money, and finance it for the running of the mine. He referred to certain securities owned by plaintiff on which he could realize a profit and pay for the mine. He did not tell plaintiff at any time that he had an option on the property, or that he had any interest therein. Plaintiff was having domestic troubles, and did not wish to own real property. Wilson suggested that a corporation be formed, and the mine be conveyed to it, each to own one-half of the stock. Plaintiff, so he further testified, made no independent investigation, or inquiry, concerning any matter connected with the deal. He had confidence in Wilson, trusted him in all matters of business, believed his statements concern-

ing the mine, and relied wholly upon the representations made by him, believing them to be true. He finally decided to accept the offer, and told Wilson "to go ahead." He did not search the title to the property, or examine any abstract, until 2½ years later, just before the present action was begun. He claims to have had no knowledge of the Ward option, or of the price paid by Wilson for the mine until about that time.

According to the testimony of Wilson, corroborated in part by his manager, Wilbrand, it was plaintiff who opened the negotiations relative to the purchase of the mine, stating that Wilbrand had told him about it. After going into the matter thoroughly, plaintiff asked, "What is the proposition?" Wilson offered to sell him a one-half interest in the property for $175,000. Wilson's further testimony is that on plaintiff's saying, "You are making an awful lot of money out of this," he told Tower that he thought the property was worth $500,000. "I believed it was the big thing at that time," he testified, "and I believed that Mr. Tower was going to make a great deal of money out of it. I told him that if he went into the mine with me and bought that property, and developed the property, both of us would make a great deal of money." Wilson further testified that he fully explained all the details of the matter to plaintiff, including his option, and told him he was already in possession of, and developing the property, giving the name of the mining engineer in charge, and also referring plaintiff to others for information. He denied ever stating that the mine could be purchased for $350,000, but claimed that the offer was always to "sell" a half interest in it for $175,000. Wilson also testified that diagrams, tabulated statements, indicating the interest of Ward in the mine, were produced by him and examined by plaintiff. According to his testimony, also, when the organization meeting of the Oro Rico Mines Company was held, the plaintiff was present. The Ward option, an abstract of the property, the deeds from Ward to Wilson, Wilson to Tower, Tower to Wilson, and Wilson and wife to the mining company, were all produced and commented upon by the attorney conducting the meeting. That plaintiff had knowledge of the option is borne out by the evidence of Wilson's manager, Wilbrand, who testified that he informed Tower of all the details of the matter, including the price at which Wilson could purchase the mine. In passing, it may be said, the trial court did not appear to have put very much reliance upon this witness' testimony.

[1] Much of appellant's argument rests upon the assumption that the facts were as contended for by him, and that it was error for the trial court to find otherwise. This court is not in position to now determine that question. Without going into detailed discussion of many matters appearing in the record, which no doubt appealed to the trial court with persuasive force, suffice it to say that the very brief epitome of the long record we have included in our statement of the facts presents, in the main, the conflicting testimony of the parties in relation to the real matter at issue. If there are discrepancies, inconsistencies, and improbabilities in the evidence, these were matters for the trial court to pass upon in connection with its consideration of the entire testimony in the case. Blanc v. Connor, 167 Cal. 719, 723, 141 Pac. 217. An appellate court will not disturb findings based upon evidence wherein, as here, there is a substantial conflict. Reynolds v. Jackson, 25 Cal. App. 490, 144 Pac. 305; Ryder v. Bamberger, 172 Cal. 791, 799, 158 Pac. 753. As the trial court accepted Wilson's testimony as the correct statement of the issue, the findings are consistent with the facts, and find ample support in the evidence.

[2] A further contention of the appellant is that the court failed to make its findings upon material issues. The plaintiff first states his cause of action as a quantum meruit, the specific allegation being that Wilson "was indebted to plaintiff * * * for and on account of so much money had and received * * * for the use and benefit of plaintiff." The second count, as shown in our former reference to it, is nothing more than a specific rehearsal of the probative facts relied upon to support the cause of action. Appellant so states in his opening brief. There is no allegation that plaintiff has been in any way damaged by these acts. If the interest in the mining property sold to plaintiff by Wilson be of less value than plaintiff paid for it, the fact is not stated. We are not permitted, therefore, to regard the second cause of action as one of damages for fraud. Holton v. Noble, 83 Cal. 7, 8, 23 Pac. 58; Wainwright v. Weske, 82 Cal. 193, 196, 23 Pac. 12. Plaintiff is seeking a return of the money he claims Wilson unlawfully obtained from him. His second cause of action seems to rest upon the implied contract, upon the part of Wilson to repay the difference between the $175,000 received by him, and one-half of the amount he paid Ward as the purchase price of the mine, which sum he is alleged to have inequitably received, and a demand for the return of which, plaintiff avers, has been made and refused. It comes squarely within the definition of an action for money had and received. London, etc., Fire Ins. Co. v. Liebes, 105 Cal. 203, 207, 38 Pac. 691. It is obvious, we think, that these counts relate to the same matter, and are an attempt to declare upon an alleged liability growing out of the same transaction. We are therefore of the opinion that the findings are sufficient, and when properly construed will be found to dispose of every material issue in the case.

[3] It is not necessary that the findings of the court on material issues shall follow the

pleadings. If the findings, taken together, are such that the court can say the ultimate facts necessarily result therefrom, they are sufficient. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code, relating to such matters, are met. Millard v. Legion of Honor, 81 Cal. 340, 342, 22 Pac. 864; Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194. In another case in which "the cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing," what was done under it, and an agreement "to repay to plaintiff all moneys he had advanced or paid * * * under the contract," the Supreme Court said:

"Appellant * * * specifies that the issues under the first and second counts were not found upon by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them." Haines v. Stilwell, 5 Cal. Unrep. 27, 30, 40 Pac. 332, 333.

See, also, Leeke v. Hancock, 76 Cal. 127, 130, 17 Pac. 937.

[4-6] Appellant particularly complains that the court failed to specifically find upon the issues of confidential relationship between Tower and Wilson, the volume and character of the business transacted by Wilson as Tower's agent, the confidence and trust reposed in Wilson by Tower, his acting without seeking independent advice, his failing to make an investigation as to the proposed mining venture, and as to the alleged concealment and suppression of facts relating to the actual purchase of the mine from Ward. He complains also that the court did not find specifically upon certain affirmative allegations of the answer. Those allegations followed and their effect was but to emphasize the denials of the answer. The answer was sufficient without the affirmative matter. It was not necessary that there should be specific findings on such allegations. Needham v. Chandler, 8 Cal. App. 124, 127, 96 Pac. 325; Murphy v. Bennett, 68 Cal. 528, 531, 9 Pac. 738. The trial court did find, however, that Wilson was "not indebted to plaintiff in the sum of $148,750, or any other sum, for or on account of so much money had or received * * * from plaintiff for the use, or benefit, of plaintiff, or at all." This was a finding upon the ultimate fact, the amount, if anything, due from defendant to plaintiff (Jacobs v. Ludemann, 137 Cal. 176, 182, 69 Pac. 965), and, we think, necessarily included the whole controversy (Southern California Ry. Co. v. Slauson, 6 Cal. Unrep. 874, 876, 68 Pac. 107). See, also, Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 352, 123 Pac. 219. It must receive such construction as will uphold, rather than defeat, the judgment predicated thereon. Whenever, from facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Its failure to find from the evidence the facts deemed by appellant to be essential to a recovery by him, as well as its own construction of the findings which it had made, by rendering judgment in favor of the defendants, must be regarded as its own conclusion that the evidence was insufficient to justify such findings as would authorize a decision in favor of plaintiff. Breeze v. Brooks, 97 Cal. 72, 77, 31 Pac. 742, 22 L. R. A. 257; Lomita L. & W. Co. v. Robinson, 154 Cal. 36, 40, 97 Pac. 10, 18 L. R. A. (N. S.) 1106. In other words, the court having found the ultimate fact in favor of the defendants, in effect finds and concludes that the contra probative facts alleged by plaintiff are untrue. In addition to the finding quoted, the court did find with great particularity that the transaction between plaintiff and Wilson was not as alleged, and testified to by plaintiff. The findings also recite that Wilson did not represent that there was a mine which could be purchased for $350,000, or any sum, and never proposed to Tower that they two acquire the property for their joint use or benefit, or that each should pay one-half of the purchase price; the mine when acquired to be conveyed to a corporation and operated by them jointly through the company. The court also found specifically that Wilson paid the whole of the purchase price of the mine with his own money, and upon his purchase of the same on his own account. From the evidence in the record, from the judgment ordered, and from the facts found, it is evident that if more complete findings had been made they would have been adverse to appellant. In such case the failure to find is not a ground for the reversal of the judgment. Krasky v. Wollpert, 134 Cal. 338, 342, 66 Pac. 309. This, we think, disposes of all the questions suggested by the appellant as to the lack of findings.

Aside from the foregoing conclusions, which we think are of compelling force, respondent calls our attention to the fact that there is nothing in the record affirmatively indicating or showing that the appellant did not waive findings. Therefore, absence of findings is not a fatal defect, and the judgment is supported even in the absence thereof. Richardson v. City of Eureka, 110 Cal. 441, 446, 42 Pac. 965; Baker v. Baker, 139 Cal. 626, 627, 73 Pac. 469; Ladd v. Myers, 4 Cal. App. 352, 353, 87 Pac. 1110.

[7] The only logical inferences which may be drawn from the findings, and, as we said before, there is evidence, if accepted by the court, to support them, are that Tower knew that Wilson had the option on the mine, and that Wilson was guilty of no concealment, misrepresentation, or violation of confidence in the matter and that Tower did not rely absolutely upon Wilson in the matter of the

mine deal. Each was therefore in a position to form an independent judgment concerning the transaction. The fact that Wilson was Tower's broker in the stock and grain deals did not raise any agency or confidential relation concerning the sale of the mine. In negotiating concerning that property, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature. Hallidie v. First Federal Trust Co., 177 Cal. 600, 604, 171 Pac. 431. This being so, it was no breach of faith for him to sell Tower a one-half interest in the mining property, no matter what it may have originally cost, provided, and the court's findings so imply, there was no fraud or deceit in the matter. Wilson, under such circumstances, was not bound to disclose the profit which he was making in the transaction. Burbank v. Dennis, 101 Cal. 90, 97, 35 Pac. 444.

[8] At the conclusion of the trial, the court announced its views as to how the case should be decided, and directed counsel for the defendants to prepare findings. The appellant thereupon sought to amend his third amended complaint by adding thereto a third count, which he styled a "further, separate and distinct cause of action." The court denied the application for leave to amend. In the proposed amendment it was, in substance, averred that Wilson, owning the Ward option and in possession of the property, induced plaintiff to purchase a one-half interest in the mine, which he represented to be worth over a million dollars, for $175,000, without disclosing the amount Wilson had paid, or would pay, for the property, and for the purpose of making a large profit out of the transaction. There was no error in the ruling. It was within the discretion of the court to refuse to allow the filing of the proposed amendment, presented as it was at the conclusion of the trial. The matter set forth in the proposed amendment was inconsistent with the averments of the original complaint, as finally amended, and with the testimony of the plaintiff given at the trial. Furthermore, it raised new and distinct issues, requiring an answer from the defendant, and which could have been asserted under the first cause of action of the original complaint. The plaintiff was therefore not injured. There was no abuse of discretion in refusing plaintiff permission to amend as to the matters set forth. Williams v. Youtz, 178 Cal. 107, 172 Pac. 383; Bowman v. Wohlke, 166 Cal. 121, 128, 135 Pac. 37, Ann. Cas. 1915B, 1011.

[9] Appellant's further contention is that the court was not warranted in awarding judgment on Wilson's counterclaim. He asserts that the basis of the claim—Tower's liability as a stockholder in the corporation owning and operating the mine—was not connected with the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action as required by the first subdivision of section 438 of the Code of Civil Procedure. This provision is to be construed as permitting matters growing out of the same transaction, which may constitute an independent cause of action, to be set up by way of counterclaim.

"Every transaction is more or less complex, consisting of various facts and acts done by the respective parties, and it frequently happens that one or more of these acts would, if viewed by itself, be such a violation of duty as to give to the other a right of action, but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor. While the parties are carrying their agreement into execution, and mutual rights and obligations accrue by reason of the failure of either or both of them to comply strictly with its terms, neither party should have the right, so long as the agreement is in force and is in process of execution, to recover the damage sustained by him from any breach of duty by the other, without at the same time satisfying any obligation against himself growing out of the same affair. In such a case the rights of the one are so dependent upon the rights of the other, that simple equity requires that the respective causes of action in behalf of each should be adjusted in a single suit." Story & Isham C. Co. v. Story, 100 Cal. 30, 35, 34 Pac. 671, 673.

Under the theory of either plaintiff or defendant, the interposition of the counterclaim by the defendant was proper. The money advanced by plaintiff, and by defendant, to carry on the mine, was contributed under and as part of the original agreement for the purchase of the property, whatever that agreement may have been, and which forms the basis of plaintiff's action to recover from defendant. Plaintiff seeks to get back from Wilson, on one theory, part of the purchase price paid for his interest in the mine, and through another relation to recover an alleged secret profit, both claims being based on an alleged agreement, between the two parties, to acquire the property and to carry it on as a joint venture through the instrumentality of the corporation formed for the purpose. While carrying their agreement into execution, mutual rights and obligations accrued, through the advancement by each of them, of large sums of money for the use and benefit of the corporation, to which that project was committed. Whether the Oro Rico Mines Company was a mere agency, or a naked trustee, charged with carrying out the agreement, as appellant insists, we are unable to perceive how the liability of the stockholders for any indebtedness incurred by it would differ from that legally imposed upon stockholders in ordinary cases. None of the cases cited by appellant indicates that it does. They merely go to the point of holding that, as between the original incorporators, the corporation is a trustee, and the

court will dispose of its assets in accordance with the original agreement made between them; they, to that extent, some of the cases holding, being regarded as partners in the concern.

Tower recognized the fact, and proceeded on the theory that the interests of himself and Wilson were represented and measured by the ownership of the stock in the corporation after it was formed. His testimony establishes that very clearly. He testified that, when Wilson and he were seeking to adjust their affairs in 1912, it was on the basis of Wilson's "stockholder's proportion of the advances made by me." We feel that it needs no further discussion on our part to demonstrate that the counterclaim was properly entertained by the court.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

[10] We desire to say, however, that we do not concur in that portion of the opinion which seems to hold that it may be assumed that findings of fact were waived as to matters claimed to be not covered by the findings of fact actually made and filed. Such an assumption has never been indulged in except in the absence of any purported findings. This portion of the opinion is not in any way essential to a decision.

All concur.

182 Cal. 359

HINES, Director General of Railroads, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 9384.)

(Supreme Court of California. March 4, 1920.)

MASTER AND SERVANT ⟸382—COMPENSATION RECOVERABLE NOTWITHSTANDING AGREEMENT RELEASING EMPLOYER.

Employé was entitled to compensation for inguinal hernia sustained during course of employment, under Workmen's Compensation, Insurance, and Safety Act of 1917, notwithstanding his agreement, made at time of employment, releasing employer from any claims arising on account of hernia, the existence of which then appeared as the result of a physical examination; such an agreement being ineffectual, under section 27a, to exempt employer from liability for compensation fixed by the act.

In Bank.

Proceedings under Workmen's Compensation, Insurance, and Safety Act of 1917, for compensation by Desiderio Dell 'Era, opposed by Walker D. Hines, Director General of Railroads, United States Railroad Administration (Southern Pacific Railroad), employer. Award of compensation by Industrial Accident Commission, and employer applies for certiorari. Application denied.

The following is the agreement referred to in the opinion:

Having submitted myself to an examination by an examining physician of the Southern Pacific Company, with a view of entering the service of that company, it has been found that I have a congenital defect, viz.: lax inguinal rings. I have been fully advised and informed concerning such condition, and it has been explained to me that because of such congenital defect, a protrusion of the abdominal contents, commonly known as rupture or hernia, may take place at any time and due wholly to said congenital defect. Realizing this and in consideration of my employment by the Southern Pacific Company I hereby agree to hold the said company blameless in event of said rupture or hernia so appearing, and that I will not apply to said company or its hospital department during my term of service for any operation or treatment therefor; and for the consideration herein above expressed I do hereby release the Southern Pacific Company from any and all claims that may arise on account of rupture or hernia so appearing while in its service.

It is further understood and agreed that I am not entitled to hospital benefits for the following further disability from which I am now suffering, to wit: Chronic affection of tonsils.

It is further understood and agreed that I am entitled to and will be given hospital benefits for all other disabilities than those I am now subject to, in accordance with the rules and regulations of the hospital department of the said company.

Henly C. Booth, of San Francisco, for petitioner.

PER CURIAM. We are satisfied that, in view of the provisions of section 27a of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 855), petitioner cannot avail himself of the agreement relied on.

The application for a writ of review is denied.

ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; WILBUR, J.; SHAW, J.; and LENNON, J., concur.

45 Cal. App. 509

COHN et al. v. ISENSEE, City Clerk.
(Civ. 3278.)

(District Court of Appeal, Second District, Division 2, California. Jan. 19, 1920.)

1. MANDAMUS ⊂⊃9—PRIOR PROCEEDING IN SUPERIOR COURT BAR TO PROCEEDING IN APPELLATE COURT.

Where petition invoking original jurisdiction of appellate court for writ of mandate to compel city clerk to receive and file nominating petition shows on its face that the jurisdiction of the superior court was similarly invoked in a mandamus proceeding between the same parties and involving the same subject-matter, and that superior court denied peremptory writ, the prior proceeding in the superior court is a matter for abatement of proceeding in appellate court.

2. MANDAMUS ⊂⊃141—APPELLATE COURT AND SUPERIOR COURT HAVE CONCURRENT JURISDICTION.

The appellate court and the superior court have concurrent jurisdiction to grant an original application for mandate.

3. JUDGMENT ⊂⊃713(1) — MATTER ADJUDICATED NOT OPEN TO INQUIRY IN SUBSEQUENT ACTION.

When a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent action for the same cause and between the same parties.

4. MANDAMUS ⊂⊃178—DECISION OF SUPERIOR COURT WITHIN ITS JURISDICTION CONCLUSIVE EXCEPT ON APPEAL.

Where petitioners petitioned superior court for writ of mandate to compel city clerk to receive and file nominating petitions they must abide by its decision unless decision is reversed on appeal.

5. MANDAMUS ⊂⊃9—FINAL JUDGMENT OF LOWER COURT IS A BAR TO APPLICATION IN APPELLATE COURT.

In proceedings in appellate court for writ of mandate to compel city clerk to receive and file nominating petitions, the pendency of a prior proceeding between the same parties involving the same subject-matter in the superior court is a good defense by way of a plea in abatement, and when the judgment of the superior court becomes final, it may be pleaded in bar of a similar proceeding in appellate court between the same parties.

Petition by Sol Cohn and others for a writ of mandate to be directed against Edwin Isensee, City Clerk of the City of San Buenaventura. Writ denied.

Walter E. Barry, of Ventura, for petitioners.

H. F. Orr, of Ventura, for respondent.

FINLAYSON, P. J. Petitioners, invoking the original jurisdiction of this court, have petitioned for a writ of mandate to compel the respondent, the city clerk of the city of San Buenaventura, to receive and file the nominating petition of each of four electors of the city—upon whose behalf the petition for the writ is presented—whereby each of the four is nominated for election to the office of city trustee, to be voted for at a special recall election to be held January 27, 1920.

[1] Respondent demurs to the petition upon the ground that it appears on the face thereof that a final judgment has been entered in the same matter by the superior court in and for Ventura county.

It appears from the petition that on January 8, 1920, the jurisdiction of the superior court for Ventura county was similarly invoked in a mandamus proceeding between the same parties and involving the same subject-matter, that the superior court issued an alternative writ returnable before it January 12, 1920, and that on that day the court, after due hearing, gave judgment for the respondent and denied the peremptory writ. Notwithstanding the petition filed in this court discloses this prior adjudication by the superior court, we directed the issuance of the alternative writ of mandate, returnable before us on this 19th day of January, 1920, upon the theory that, while an appeal from the judgment of the superior court would afford a plain remedy, the remedy by appeal is neither speedy nor adequate, since, in the nature of things, the appeal could not be decided until long after the date set for the recall election. Upon more deliberate consideration, we are convinced that the prior

proceeding in the superior court is matter for abatement of the original proceeding before us.

[2, 3] This court and the superior court have co-ordinate or concurrent jurisdiction to grant an original application for mandate. When a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent action for the same cause and between the same parties. The doctrine of estoppel by judgment does not rest upon any superior authority of the court rendering the judgment. Indeed, in the issuance of writs of mandamus, this court and the superior court are peers. Unless reversed on appeal, the judgment of the superior court, when final, is a conclusive determination of the rights of the respective parties to the proceeding. It is an adjudication by a competent tribunal, and not an adjudication by every competent tribunal, to which the petitioner for a writ of mandate is entitled. It does not accord with the orderly administration of the law to allow an application for mandamus to be made to the superior court, and, failing there, to this court, and, mayhap, to the Supreme Court, should the petitioner fail here.

[4, 5] Having elected to submit the issue to the superior court petitioners must abide by the judgment of that tribunal unless and until it be reversed on appeal. The superior court having adjudicated the merits of the application, that adjudication is as conclusive upon this court, except on appeal, as upon another superior court. The pendency of the prior proceeding in the superior court is good defense by way of a plea in abatement, and, when the judgment of the superior court becomes final, it may be pleaded in bar of a similar proceeding here between the same parties. Santa Cruz Gap T. Co. v. Santa Clara Co., 62 Cal. 40; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Goytino v. McAleer, 4 Cal. App. 655, 88 Pac. 991.

The demurrer to the petition is sustained, and the writ denied.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 531

COHN et al. v. ISENSEE, City Clerk.

(Civ. 3281.)

(District Court of Appeal, Second District, Division 2, California. Jan. 23, 1920.)

1. STATUTES ⊜225½—SPECIAL LAW DOES NOT EXCLUDE GENERAL LAW NOT ANTAGONISTIC.

Though it is a general rule that a special controls a general statute without regard to their respective dates, still it is not always or necessarily true that a special law entirely excludes from its field of operations the provisions of a general law, where the two can occupy the same domain without any inherent antagonism.

2. ELECTIONS ⊜170—BLANK SPACES MUST BE LEFT IN CITY RECALL ELECTION BALLOTS.

It was the intention of the Legislature that the requirement of Pol. Code, §§ 1196, 1197, requiring blank spaces to be left on ballots wherein the voter may write the names of the candidates of his choice, should apply to recall elections in cities under the Recall Act of January 2, 1912, just as in the case of every other election of public officers.

3. STATUTES ⊜225—CONSISTENT STATUTES RELATED TO SAME SUBJECT CONSTRUED TOGETHER.

All consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to the whole system of which they form a part, and shall be harmonized and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results.

4. STATUTES ⊜181(1)—PURPOSE OF CONSTRUCTION IS TO ASCERTAIN INTENT.

The purpose of all rules of construction of statutes is to ascertain, if possible, the intention of the Legislature; for it is the legislative intent that must control.

5. ELECTIONS ⊜163—BALLOTS NOT FURNISHED BY STATE AT RECALL ELECTION INVALID.

All ballots to be used at city recall elections under St. Ex. Sess. 1911, p. 128, must be printed and furnished at the public expense just as at all other elections, and the use of any ballot other than such as may be furnished by the state is absolutely prohibited, in view of Pol. Code, §§ 1196, 1197.

6. ELECTIONS ⊜21—LEGISLATURE CANNOT RESTRICT ELECTORS TO PERSONS WHOSE NAMES ARE ON BALLOTS.

In view of Const. art. 2, § 1, it is not within the power of the Legislature to pass enactments restricting electors in their choice of candidates, or prohibiting them from voting for persons whose names are not printed on the ballots.

7. CONSTITUTIONAL LAW ⊜48—CONSTRUCTION SHOULD BE IN FAVOR OF CONSTITUTIONALITY.

Where a statute is fairly susceptible of a construction that makes it harmonize with the Constitution and comport with the legitimate powers of the Legislature, that is the construction which it should receive.

8. MUNICIPAL CORPORATIONS ⊜154—OFFICER RECALLED AT ELECTION NOT REMOVED UNTIL QUALIFICATION OF SUCCESSOR.

A city officer is not removed from office by a vote of a majority of the voters for his recall, where no votes are cast for a successor; there being no vacancy in office unless a successor is voted for and fails to qualify, under St. Ex. Sess. 1911, p. 130.

Petition by Sol Cohn and Ralph W. Cummings for a writ of mandate to compel Edwin Isensee, City Clerk of the City of San Buenaventura, to provide for the use of voters official ballots with blank spaces. Writ granted.

Walter E. Barry, of Ventura, for petitioners.

H. F. Orr, of Ventura, for respondent.

FINLAYSON, P. J. This is an original petition for a writ of mandate to compel respondent, as the city clerk of the city of San Buenaventura, to provide for the use of the voters at a recall election, to be held in that city on the 27th day of this month, official ballots with blank spaces wherein the voter may write the names of persons whose names are not printed on the ballot.

It appears from the petition, to which a general demurrer has been interposed, that, following the filing of a recall petition, signed by the necessary number of qualified electors and petitioning for the recall of two of the city trustees, the city's board of trustees fixed January 27, 1920, as the date for holding the recall election; that sample ballots have been provided by respondent; that there is no blank space on any of the sample ballots wherein the electors may write in the names of candidates; and that respondent refuses to provide, for use at the recall election, official ballots having thereon any such blank space or spaces. Attached to the petition is one of the sample ballots. From this sample ballot it appears that there is no name thereon other than the names of the two incumbent officers sought to be recalled, and that, by instructions printed on the ballot, the electors are instructed to vote on the question of recall by stamping a cross in the voting square after the word "Yes" or the word "No." There does not appear on the ballot the name of any person nominated as a candidate to succeed either of the two incumbents whose removal is to be voted upon at the recall election. This, we were informed by counsel at the argument, is because the petitions that were signed by the requisite number of qualified electors, nominating candidates for election to succeed the incumbents, were not filed by respondent for the reason that, as he claimed, there were certain fatal defects in a matter of procedure. See case No. 3278, 188 Pac. 278, decided by this court January 19, 1920.

The matter now presented to us involves the question whether certain provisions of sections 1196 and 1197 of the Political Code —provisions that require the official ballots for every election of public officers to have thereon a blank space or spaces to permit the electors to write in the names of persons whose names are not printed on the ballot— are applicable to elections for the recall of elective officers in incorporated cities and towns held under the act entitled "An act to provide for the recall of elective officers of incorporated cities and towns," approved January 2, 1912. Stats. Ex. Sess. 1911, p. 128.

No question relating to remedy or parties is made. Petitioners and respondent both seek a decision on the merits of the only question presented, namely, the construction of the act for the recall of city and town elective officers. The importance of the question would justify a most painstaking examination of the grounds of our conclusion, but the necessity for a speedy decision, in order to afford a sufficient opportunity to print the ballots before the election on the 27th instant, precludes that mature deliberation which the question deserves; only yesterday was the petition for the writ filed in this court.

The act to provide for the recall of elective officers for incorporated cities and towns and the two Political Code sections in question are in pari materia. One statute (the Code) deals with the general subject of elections in comprehensive terms; the other (the recall act) deals with but a part of the general subject of elections, but deals with that part in a minute and definite way.

In determining the question with which we are confronted—the proper construction to be placed upon the act for the recall of elective officers of incorporated cities and towns —we are not embarrassed by any possible conflict between the comprehensive scheme for recall elections provided by the Constitution itself, where the person sought to be recalled is a state officer, and a general law of the Legislature. (See article 23 of the Constitution for the scheme provided thereby for the recall of an elective public officer of the state.) The Legislature, by this same article of the Constitution, is expressly empowered to enact laws prescribing the procedure for the recall of elective officers of cities and towns. The language of the organic law is:

"The recall shall also be exercised by the electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law."

It was pursuant to this authorization that the Legislature, at its special session held shortly after article 23 was adopted, passed the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns.

The act for the recall of elective city and town officers provides a comprehensive scheme of recall election. As a part of that scheme, the act describes what shall be printed on the recall ballot. It does not, however, expressly declare, as do sections 1196 and 1197 of the Political Code, that the ballots shall be printed with blank spaces to allow the voter to write in names not printed

on the ballot. So far as pertinent, the language of the recall act is:

"There shall be printed on the recall ballot, as to every officer whose recall is to be voted on thereat, the following question: 'Shall (name of person against whom the recall petition is filed) be recalled from the office of (title of the office)?' following which question shall be the words 'Yes' and 'No' on separate lines, with a blank space at the right of each, in which the voter shall indicate by stamping a cross (x) his vote for or against such recall. On such ballots, under each such question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person recalled, in case he shall be removed from office by said recall election; but no vote cast shall be counted for any candidate for said office unless the voter also voted on said question of the recall of the person sought to be recalled from said office. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office. If a majority of those voting on said question of the recall of any incumbent from office shall vote 'No,' said incumbent shall continue in said office. If a majority shall vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon the qualification of his successor. The canvassers shall canvass all votes for candidates for said office and declare the result in like manner as in a regular election. If the vote at any such recall election shall recall the officer, then the candidate who has received the highest number of votes for the office shall be thereby declared elected for the remainder of the term. In case the person who received the highest number of votes shall fail to qualify within ten days after receiving the certificate of election, the office shall be deemed vacant and shall be filled according to law."

The Code sections, so far as their provisions are pertinent, read:

Section 1196:

"* * * It shall be the duty of the clerk or secretary of the legislative body of any incorporated city or town to provide separate ballots for every election for city or town officers in which the electors, or any of the electors, of such city or town participate, and to cause to be printed in such separate ballots the name of every candidate whose name has been filed with such clerk or secretary in the manner provided for by law. All ballots shall be not to exceed twenty-four inches in length, * * * and below the printed names of the candidates for each office, the necessary blank space or spaces to permit an elector to write in the names of persons whose names are not printed on the ballot. [Then follows a provision for a special watermarked paper with a design to be furnished by the secretary of state.] At any special or separate local election, paper marked with the design used at the previous election may be used. Nothing in this Code contained shall prevent any voter from writing upon his ballot the name of any person for whom he desires to vote for any office, and such vote shall be counted the same as if printed upon the ballot, and marked as voted for."

Section 1197:

"There shall be provided at each polling place, at each election at which public officers are voted for, but one form of ballot for all the candidates for public office, and every ballot shall contain the names of all the candidates whose nominations for any office specified on the ballot have been duly made and not withdrawn, as provided by law, together with the title of the office arranged to conform as nearly as practicable to the plan hereinafter set forth. * * * All ballots shall be not to exceed twenty-four inches in length, * * * with proper blank spaces to allow the voter to write in names not printed on the ballot."

It will be noticed that the Code provides that there shall be but one form of ballot for all candidates for public office (section 1197), and that at every election for city and town officers the ballot furnished by the city clerk shall contain the "necessary blank * * * spaces to permit an elector to write in names of person whose names are not printed on the ballot" (section 1196).

[1, 2] Though it is the general rule that a special controls a general statute, without regard to their respective dates, still it is not always or necessarily true that a special law entirely excludes from its field of operations the provisions of a general law, where the two can occupy the same domain without any inherent antagonism. We are of the opinion that the recall act of January 2, 1912, and the two sections of the Political Code from which we have quoted, should be read together with a view to giving effect to what we deem to be a consistent legislative policy, namely, to provide that at each and every election held in this state at which a candidate for public office is to be voted for, whether it be a general municipal election or a special municipal election for the recall of an incumbent, none but official ballots furnished by the state shall be used, and on each and every ballot there shall be suitable spaces wherein any qualified elector may express his choice by writing in the name of any person, and not be required to choose between the persons whose names may be printed on the ballot as nominees for election. Though the two Code sections are a part of the general law that deals with the subject of elections in a general and comprehensive manner, and the act of January 2, 1912, is confined to the special subject of elections for the recall of elective city or town officers, there is no inconsistency between the provisions of the latter act (which for the sake of distinction, we shall designate as the special act or statute) and those provisions of the Code sections that we have quoted (which we shall refer to as the general act or statute.) The two acts are in pari materia, and, without creating any inconsistency or repugnancy between the two, the field covered by the special act may likewise be occupied by the general act, in so far as the latter provides

that, at every election for city and town officers, the official ballots shall contain "the necessary blank space or spaces to permit an elector to write in the names of persons whose names are not printed on the ballot."

[3] The rule is that all consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to the whole system of which they form a part, and shall be harmonized, and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results. Lambert v. Board of Trustees, 151 Ky. 725, 152 S. W. 802, Ann. Cas. 1915A, 180, 183. Where, as here it does not clearly appear that the Legislature intended to prescribe by the special statute all the rules that should govern recall elections, and where, as here, it does appear that the language of the general statute is so comprehensive that it literally embraces the subject-matter of the special statute (sections 1196 and 1197 make express provision for every election for city or town officers in which the electors of the city or town participate), the special will not exclude the general statute from the field that it occupies, unless there is a necessary repugnancy between the acts. Casey v. Harned, 5 Iowa, 1; Talcott v. Commissioners, 53 Cal. 199.

[4] The purpose of all rules of construction is to ascertain, if possible, the intention of the Legislature; for it is the legislative intent that must control. Respondent's contention amounts to this: Though the special act does not, in so many words, say that no space shall be left on the ballot wherein the elector may write the name of any person who is his choice for the office that may become vacant by the recall of the incumbent, nevertheless this result must follow from an application of the maxim, "expressio unius est exclusio alterius." This maxim expresses but one of the canons of interpretation. It should not be used as a guide for the construction of a statute when, if adopted, its application would invalidate the very statute sought to be construed, by making it violative of some constitutional inhibition. Only by holding that the general statute (that is, the provision of the Political Code that requires blank spaces to be on the ballots) occupies with the special statute the field covered by the latter can we avoid invalidating the special act.

The Constitution of this state guarantees to every qualified elector the right to vote at all elections that may be authorized by law:

"Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the Treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been resident of the state one year next preceding the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." Const. § 1, art. 2.

[5, 6] It is apparent from a reading of the act for the recall of elective city or town officers that all ballots to be used at recall elections held thereunder are required to be printed and furnished at the public expense, just as at all other elections, and that the use of any ballot other than such as may be furnished by the state is absolutely prohibited. If, therefore, the ballots that are required to be used at a recall election have no blank space wherein the voter may write the name of a person whose name is not printed on the ballot, the voter must be compelled to vote for the person or persons whose name or names may be printed on the ballot furnished him, or be deprived of the privilege of voting for any person whatever. If that is the construction that must be placed upon the act for the recall of elective city and county officers, the statute must be held to be unconstitutional and void; for it is not within the power of the Legislature to restrict electors in their choice of candidates or prohibit them from voting for persons whose names are not printed on the ballots. Eaton v. Brown, 96 Cal. 371, 31 Pac. 250, 17 L. R. A. 697, 31 Am. St. Rep. 225; Britton v. Board of Commissioners, 129 Cal. 337, 342, 61 Pac. 1115, 51 L. R. A. 115; Spier v. Baker, 120 Cal. 370, 375, 52 Pac. 659, 41 L. R. A. 196; Sanner v. Patton, 155 Ill. 553, 40 N. E. 290; 15 Cyc. 289; note on page 686 et seq. 91 Am. St. Rep. As was said by Mr. Justice Henshaw in Britton v. Board of Commissioners, supra, speaking with reference to statutes restricting the ballots to those furnished by the state:

"But, where such laws have been upheld, the right of the voter freely to express his preference has always been preserved, as in this state, by blank spaces wherein he may write the names of the candidates of his choice." 129 Cal. 342, 61 Pac. 1117, 51 L. R. A. 115."

It is no answer to say that the voter, by filing a nominating petition, may have the name of the nominee of his choice placed upon the ballot. He may not be able to induce the requisite number of electors to join with him in so nominating the candidate of his choice. If the narrow construction of this act that respondent contends for be the only permissible construction, the voter is deprived of his constitutional right of suffrage, deprived of the right of exercising his own choice; and where that right is taken away, there is nothing left worthy to be called the right of suffrage; the boasted free ballot becomes a delusion. To justify a construction that would make such consequences possible, the legislative language should be

so clear and unequivocal that it cannot with reason he said that room is left for any other permissible construction.

[7] It is a well-recognized canon of interpretation that, where a statute is fairly susceptible of a construction that makes it harmonize with the Constitution and comport with the legitimate powers of the Legislature, that is the construction which it should receive. Chesebrough v. San Francisco, 153 Cal. 559, 567, 568, 96 Pac. 288. A construction of an election law that will permit the virtual disfranchisement of any qualified voter should never be adopted if the statute be fairly susceptible of any other meaning. Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; Park v. Rives, 40 Utah, 47, 119 Pac. 1034; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177.

In the light of the foregoing considerations, we are satisfied that it was the intention of the Legislature that the requirement of sections 1196 and 1197 of the Political Code with respect to blank spaces on the ballots, wherein the voter may write the names of the candidates of his choice, should apply to recall elections held under the recall act of January 2, 1912, just as in the case of every other election of public officers.

[8] There is another consideration which impels us to this construction of the act in question. It is this: If the requirement of the Code sections relative to blank spaces on the ballots should be held not to be applicable to municipal recall elections, then it would be possible for the act for the recall of elective city and town officers to defeat its own purpose. The purpose of the recall statute is to enable a majority of the voters, voting at any recall election, to remove an unfaithful or undesirable incumbent of any elective office of the city or town. But if, as in the instant case, no nominating petition has been filed nominating a candidate for the office, and if, therefore, no name of such nominee be printed on the ballot, then, even though a majority of the voters vote 'Yes' on the question of the incumbent's recall, their purpose must be frustrated if they are not to be permitted to write in the name of any person as their choice for the office. The language of the act is that, if a majority of the voters shall vote "Yes" on the question of recall, then "said incumbent shall thereupon be deemed removed from such office upon the qualification of his successor." But if, as in the present case, no candidate's name is printed on the ballot, and if no voter can write in the name of any person as his choice for the office, then there is no "successor" who can qualify, and consequently no vacancy in the office to be filled by appointment or otherwise. For the act says, in effect, that the incumbent, though a majority vote for his recall, is not for that reason alone deemed to be removed. He is not deemed removed until the "qualification of his successor." This reasoning is in no wise vitiated by the last sentence of the section, which reads:

"In case the person who received the highest number of votes shall fail to qualify within ten days after receiving the certificate of election, the office shall be deemed vacant and shall be filled according to law." Stats. Ex. Sess. 1911, p. 130.

This language refers only to a vacancy created by a failure to qualify on the part of a person whose name was printed or written on the ballot, and who received the highest number of votes cast at the election.

For the foregoing reasons we think the demurrer should be overruled, and a peremptory writ issued as prayed.

It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 561

MATTHEWS v. DIGGES. (Civ. 3064.)

(District Court of Appeal, First District, Division 1. California. Jan. 26, 1920. Rehearing Denied Feb. 24, 1920; Hearing Denied by Supreme Court March 25, 1920.)

1. LANDLORD AND TENANT ⊂=79(2) — ASSIGNEE OF LEASE IS BOUND BY NOTICE OF FORFEITURE GIVEN TO ASSIGNOR.

An assignee of a lessee, who took his assignment of the lease with full knowledge that notice of forfeiture and demand for possession had been served upon his assignor, stands in no better position than the original lessee.

2. APPEAL AND ERROR ⊂=1011(1)—FINDINGS BASED ON CONFLICTING EVIDENCE NOT DISTURBED.

Findings of trial court based on conflicting evidence will not be disturbed on appeal.

3. LANDLORD AND TENANT ⊂=106—COVENANT TO POISON SQUIRRELS HELD A CONTINUING ONE FOR ENTIRE TERM.

A covenant of a lessee to poison squirrels was a continuing one, and it was specious to argue that, since the covenant set no time within the term of the lease within which it was to be performed, a forfeiture could not be declared for its breach.

4. LANDLORD AND TENANT ⊂=94(2)—THREE DAYS' NOTICE HELD UNNECESSARY WHERE COVENANT VIOLATED RELATED TO POISONING OF SQUIRRELS.

A covenant respecting the duty of the lessee to poison squirrels was a continuing one which could not be performed within three days after notice of its violation, and it was unnecessary to give such notice before forfeiting the lease for a violation thereof, under Code Civ. Proc. § 1161, subd. 3.

5. LANDLORD AND TENANT ⟸112(2)—ACCEPTANCE OF RENT NOT WAIVER OF BREACH OF COVENANT TO POISON SQUIRRELS.

Although the acceptance of installments of rent might be a waiver of prior breaches of a covenant to poison squirrels on the leased premises, it was not a waiver of a subsequent failure to poison squirrels; the covenant being a continuing one.

6. LANDLORD AND TENANT ⟸103(1)—ASSIGNEE OF LESSEE WHO VIOLATED COVENANTS NOT ENTITLED TO RELIEF FROM FORFEITURE.

An assignee of a lessee, who took an assignment of the lease with full knowledge that the owner had given notice of forfeiture and demand for possession by reason of breach of a covenant by the lessee to poison squirrels on the premises, was not entitled, under Code Civ. Proc. § 1179, to be granted relief from the forfeiture of the lease; the matter of granting or denying such application being one lying largely in the discretion of the trial court.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by John L. Matthews against Robert M. Digges. From judgment in plaintiff's favor, and from an order made after final judgment denying defendant's application to be relieved from a forfeiture of a lease declared by said judgment, the defendant appeals. Judgment and order affirmed.

Wyckoff & Gardner, of Watsonville, Daugherty & Theile, of Salina, and Thos. E. O'Donnell, of Hollister, for appellant.

C. F. Lacey, of Salinas, for respondent.

RICHARDS, J. There are two appeals in this case presented in the same transcript; one an appeal from the judgment in the plaintiff's favor, the other an appeal from an order made after final judgment, denying the defendant's application to be relieved from the forfeiture declared by said judgment under section 1179 of the Code of Civil Procedure.

The action was one in unlawful detainer after forfeiture of certain demised premises alleged to have arisen through the breach of certain covenants in the lease thereof by the plaintiff to certain lessees named Wood and Judge, assignors of the defendant. The lease in question was executed by said plaintiff to Wood and Judge on March 22, 1917, the property covered by said lease consisting of two separate ranches containing in the aggregate about 9,000 acres of land, known as the San Lorenzo ranch and the Bitterwater ranch, and situate in the counties of San Benito and Monterey. About 600 acres of the land of these ranches was tillable, the balance being grazing land. The plaintiff alleged that there were three certain covenants of this lease which had been broken by the predecessors of the defendant prior to the latter's assignment of the lease. By one of these the said lessees were required to take proper care of a small orchard on one of these ranches; by another to take proper care of a certain cream separator thereon; by the third of these covenants the lessees were to use reasonable efforts to poison the squirrels upon the leased property. The plaintiff, in his amended complaint, alleged the breach of all three of these covenants, but upon the trial of the cause the court found that as to the first two of these in the order above stated the averments of said complaint were untrue. As to the covenant to poison squirrels the trial court found the covenant had been broken so as to entitle the plaintiff to declare a forfeiture of the lease and to recover possession of the premises in this action. Judgment decreeing such forfeiture and recovery was accordingly entered in the plaintiff's favor, and from such judgment the first of the appeals herein was taken.

After the entry of such judgment the defendant moved the trial court for an order relieving him from such forfeiture under section 1179 of the Code of Civil Procedure, which motion was upon the hearing thereon denied, from which order denying the same the second appeal was taken.

[1] Upon the first of these appeals the appellant makes several contentions. The first of these is that the evidence was insufficient to sustain the finding of the trial court that there was a breach of the covenant in said lease requiring the lessees to poison the squirrels upon the leased premises such as would entitle the plaintiff to declare a forfeiture of said lease. The covenant in relation to the poisoning of squirrels upon the lands in question reads as follows:

"The parties of the second part also agree that they will at their own cost and expense use reasonable efforts to poison squirrels upon said leased property, the party of the first part at his own cost and expense to furnish the necessary poison."

It may be stated in limine with respect to the breach of this covenant that it was broken, if at all, by the original lessees in said lease; that the plaintiff's notice of his claim of forfeiture for such breach and of his demand for the possession of the premises was served upon the said original lessees prior to the assignment by them of their said lease to the defendant herein, and that the said defendant took said assignment of said lease with full knowledge that said notice of forfeiture and demand for possession had been served by plaintiff upon his assignors. It cannot, therefore, be successfully claimed that the defendant herein stands in any better position respecting this action and these appeals than his said predecessors in interest would have occupied had no such assignment been made.

[2, 3] With respect to the appellant's first contention upon the first of these appeals, that

the evidence is insufficient to justify the findings and conclusions of the trial court as to a sufficient breach of the foregoing covenant to justify a forfeiture of the lease, it may be said that, after a careful reading of the evidence in the case, we are entirely satisfied that there was sufficient evidence furnished by the plaintiff and his witnesses, both as to the fact that the plaintiff had on his part in said covenant supplied the necessary poison to enable his lessees to perform their part of said covenant, and as to the fact that they had not reasonably performed their part thereof, to justify the findings and conclusions of the trial court in both of these regards. The evidence, it is true, is conflicting as to both of these matters, but the trial court resolved these conflicts in the plaintiff's favor, as it was entitled to do, and with its findings and conclusions in so doing we are not at liberty to interfere. The appellant's rather specious argument—that since the covenant in question sets no specific time within the five-year term of the lease within which they were bound to perform it, and hence that a forfeiture was prematurely declared—had apparently little weight with the trial court, and could have little with any person at all familiar with the pest of ground squirrels in farming or grazing communities and with the necessity of regular and organized measures for the extirpation of this troublesome and destructive rodent on the part of owners and occupiers of such lands and insisted upon by the laws of the state especially framed for this purpose. It was clearly the duty of the lessees of these premises under the terms of this covenant in their lease to reasonably keep in a state of reduction the squirrels thereon. This, according to the positive testimony of the plaintiff and his witnesses, they did not do, since they testified, and the court found, that as a result of their failure of reasonable efforts in that regard the said leased property continued to be infested with squirrels. We find no merit, therefore, in the appellant's contention as to the insufficiency of the evidence to sustain the findings of the court in respect to the plaintiff's performance and his lessees' breach of their respective parts of the foregoing covenant in said lease.

[4] The appellant's next contention is that the plaintiff's written notice and demand of possession of the premises covered by said lease was insufficient, for the reason that he failed to serve therewith the three days' notice to perform the covenants of said lease or deliver possession, as required by subdivision 3 of section 1161 of the Code of Civil Procedure. A reference to said section, however, shows that it is only in cases where the conditions and covenants of a lease violated by a lessee can be performed within three days after the giving of such notice that the duty is cast upon the lessor to give notice to his lessee to perform the same within said time or surrender possession of the leased premises. In the case at bar the evidence sufficiently showed, and the court found, that the conditions of the foregoing covenant respecting the poisoning of squirrels upon the leased premises could not have been performed within three days after notice of its violation. It was therefore unnecessary for the plaintiff to include in his notice and demand for possession the alternative otherwise required by said section of the Code. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449; Zucco v. Farullo, 174 Pac. 929.

[5] The appellant's next and final contention upon the first of these appeals is that the plaintiff waived any breach of the covenant in question by accepting rent after such breach and with full knowledge thereof, and by other conduct on his part amounting to such waiver. By the terms of the lease in question the full rental of the premises covered by it was to be the sum of $25,000 for its entire term, $2,500 of which was to be paid upon the 1st day of September of each year, and $2,500 upon the 1st day of each April thereafter. On the 5th or 6th of April, 1918, the original lessees under said lease sent to plaintiff by mail their check for the installment of the rent then a few days overdue, which check the plaintiff in due course received and retained. He did this knowing that at the time his said lessees were not performing their covenant to poison the squirrels upon the leased premises; and it might be argued that had such lessees thereafter and before the serving upon them of the plaintiff's written demand for the surrender of said premises performed their continuing covenant in respect to the poisoning of squirrels, their lessor's acceptance of the said installment of rent would have constituted a waiver of their past breaches thereof under the authorities cited by appellant. But the covenant was, as above stated, a continuing covenant; and, this being so, the plaintiff's acceptance of the installment of rent due on the 1st of April did not, and could not, constitute a waiver of the continuing breach of such covenant after the payment of such past-due rent. German Sav. Bk. v. Gollmer, 155 Cal. 683, 688, 102 Pac. 932, 24 L. R. A. (N. S.) 1066; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; McGlynn v. Moore, 25 Cal. 384; Taylor, Landlord and Tenant (9th Ed.) § 501. We are therefore of the opinion that the plaintiff's receipt of the installment of rent in question did not operate as a waiver of the terms and conditions of said covenant, at least as to his lessees' continuing breaches thereof; nor de we think that his subsequent conduct, without reciting the details thereof, amounted to such a waiver.

[6] Upon the second appeal the appellant contends that he was entitled, under section 1179 of the Code of Civil Procedure, to have been granted relief from the forfeiture of the lease, which had been assigned to him after the immediate lessees' breach thereof, and after the plaintiff's written notice and demand

for possession duly served upon them. As before stated, the appellant, as such assignee of said lease, stands in no better position than his assignors, having taken the same with knowledge of its breach by them and of the lessor's action in respect of terminating the same. His application for relief and his showing made thereon were met by the plaintiff with a denial of its essential averments and with a counter showing as to its alleged facts, the matter was heard before the trial court, and upon such hearing the respective parties testified in support of and in denial of the equities presented by the defendant's said application. The trial court, after hearing such testimony, denied the application. The matter of granting or denying such an application is one which lies so largely in the discretion of the trial court that it would require a very clear showing of an abuse of such discretion to justify a reversal of the order made thereon. No such showing has been here presented, but, on the contrary, it was made to appear, not only that the defendant making such application had taken his assignment of said lease with his eyes open to the fact that he was buying a lawsuit, but that, as between himself and the plaintiff, a state of hostility existed which boded ill for any satisfactory resumption and continuance of their relations as landlord and tenant under said lease. The trial court had the parties before it and was thus in the position—which this court is not—of determining where the equities between the parties lay. With such determination we will not attempt to interfere.

Judgment and order affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 661

FRAZEE v. FOX FILM CORPORATION.

(Civ. 2764.)

(District Court of Appeal, Second District, Division 1. California. Jan. 30, 1920.)

1. APPEAL AND ERROR ⊂=1011(1)—FINDING OF COURT WITHOUT JURY BASED ON CONFLICTING EVIDENCE IS CONCLUSIVE.

The trial court's finding of fact in an action tried without a jury, based on conflicting evidence, is conclusive on the appellate court, both as to conflicts between witnesses for the respective parties, and as to conflicts between witnesses for the same parties.

2. EVIDENCE ⊂=208(2), 210—PLEADINGS AND AFFIDAVIT INADMISSIBLE AS JUDICIAL ADMISSIONS.

In an action on a contract which plaintiff claimed to have entered into with defendant corporation, where the president of the corporation testified that the one with whom plaintiff claimed to have contracted did not represent the corporation at that time, and the one with whom plaintiff claimed to have contracted testified that he did not engage him to perform services for the defendant corporation, *held* that pleadings and affidavit, filed by defendant corporation about a year after the making of the alleged contract, which were signed by the person with whom plaintiff claimed to have contracted as general manager, were inadmissible in evidence as judicial admissions.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Edwin A. Frazee against the Fox Film Corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

Alfred Wright and Alexander Macdonald, both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover $800, alleged to be due him as the balance of salary upon a contract made with defendant whereby he was employed by the latter as a director of the production of motion pictures for a compensation of $200 per week and a royalty on all pictures so produced. Judgment went for defendant, from which plaintiff appeals.

By answer defendant denied the alleged making of the contract, or that it ever at any time employed plaintiff in any capacity or agreed to pay him any compensation for services rendered to it, or that it agreed to pay plaintiff a royalty on the pictures produced under his direction, and further denied that plaintiff, as alleged, worked for it from July 17, 1916, to January 14, 1917, or worked for it at all; in accordance with all of which denials the court found in favor of defendant.

[1] Plaintiff's first contention is that the findings are without sufficient support. It appears from plaintiff's testimony that about July 16, 1916, in the city of Los Angeles, he was by oral agreement employed by A. Carlos, acting for and on behalf of defendant, at a salary of $200 per week, in addition to which he was to receive a royalty of $200 upon the first picture produced and $300 on each picture thereafter produced; that he produced four pictures upon which no royalty was paid; that his employment continued from July 17, 1916, to January 14, 1917, during which time, except for the last four weeks, he had received from defendant his salary of $200 per week, but was paid nothing on account of the royalty. As against this evidence, it appears from the testimony of William Fox, president of defendant corporation, that prior to May, 1916, Mr. Carlos was general representative of the company in its sales department, which position he resigned on said date and came from New York City to Los Angeles, where he en-

tered the employ of another corporation, known as the William Fox Vaudeville Company, as general manager of its studios in Los Angeles, and from the time of his resignation occupied no position whatever with defendant, had no authority to act for it, and performed no duties in connection therewith. A. Carlos testified that, while he employed plaintiff at a salary of $200 per week, his act in so doing was for and on behalf of and as the manager of the William Fox Vaudeville Company, for which plaintiff performed services as director of moving pictures, but that he never at any time agreed to pay him any royalty on pictures so produced as director. In addition to this testimony it also appears that plaintiff, upon the payment of his salary, signed pay roll vouchers, whereby he acknowledged the weekly receipt of $200 from the William Fox Vaudeville Company, thus recognizing it as his employer. Upon this conflicting evidence so presented, it was the sole province of the trial court to determine the questions in issue; and, having done so, its findings thereon must be deemed conclusive and binding upon this court. This rule, which needs no citation of authorities, applies with equal force to conflicting testimony between the witnesses for defendant, as it does to like conflicts between witnesses of the respective parties. Hence, conceding the testimony of Carlos to be inconsistent with that of Fox, both of whom were witnesses for defendant, the question as to which one of them was entitled to credence in the statements made was for the determination of the trial court.

[2] Another alleged error is predicated upon the rulings of the court in rejecting certain documentary evidence offered by plaintiff for the purpose of showing that Carlos, with whom he made the contract, was the representative of and acting for defendant. One of these documents consisted of an application made March 17, 1917, by Mrs. O'Connor to the Industrial Accident Commission for an award of compensation for injuries alleged to have been sustained by her as an employé of defendant on September 26, 1916. The answer thereto was signed, "Fox Film Corporation, by A. Carlos, Its General Representative." Another document was the verification of an answer filed in the superior court of Los Angeles county on August 1, 1917, in the case of Standing against the defendant, which likewise was made by A. Carlos as the general representative of defendant. The third document was an affidavit made by him on March 10, 1917, for the removal of an action pending in the superior court to the federal court, and wherein he stated that he was the general representative of defendant. The court sustained objections to the introduction in evidence of all these documents. At most, the proffered evidence was a mere repetition of the testimony given by Carlos, and hence not admissible for the purpose of impeachment. Appellant, however, insists that the documents were admissible as substantive evidence showing admissions against interest and tending to contradict the witness Fox. The contract under which plaintiff was employed was made on or about July 17, 1916, and the question presented for solution was whether Carlos at such time had power to act for defendant, rather than as to his authority to act on the dates of March 10th, March 17th, and August 1st, in the year 1917, when he represented himself as the general representative of defendant. It might readily be conceded that on these dates he was the general representative of defendant, but such fact would not justify the inference that he held such position nearly a year before such dates; and hence the documents could not be deemed evidence tending to contradict the statements of Fox, as president of the corporation, that Carlos was not connected therewith, and had no power to act therefor at the time of plaintiff's alleged employment by defendant.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 582

ZIEGLER v. COLKINS et ux. (Civ. 2503.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1920.)

1. APPEAL AND ERROR ⊂=110—ORDER DENYING MOTION TO VACATE TREATED AS MOTION FOR NEW TRIAL HELD NOT APPEALABLE.

An order denying a motion to vacate and set aside a judgment, which was, in effect, a motion for a new trial and was so considered, is not appealable.

2. APPEAL AND ERROR ⊂=773(4)—JUDGMENT AFFIRMED IN ABSENCE OF BRIEF AND ORAL ARGUMENT.

Where appellant filed no brief and did not appear at time set for oral argument, no reason is presented to appellate court to show that judgment as entered by trial court was in any wise defective, erroneous, or improper, and judgment of trial court will be affirmed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Charles F. Ziegler against A. Colkins and Anna M. Colkins, his wife. From a judgment for defendants and order denying a motion to vacate and set aside the judgment, the plaintiff appeals. Appeal from order dismissed, and judgment affirmed.

Charles H. Mattingly, of Los Angeles, for appellant.

James Brunken, of Los Angeles, for respondents.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

JAMES, J. [1, 2] From an examination of the clerk's transcript, prepared in accordance with the alternative method of appeal, we learn that the plaintiff in this action gave notice of appeal from the adverse judgment and from an order made after judgment denying plaintiff's motion to vacate and set aside the same. The latter motion appears to have been, in effect, a motion for a new trial, and, so considered, the order denying the same is not appealable. The clerk's transcript and reporter's transcript were filed in this court on November 7, 1917, and thereafter stipulations were made between the parties extending time to appellant to file his brief to August 15, 1918. Appellant filed no brief and did not appear at the time set for oral argument.

No reason is presented to us, therefore, to show that the judgment as entered by the trial court was in any wise defective, erroneous, or improper.

The appeal from the order is dismissed; the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 621

PURINGTON v. OLSTEN et al. (Civ. 2770.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

1. TRIAL ⟸404(1)—FINDING IN ACTION BY ASSIGNEE OF MATERIALMEN ON CONTRACTOR'S BOND HELD NOT TO SHOW PAYMENT OF CLAIM.

In an action on a contractor's bond by the assignee of materialmen, finding that, at the time the materialmen assigned their claims, plaintiff assignee paid the full amount thereof, the money being furnished to him by the owner of building, *held* not to necessitate reversal of judgment for plaintiff assignee on any ground that it appeared the owner had paid the claims to the materialmen, so that no action could be founded on the bond.

2. MECHANICS' LIENS ⟸317—CONTRACTOR'S BOND GIVES RIGHT OF ACTION TO FORECLOSE OR FOR MATERIALS IN SEPARATE ACTION.

Where contractor's bond executed pursuant to statute by its terms inured to benefit of all persons furnishing materials, to all of which it accorded right of action for materials so furnished, either in a separate action on the bond, or in any suit to foreclose mechanics' liens, contention of sureties in an action by the assignee of materialmen that no recovery can be had on the bond, except in an action to foreclose mechanics' liens wherein there should be as a condition of recovery, an adjudication of an unpaid balance is without merit.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by H. F. Purington against J. H. Olsten and another. From judgment for plaintiff, the named defendant appeals. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellant.

Taylor & Forgy, of Los Angeles, for respondent.

SHAW, J. Action to recover on a contractor's bond given pursuant to the provisions of section 1183, Code of Civil Procedure. Judgment went for plaintiff, from which defendant appeals on the judgment roll.

It appears that the Boynton Company and the Nelson Manufacturing Company furnished materials to a subcontractor and used in the construction of a building, for which payment was not made, which claims and all right, title, and interest in and to the bond, after the completion of the building and before the commencement of the action, were, as found by the court, duly assigned by said companies to plaintiff, who was the legal owner and holder thereof. In addition to these findings, all of which were in favor of plaintiff, the court made the following finding:

"That at the time said Boynton Company and said Nelson Manufacturing Company assigned their said claims to the plaintiff the plaintiff paid therefor the full amount of said claims, and that the money therefor was furnished to him by said Hughes, the owner of the building, and neither of said claimants has any further interest therein."

[1] Upon this finding appellant asks for a reversal of the judgment, his contention being that it appears therefrom that Hughes, the owner of the building, had paid the claims to the materialmen, and hence no action therefor could be founded on the bond. We do not so interpret the finding. On the contrary, construing it in support of the judgment, it appears therefrom that plaintiff obtained from Hughes the money with which he acquired the claims, as to the validity of which, and the assignor's right to recover upon the bond in the absence of an assignment, no attack is made. The court found that the claims which were the subject of transfer by assignment were unpaid, and that they were duly and regularly assigned to plaintiff. From whom or how he obtained the money paid in acquiring the claims was not a matter which concerned defendant, since, as to him, the assignment would have been equally valid without such payment. Hence the fact so found seems to be wholly immaterial.

[2] Equally without merit is appellant's contention that no recovery could be had on the bond except in an action to foreclose a mechanic's lien on the building, wherein there should be, as a condition of such recovery, an adjudication of an unpaid balance. By

the terms of the bond executed in pursuance of the provisions of the statute, it inured to the benefit of all persons furnishing materials to be used in the work described in the contract, to all of whom it accorded a right of action for materials so furnished, either in a separate action upon the bond or in any suit brought to foreclose mechanics' liens upon the property. General Elec. Co. v. American Bonding Co., 182 Pac. 444.

While the action was brought against both the contractor and his surety, it is claimed that judgment was rendered against the surety only, which fact is urged by appellant as another reason for reversal. Not only does the bond, in express terms, authorize the bringing of an action against the principal and surety, or either of them, but appellant does not even suggest that a suit may not be maintained against a surety for the default of his principal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 584

FARRAR v. FARRAR. (Civ. 3069.)

(District Court of Appeal, Second District, Division 2, California. Jan. 28, 1920.)

1. DIVORCE ⊂=213 — INABILITY TO PAY NO DEFENSE TO CLAIM FOR TEMPORARY ALIMONY AND SUIT MONEY.

It is no defense to wife's application for temporary alimony and necessary suit money, pending her husband's appeal from a decree denying him a divorce and granting the wife a divorce on a cross-complaint, to show that the husband is without means.

2. DIVORCE ⊂=262—ON NONPAYMENT OF TEMPORARY ALIMONY PROCEEDINGS MAY BE STAYED.

While the court may not punish a husband, suing for divorce, for contempt, or dismiss his suit, if he is unable to pay or earn the amount awarded his wife as temporary alimony and suit money, nevertheless the court will refuse to proceed with the action until he has made the payments.

3. DIVORCE ⊂=213—WIFE NEED NOT RESORT TO HER NONINCOME-PRODUCING PROPERTY BEFORE APPLYING FOR TEMPORARY ALIMONY.

Where the wife is the owner of nonincome-producing property, the law does not require her to have recourse to such property before applying for temporary alimony and suit money pending an appeal by her husband, or to impair the capital of her separate estate.

4. DIVORCE ⊂=214(3)—WIFE MUST SHOW NEW CONDITIONS TO BE ENTITLED TO INCREASE IN ALIMONY PENDING APPEAL.

Where a wife petitions for temporary alimony pending her husband's appeal from divorce decree to an amount in excess of permanent alimony thereby awarded her after a trial on the merits, it should be incumbent upon her to adduce evidence of new conditions that show a necessity for the increase, or else that the amount allowed by decree was inadequate in the first instance.

5. DIVORCE ⊂=182 — ORDER FOR ALIMONY PENDING APPEAL SHOULD PROTECT HUSBAND FROM PAYING ALIMONY TWICE.

It was the duty of trial court, in making an order for temporary alimony and suit money pending appeal, to protect the husband against the possibility of being compelled by reason of possible affirmance of the judgment, which awarded permanent alimony, or the dismissal of appeal therefrom, to pay alimony twice for any period of time.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Arthur L. Farrar against Matilda L. Farrar. From an order for payment of alimony, plaintiff appeals. Modified and affirmed.

See, also, 182 Pac. 989.

Thompson & Creighton, of Los Angeles, for appellant.

Frank C. Collier and Collier, Shelton & Schlegel, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal by plaintiff from an order made after judgment, requiring him to pay defendant the sum of $60 per month as alimony pending plaintiff's appeal from an interlocutory decree of divorce, and the further sum of $25 to pay for printing defendant's brief on that appeal.

Plaintiff commenced an action for divorce against defendant. Defendant filed an answer and cross-complaint. The trial court found against plaintiff on the issues tendered by his complaint, and with defendant on the issues tendered by her cross-complaint, adjudged that she was entitled to a divorce, and, by its interlocutory decree of divorce, awarded defendant permanent alimony at the rate of $35 per month. From that judgment plaintiff took an appeal, and stayed execution thereof by giving the necessary undertaking. Thereupon defendant made a motion for temporary alimony pending such appeal, resulting in the order here under review.

[1, 2] It is no defense to defendant's application for temporary alimony and necessary suit money, pending her husband's appeal, to show that the husband is without means, or that his condition and circumstances will not allow of his making such provision. The action was brought by him, and he, not she, is pressing the appeal from the judgment. If a husband comes into court for a divorce, complaining of his wife, and she makes a defense, he must expect to furnish her with money to enable her to make her defense, and likewise money wherewith to support herself during the litigation, and his poverty or inability to earn the money is no excuse. While

the court may not punish him for contempt or dismiss his suit, if he is unable to pay or earn the amount awarded his wife, nevertheless the court will refuse to proceed with the action until he has made the payments. Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194; Cohen v. Cohen, 11 Misc. Rep. 704, 32 N. Y. Supp. 1082; 14 Cyc. 755; State v. Superior Court, 85 Wash. 607, 148 Pac. 882, L. R. A. 1915E, 567. See, also, Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633. Bishop states the rule as follows:

"But a plaintiff husband, destitute both of funds and ability, will in a proper case have his suit suspended until he can do justice to his defending wife. If he cannot aliment her, and give her the means of defense, he cannot have his divorce." Bishop, Marriage, Div. & Sep. (2d Ed.) § 981.

This consideration disposes of a number of appellant's points, as, for instance, that the wife's affidavit, upon which the order was based, was filed some time previous to the making of the order; that the court erred in receiving evidence of the condition of appellant's bank account as of a certain date anterior to the making of the order, and receiving in evidence a certain check for $1,000. The sole purpose of these items of evidence was to show plaintiff's ability to pay. But, as we have seen, ability to pay is not a sine qua non, where, as here, the husband is the actor, pressing for a final decree in his own favor.

[3] Nor is it any defense to the order appealed from that the wife has property in her own right. It does not appear that her property is income-producing. Her affidavit states that she has no income whatever, except $2.50 per month, and that she is dependent upon her husband for support. Where the wife is the owner of nonincome-producing property, the law does not require her to have recourse to her own resources first, or to impair the capital of her separate estate. White v. White, 50 Ill. App. 149.

[4] For these reasons the court below was warranted in awarding respondent some alimony for her support and maintenance, as well as suit money, during the pendency of her husband's appeal from the judgment. We think, however, that the amount allowed as temporary alimony for the wife's support, pending her husband's appeal, should have been limited to the amount awarded by the divorce decree as permanent alimony; also that the husband should have been protected against the possibility of being compelled to pay twice for a part of the period covered by the pendency of his appeal from that decree.

The evidence upon which the interlocutory decree of divorce was granted is not before us. We must assume that the decree awarding the wife $35 a month as permanent alimony was based on sufficient evidence. That decree is evidence that the amount allowed thereby for permanent alimony was an adequate amount for that purpose. Ordinarily temporary alimony should not exceed permanent alimony. Indeed, it has been said that temporary alimony should, under all ordinary circumstances, be less than permanent alimony. Sharon v. Sharon, 75 Cal. 46, 16 Pac. 345. At any rate, in the absence of necessity for an increase, temporary alimony, pending an appeal from the judgment, should not exceed the permanent alimony awarded by that judgment. To entitle a wife, petitioning for temporary alimony pending her husband's appeal from the divorce decree, to an amount in excess of the permanent alimony thereby awarded her, after a trial on the merits where all the facts and circumstances may be, and presumably are, adduced and considered, it should be incumbent upon her to adduce evidence of new conditions that show a necessity for the increase, or else that the amount allowed by the decree was inadequate in the first instance. In the absence of such showing, the amount awarded by the decree must be presumed continuously adequate for her support until the judgment appealed from has become final, or, if the judgment be reversed, until a final judgment shall have been rendered in the divorce suit. Smith v. Smith, 147 Cal. 143, 81 Pac. 411. The record here furnishes no evidence that such showing was made.

[5] Moreover, it was the duty of the trial court, in making the order from which this appeal was taken, to have protected the husband against the possibility of being compelled, by reason of the possible affirmance of the judgment or the dismissal of the appeal therefrom, to pay twice for any period of time. In so far as the order fails to give such protection, it is erroneous. Sheppard v. Sheppard, 161 Cal. 348, 119 Pac. 492.

The order appealed from is modified by striking therefrom the words "$60 per month," and inserting in lieu thereof the words "$35 per month"; also by inserting at the end of the order the following:

"Provided, however, that all amounts paid hereunder by plaintiff to defendant on account of alimony at the rate of $35 per month shall, in the event of the affirmance of the judgment in this action providing for permanent maintenance at that rate, be credited in favor of plaintiff in satisfaction pro tanto of such judgment; and provided, further that if, in the event of the affirmance of the portion of such judgment providing for such permanent maintenance, plaintiff pays defendant thereunder at the rate of $35 per month for support and maintenance for any period of time covered by this order, such payment shall operate pro tanto as a satisfaction of the requirements of this order as to support and maintenance for such period of time, and plaintiff shall not be required to make under this order any further payment on account of support and maintenance for such period of time."

As so modified, the order is affirmed, appellant to pay his own costs on this appeal.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 664

GOODMAN v. WILLIAMSON. (Civ. 2769.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. PAYMENT ⇐21—DEBT NOT DISCHARGED BY DELIVERY OF CHECK SUBSEQUENTLY DISHONORED.

In the absence of express agreement, payment of a debt, whether pre-existing or contemporaneous, by a check which is subsequently dishonored, will not discharge the debt, and, though a receipt is given, the creditor may sue for the debt.

2. SALES ⇐191 — SELLER ACCEPTING GOOD CHECK NOT ENTITLED TO REPUDIATE ON DISHONOR BY BANK OTHER THAN THAT ON WHICH DRAWN.

Where the seller of hogs was paid part of the price on account by a check which was in fact good, but which was dishonored on presentation to a bank other than that on which it was drawn, he was not warranted in repudiating the contract and refusing to comply with its terms, and, the seller having accepted the check without objection, the buyer could rely on the fact that he would in the usual course of business present it for payment.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by L. Goodman against A. Williamson. From judgment for plaintiff, defendant appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.

E. A. Klein, of Bakersfield, for respondent.

SHAW, J. On the 14th day of December, 1917, defendant, in Kern county, sold for delivery to plaintiff on or about December 17th, 88 head of hogs of an average weight of 210 pounds, for the price of 13½ cents per pound, on account of the purchase of which and as part payment thereon plaintiff at the time paid to defendant by check on the American Savings Bank at Los Angeles the sum of $1,000, which defendant without objection accepted for the purpose given. At all times plaintiff had sufficient funds to his credit in the bank on which the check was drawn, to pay the same. Defendant, however, without presenting or causing it to be presented for payment to the American Savings Bank, where concededly it would have been honored, presented it to a bank at Bakersfield, and upon its refusal to pay the money thereon he repudiated the contract of sale, and refused to deliver the hogs in accordance with his agreement. Thereupon plaintiff brought this action for breach of the contract, in which the court found that defendant made the contract of sale upon which plaintiff had paid him on account of the purchase price the sum of $1,000, which check, without collection, defendant retained until lost or destroyed; that plaintiff was ready, able, and willing to fulfill his part of the contract, but that defendant refused to perform the same on his part, as a result of which plaintiff was damaged in the sum of $440, for which judgment was entered against defendant, and from which he appeals.

The evidence tended to show that the total weight of the hogs was 18,480 pounds, the value of which was 16 cents per pound, and hence the damage as found by the court, under section 3308, Civil Code, was 2½ cents per pound, from which it is apparent the court did not err in its finding as to the amount of damage sustained by plaintiff on account of defendant's breach of the contract.

[1, 2] Appellant's chief contention is that the check was taken merely for collection, and therefore could not be deemed payment, and notwithstanding the fact that it was concededly good and would have been paid upon presentation to the bank upon which it was drawn, he insists that when the First National Bank of Bakersfield refused to give him the cash thereon he was entitled to repudiate the contract. It is quite true, as claimed by appellant, that in the absence of express agreement so to do, payment of a debt, whether pre-existing or contemporaneous, by check which is dishonored will not discharge the debt, and that, although a receipt is given, the creditor may sue to recover the debt; but such facts do not exist in the instant case. On the contrary, the check was not dishonored; it was concededly good, and, as appears from the evidence, would have been paid upon presentation to the bank upon which it was drawn. Counsel for appellant cites no authorities or principle of law, and we know of none, supporting his assertion that the mere fact that a bank other than the one upon which the check was drawn refused to cash it warranted defendant in repudiating the contract and refusing to comply with its terms. Defendant having accepted the check without objection, plaintiff was entitled to rely upon the fact that he would in the usual course of business present the same for payment, upon which, under the circumstances shown and unless dishonored, his obligation upon the contract was precisely the same as though he had received the thousand dollars in cash. No ground exists for the claim that the check was received by defendant as an agency for its collection.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 5

LOS ANGELES FURNITURE CO v. HANSEN. (Civ. 3146.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1920.)

1. REPLEVIN ⟸62—NONPAYMENT OF VALUE OF PROPERTY NEED NOT BE EXPRESSLY ALLEGED.

A complaint for claim and delivery which alleged unlawful detention of property without plaintiff's consent does not fail to state a cause of action because it did not in terms allege that the damages for the unlawful detention had not been paid.

2. REPLEVIN ⟸76—DAMAGES FOR UNLAWFUL DETENTION MAY BE AWARDED.

Damages may be awarded to compensate one entitled to possession of personal property for the time it was unlawfully detained by defendant.

3. REPLEVIN ⟸76—REASONABLE VALUE OF USE IS MEASURE OF DAMAGES FOR DETENTION.

The reasonable value of use of personal property unlawfully detained is the measure of damages for the unlawful detention.

4. REPLEVIN ⟸76—JUDGMENT CANNOT AWARD FUTURE USE VALUE.

A judgment in replevin cannot award to plaintiff the reasonable value of the use of the property for the time between the judgment and the delivery of the property or payment of its value by defendant.

5. APPEAL AND ERROR ⟸1151(2)—ERROR IN GIVING ITEMS OF DAMAGES WHICH CAN BE STRICKEN NOT CAUSE FOR REVERSAL.

Error in awarding plaintiff in replevin future damages will not cause reversal but judgment will be affirmed as modified, where such damages can be stricken out without impairing determinative effect of judgment.

6. EVIDENCE ⟸353(14)—CONTRACT AND LIST OF PROPERTY SUBSEQUENTLY ATTACHED HELD ADMISSIBLE.

In an action of claim and delivery, the written lease contract, expressing the terms on which the property was delivered to defendant, objected to as incomplete, and a list of the property, made and attached to the contract after its execution, were competent evidence, where it was undisputed defendant had received the property.

7. SALES ⟸479(4)—RESERVATION OF TITLE GIVES RIGHT TO RECOVER POSSESSION WITHOUT RETURNING PAYMENTS.

A sale contract, reserving title in the seller until all payments have been made, irrespective of an express provision to that effect, authorizes the seller to retake possession of the property on breach of the conditions without returning the payments already made.

8. APPEAL AND ERROR ⟸1011(1)—COURT'S FINDING ON CONFLICTING EVIDENCE CONCLUSIVE.

Where the evidence as to the price of merchandise conditionally sold was conflicting, the trial court's finding thereon in favor of plaintiff is final.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action for claim and delivery by the Los Angeles Furniture Company against H. A. Hansen. Judgment for plaintiff, and defendant appeals. Judgment modified and affirmed.

F. E. Davis, of Los Angeles, for appellant.

Horace S. Wilson and Frank Lillard, both of Los Angeles, for respondent.

JAMES, J. This action was one of claim and delivery by which recovery of possession of a certain lot of furniture was sought to be secured. The judgment was in favor of plaintiff, and defendant has appealed.

The complaint was in the usual form appropriate to the character of the action, and contained all the essential allegations. Demand for possession was alleged to have been made on the 4th day of May, 1917, and that possession was refused to be delivered to the plaintiff by the defendant, and the value of the property was alleged to be the sum of $1,500. By an amendment made to the complaint the following allegation was added:

"That defendant, without the consent of plaintiff, now detains said personal property from the possession of the plaintiff to its damage in the sum of $1,500, the value of the property, and the further sum of $100 per month, the reasonable usable value of the said property, from the said 4th day of May, 1917, as damages for the detention thereof."

[1] It is first contended that the complaint failed to state a cause of action because it was not in terms alleged that the damages had not been paid. We think that an express allegation of nonpayment of the damages accruing subsequent to the time that the detention of the property became unlawful was not necessary, and that such a condition would be implied from the allegations made.

[2] The second point urged is that the court by its judgment awarded damages in excess of those permitted by law, when it included the following term in the judgment:

"The additional sum of $90 per month from the 4th day of May, 1917, damages for the unlawful detention of said furniture, until said property is delivered to the plaintiff or the value thereof paid."

[3-5] In the findings of fact it was determined that $90 per month was "the reasonable usable value of the said property." That damages may be awarded to compensate the person entitled to the possession of personal property for the time that it shall be unlawfully detained by a defendant is not and cannot be disputed. That the reasonable value

of the use of the personal property is a proper measure in particular cases to be applied, we think also must be affirmed. However, we do not believe that it lies within the power of the court in determining such damages to provide that the same shall continue to accumulate at a monthly rate after the date of the judgment, and for that reason we are of the opinion that the judgment is in part erroneous. The unauthorized portion of the judgment, however, may be stricken out without impairing the judgment in its determinative effect upon all material issues involved.

[6] Several other points are made in the brief of appellant. He contends that a sale upon credit of the merchandise claimed was shown by the evidence, and that it was not made to appear that any right was reserved in the plaintiff to retake possession of the articles of furniture. On the part of the plaintiff it was shown that, after some negotiation with the defendant as to articles desired by the latter and as to their price, the defendant came to the place of business of the plaintiff, and there signed the document, which was in form a lease contract, and which provided that for the use of merchandise not described in the writing itself defendant was to pay the total rental of $1,600, $500 of which was to be paid on or before the 16th day of December, 1916, and $100 on the 12th day of each and every "following month." At the time this writing was signed all of the merchandise desired by the defendant had not been collected together; some of it, it appears, had not been made, and when the lot was completed a list thereof was attached to the lease contract. It was admitted by the defendant at the trial that he had received all of the goods described in the list attached to the lease. His counsel objected, however, to the introduction of the document designated as a lease on the ground that it was incomplete, and objected to the attached list being received in evidence, for the reason that it was not made a part of the alleged contract at the time of its execution. The writing was executed as evidence of the terms of an agreement then made respecting the property which was to be delivered by the plaintiff to the defendant. It was competent evidence to show the assent of the defendant to those terms and conditions. There was no uncertainty made by the evidence as to an understanding of what merchandise was intended to be covered by the contract. As before mentioned, defendant at the trial admitted that he had received all of it.

[7] The fact that prior to the time when default occurred in the making of the payments under the lease contract the defendant had paid to the plaintiff the sum of $600 is made the basis for the argument further advanced by the appellant that the plaintiff could not retain the money of the defendant and recover possession of the property itself, or its value. Conceding the contract to represent in legal effect a conditional sale, the right of the plaintiff to retake possession was not only covered by the express terms of the contract, but the fact that title was reserved in the plaintiff until all payments had been made would give such a right, irrespective of an agreement expressed to that effect. Liver v. Mills et al., 155 Cal. 459, 101 Pac. 299; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. The case cited by appellant on the proposition (Muncy v. Brain, 158 Cal. 300, 110 Pac. 945), is not in point, for in that case the seller sold pledges held as security, and applied the proceeds on the alleged purchase price, and also sued to retake the property itself. The court there said, and, of course, very properly, that in cases under such contracts the seller could affirm the right of the buyer to the possession and sue for the purchase price, or retake possession and relinquish claim to the unpaid price, but that both remedies were not open to him.

[8] The principal dispute between the parties at the trial seems to have been over the price of the merchandise; the contention of the defendant being that the agreed price was less than that claimed by the plaintiff. The court, however, resolved the disputed questions in favor of the plaintiff; and, as there was a conflict in the evidence, the trial court's determination thereunder was final.

A careful consideration of each of the questions raised by the appellant leads us to the conclusion that the judgment should not be disturbed, except in that part where damages to accumulate after the date of the judgment are provided for.

The judgment is modified by striking from that portion which reads, "The additional sum of $90 per month from the 4th day of May, 1917, damages for the unlawful detention of said furniture, until said property is delivered to the plaintiff or the value thereof paid," the words embraced in the last clause, to wit, "until said property is delivered to the plaintiff or the value thereof paid." As so modified, the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 731

GRANT v. LOS ANGELES TRANSFER CO.

(Civ. 3180.)

(District Court of Appeal, Second District, Division 2, California. Feb. 2, 1920.)

1. APPEAL AND ERROR ⟸1006(5)—THIRD VERDICT NOT DISTURBED AS EXCESSIVE, EXCEPT ON EXTRAORDINARILY STRONG SHOWING.

Where a negligence case was tried three times, and the verdict on the first trial was $15,000, on the second $10,500, and on the third, $10,000, the verdict on the third trial will not be disturbed on appeal, as being grossly excessive, except on an extraordinarily strong showing that it was excessive and actuated by passion or prejudice.

2. DAMAGES ⟸130(2)—$10,000 NOT EXCESSIVE FOR FRACTURE OF TIBIA AND FIBULA AND A CRUSHING INJURY TO LEFT LEG OF BOY.

A verdict of $10,000 *held* not excessive to a boy, who was rendered very ill and had a compound fracture of the tibia and fibula and a crushing injury to his left leg, just below the knee.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Charles Grant, a minor, by his guardian ad litem, Virginia Grant, against the Los Angeles Transfer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hickcox & Crenshaw, Norman S. Sterry and George H. Moore, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover damages for the negligence of defendant. A verdict in the sum of $10,000 was awarded plaintiff, and judgment was entered accordingly. There was a motion for new trial, which was denied. The appeal is from the judgment.

From the record we find that, on January 16, 1917, plaintiff, a minor, was injured in an accident at the corner of Ninth and Los Angeles streets, in the city of Los Angeles, through the admitted negligence of the defendant. The plaintiff was taken to the city receiving hospital, was there given temporary aid and assistance, and then removed to the county hospital. The injury consisted of a compound fracture of the tibia and fibula, and a crushing injury to the left leg, just below the knee. The boy was extremely ill when first taken to the hospital, and required stimulation, which was given him by injecting salt solution into his veins. Infection thereafter set in, and his life was in danger. It was some time before the infection began to subside, after which the injury gradually improved. Since that time his general condition, which was very poor, has been continually improving. It is claimed by appellant that there will be no permanent injury, "except perhaps, a slight shortening of the leg, but this is indefinite."

Appellant informs us that the judgment appealed from is the result of a third trial. The first trial was had on June 7, 1917, when a verdict of $15,000 was rendered. This verdict, however, was set aside by the trial judge, Hon. Frederick W. Houser, and a new trial ordered, because the verdict was excessive. Shortly thereafter, and as the parties were about to try the case anew before the same judge without a jury, the court stated that without further proof than was offered at the former trial he would enter judgment for $10,000. Thereupon defendant objected to his trying the case, and the matter was transferred to another department of the same court, where, on the 6th day of September, 1917, it was tried before Hon. Leslie R. Hewitt, judge, and a jury, the result of which was a verdict in favor of plaintiff in the sum of $10,500. The court thereafter denied a motion for a new trial, but, upon the discovery that an instruction had been given which jeopardized the verdict, by consent of counsel for both parties, a new trial was ordered. Trial was again had, on January 17, 1918, resulting in a verdict for plaintiff in the sum of $10,000. The judgment entered in accordance therewith is the subject of this appeal.

The only evidence in the case is as to the extent and probable duration of plaintiff's injuries. Only one point is raised by the appeal, namely, that the "amount of the verdict was excessive, and was given under the influence of passion or prejudice."

[1, 2] We have read the entire record, and are not able to agree with appellant in its contention. No good purpose can be served by discussing the evidence, or any part thereof, or in dwelling long upon, or giving a verbose statement of, our reasons for the conclusion reached. Suffice it to say that we have presented to us here the fact that three juries and two trial judges have passed upon the case at different times, and that each and all of them have concluded that $10,000 was not too great a verdict to be awarded herein. Under this state of the record, coupled with the fact that "it has been repeatedly said by the courts, as well as the text-writers, that 'in actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but from the necessity of the case leaves their assessment to the good sense and unbiased judgment of the jury,' and that the appellate tribunal 'will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury, in reaching their verdict, were actuated by passion or preju-

dice' " (Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706), we think it would require an exceedingly strong case to move an appellate court to set aside the verdict for the reasons urged. It would be going far afield, in our opinion, in the face of these facts, to assume, as a matter of law, that all these—the three juries and two judges—were moved to reach their conclusions "under the influence of passion or prejudice." No such case is here presented.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 616

HALL v. CLINE, Sheriff. (Civ. 2738.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

1. TROVER AND CONVERSION ⊜54—DAMAGES FOR TIME AND MONEY SPENT IN PURSUIT RECOVERABLE.

In an action for the wrongful conversion of property, under Civ. Code, § 3336, plaintiff is entitled to recover fair compensation as damages for time and money properly expended in pursuit.

2. COURTS ⊜122—AMOUNT INVOLVED IS DETERMINABLE BY GOOD FAITH OF DEMAND IN COMPLAINT.

Whether superior court has jurisdiction in action at law, as one in tort for conversion, is to be determined by demand of complaint made in good faith and reasonably supported by allegations on which founded, and if demand amounts to $300, as in case of the value of the property, plus damages for expenditures made in pursuit, the court has jurisdiction for all purposes, regardless of the amount plaintiff may actually recover.

3. COSTS ⊜263—FIFTY DOLLARS ASSESSED IN ADDITION TO COSTS ON FRIVOLOUS APPEAL.

Under Code Civ. Proc. § 957, where the appeal is not only frivolous, but that it was taken for delay is apparent from an inspection of the record and appellant's brief, the sum of $50 to be paid to plaintiff appellee as damages, will be added to the costs on appeal awarded him.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Harry E. Hall against John C. Cline, Sheriff of Los Angeles County. From judgment for plaintiff, defendant appeals. Affirmed.

H. L. Sacks, of San Francisco, for appellant.

George H. Moore and Raymond E. Hoyt, both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sued to recover $275 as the value of personal property alleged to have been converted by defendant, and also to recover damages in the sum of $200, claim for which was based upon alleged expenditures made in the pursuit thereof.

The court found that defendant converted the property as alleged, the value of which it found to be $240, but it was untrue that plaintiff had suffered any damage on account of expenses incurred in pursuit of the property.

[1, 2] Judgment followed for plaintiff for $240, from which defendant appeals on the judgment roll. The sole ground upon which he claims a reversal is that the court had no jurisdiction to render the judgment. His contention is that the alleged demand of $200 as damages, made in the complaint, was not the subject of a real controversy, but inserted for the purpose of justifying the prayer for a demand within the jurisdiction of the superior court, citing Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195. In an action for the wrongful conversion of property a plaintiff is entitled to recover a fair compensation as damages for time and money properly expended in pursuit thereof. Civ. Code, § 3336. The record is free from anything tending in the slightest degree to show that the demand for damages was in the nature of a fraud practiced upon the court. On the contrary, it appears to have been made in utmost good faith, and hence is governed by the rule announced in Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75, where it is said:

"Whether the superior court has jurisdiction in an action at law is to be determined by the demand or prayer of the complaint, made in good faith and reasonably supported by the allegations on which it is founded, and that if this demand amounts to $300, exclusive of interest, such court has jurisdiction of the case for all purposes, entirely regardless of the amount which the plaintiff may finally be held to be entitled to recover."

[3] That the appeal is not only frivolous, but was taken for delay, is made apparent from an inspection of the record and appellant's brief in support of the alleged error. The Legislature, by section 957, Code of Civil Procedure, has wisely provided that as a means of discouraging the making of appeals for such purpose the court may, in affirming the judgment, add to the costs on appeal such damages as may be just. The remedy may seem a harsh one, for the reason that as a rule a client is governed largely in such matters by the advice of his attorney who lends himself to such practice; but there is no other method to prevent the growing evil.

To the costs on appeal herein made for delay there is added the sum of $50 to be

paid to plaintiff as damages. The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 759

BREWTHAUER v. BREWTHAUER.

(Civ. 2086.)

(District Court of Appeal, Third District, California. Feb. 4, 1920.)

1. DIVORCE ⊜130—EVIDENCE HELD TO SHOW HUSBAND GUILTY OF EXTREME CRUELTY.

In wife's action for divorce, finding that husband had not been guilty of extreme cruelty to wife, *held* not sustained by evidence.

2. DIVORCE ⊜150(2) — FAILURE TO MAKE FINDING AS TO ACT OF CRUELTY HELD ERROR.

Where wife's divorce action for cruelty was not based upon a single act, but was based on the cumulative effect of all acts and conduct of the husband extending over a period of years, and where it was alleged that more than 10 years prior to commencement of suit husband had choked and threatened to kill wife, court's failure to find that husband had at such time choked and threatened to kill wife *held* error.

3. DIVORCE ⊜135—EVIDENCE HELD NOT TO SHOW THAT WIFE CONDONED HUSBAND'S CRUELTY.

In wife's action for cruelty, evidence *held* not to sustain finding that wife had condoned cruel actions of her husband in view of Civ. Code, §§ 117, 121.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Leafie E. Brewthauer against Frederick W. Brewthauer. From a judgment for defendant denying a divorce, plaintiff appeals. Reversed, and new trial granted.

Louis J. Euler, of Los Angeles, for appellant.

Morris M. Ferguson, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. The plaintiff brought this action to obtain a decree of divorce. Findings and decree were in favor of the defendant, denying a divorce, from which the plaintiff prosecutes this appeal.

The essential features of the case may be gathered from the following quotations from the findings of the court:

"That on or about April 13, 1917, plaintiff and defendant had a quarrel about the repair of a pair of glasses for the plaintiff; that the quarrel became violent on both sides; that plaintiff called defendant an ex-convict, a name calculated greatly to excite the defendant, whereupon the defendant struck at the plaintiff, striking her upon the arm; that he threatened to leave her upon this occasion.

"That in the month of December, 1916, the defendant refused longer to sleep in the same bed with plaintiff, the bed they had been occupying being a large double bed; that thereafter plaintiff slept upon a lounge, which, however, was not an unfit sleeping place.

"That the allegations of paragraph 6 of the complaint have not been proven, except it is true that the defendant stated to two persons that the plaintiff unnecessarily and cruelly beat and struck her daughter; that these statements did not at the time come to the attention of the plaintiff, were believed by the defendant to be true, and were not made maliciously; that the defendant did for more than a year maintain an annoying attitude towards the plaintiff; that the plaintiff also maintained an annoying attitude towards the defendant; that there is no proof that the defendant was during said time insolent towards the plaintiff; he did sulk at times; he did not for weeks at a time refuse to speak to the plaintiff; that within a year last past the defendant did tell one person, but he did not tell various parties that he hated the ground that the plaintiff walked on, and that he would not live with the plaintiff; that he said this, however, not for the purpose of annoying and causing suffering on the part of the plaintiff, but because he did hate the plaintiff, and did not intend to live with her; that the plaintiff had no affection for the defendant.

"That on April 15, 1917, the defendant left and deserted the plaintiff, but such desertion was not against the will or without the consent of the plaintiff; that the conduct of the defendant towards the plaintiff found and alleged in the complaint inflicted certain suffering upon the plaintiff, but the defendant did not by said acts and conduct or otherwise wrongfully or willfully inflict upon the plaintiff a course of grievous mental or physical suffering."

A reading of these findings produces, at least, a feeling that the law should not try to compel this woman to remain the wife of a man who hates the ground she walks on, who has been guilty of inflicting physical violence upon her, who does not intend to live with her, who for months has refused to let her occupy their common bed or sleep in the same room with him, and compelled her to sleep on a cot in another room.

It would seem that when the relations between a husband and wife are as reflected by these findings, such a condition is presented "as utterly to destroy the legitimate ends and objects of matrimony" (Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660), and, the ends and object of matrimony between them having been utterly destroyed, it were better for them and for society that the union be legally dissolved.

We are of the opinion that some of the findings above referred to are not supported by the evidence; that some are contrary to the evidence; and that there is an absence of

findings on some of the material allegations of the complaint.

[1] We are also of the opinion that the general finding to the effect that the defendant had not been guilty of extreme cruelty towards the plaintiff is not in accord with the facts proved or admitted by the defendant.

As illustrative of the general attitude of the defendant towards the plaintiff, we quote from the testimony as follows: The plaintiff testified:

"Well, for weeks at a time he hadn't spoken to me at the table or in the room or at any place. Sulky and disagreeable. If I would ask him for anything he would tell me to go to hell and call me an old she-devil and such things all the time."

Gertrude Lynch, a daughter of the plaintiff, testified:

"For several years past he has been sulky. He was always unkind. When she would ask for clothing—I heard her ask him for clothing on one instance—and he would tell her to go and lay down, as though he were talking to a dog, and he was always telling her to go to hell, and she was an old she-devil, and calling her a damn fool, always sulking. At the table he would sit and not ask her for anything to eat. He would go around and search for things at the table rather than talk to her at the table."

The defendant was a witness on the trial in his own behalf, but did not deny any of this testimony. It stands uncontradicted.

The complaint alleged:

"That for more than a year last past the defendant had circulated stories regarding the plaintiff that she had unnecessarily, cruelly, and unmercifully beat and struck her daughter, and that said stories were false."

The court finds:

"That the defendant stated to two persons that the plaintiff unnecessarily and cruelly beat her daughter, but these statements did not at the time come to the attention of the plaintiff, were believed by defendant to be true, and were not made maliciously."

The witness Schultz testified:

"He (defendant) said that she (the plaintiff) was mistreating her something awful, cruelly, and used to pull her by the hair and stamp her with her feet, and he felt sorry for her."

The plaintiff testified that the statement of the defendant was utterly false. The daughter referred to testified:

"I don't remember any whipping as long as I can remember, and certainly not in the last few years; she never treated me unkindly."

The defendant made no denial of having circulated the stories. The court made no finding as to their truth or falsity. The defendant testified to no act witnessed by him, nor to any information received from any source, that caused him to believe the things he was telling were true, and there is no evidence to sustain the finding that the defendant believed his wife had cruelly treated her daughter.

The complaint alleged:

"That on the 15th day of March, 1917, the defendant without the consent of the plaintiff herein deserted this plaintiff."

The finding of the court was:

"That on April 15, 1917, defendant left and deserted the plaintiff, but such desertion was not against the will or without the consent of the plaintiff."

The plaintiff testified:

"Q. Did you leave him, or did he leave you? A. He left me.

"Q. Tell the court the circumstances of his leaving on that occasion. A. Well, he offered me $30 to get out and pay my board some place, which I refused.

"The Court: Q. Did you then leave? A. I didn't leave. He left."

There is no denial of this testimony. The finding that defendant deserted the plaintiff with her consent is contrary to the evidence.

The complaint alleged:

"That during the month of November, 1906, while plaintiff and defendant were living at East Twelfth Street, Los Angeles, the defendant became angry, cursed and swore at the plaintiff, grabbed her by the throat, choked and threatened to kill her."

As to this allegation the court finds:

"That the acts alleged in subdivision A (being the one above quoted) occurred at a time too long prior to the commencement of this action to justify a finding of extreme cruelty based upon said allegation, and the conduct of the defendant as alleged in said subdivision, whatever that conduct was, was subsequently condoned by the plaintiff."

[2] 1. It is probably true that a court would not grant a divorce upon a single act of cruelty occurring so long ago. But the plaintiff was not asking for a divorce based upon one act. She was asking for a divorce founded upon the cumulative effect of all the acts and conduct of the defendant, extending over a period of years. This act was alleged as one of a series.

Mr. Bishop, in discussing cruelty (volume 2, § 1430) says:

"This conduct may consist, under very specific circumstances, of a single act. But commonly, with one or a few acts pre-eminently reprehensible, it is the sum of the entire conjugal life."

[3] A finding in favor of the plaintiff that defendant had, in 1906, choked her and

threatened to kill her would have thrown much light upon the defendant's character, his attitude toward the plaintiff, his disposition to be cruel, and his willingness to give scope to such disposition in cruel treatment of his wife. It was error not to make a finding on the allegation. The finding that the acts had been condoned by the plaintiff is not sustained by the evidence. "Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness." Civ. Code, § 117. "Condonation is revoked, and the original cause of divorce revived: * * * (2) When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation have not been accepted in good faith, or not fulfilled." Civ. Code, § 121.

It is apparent from the record that, since 1906, the defendant has made no attempt to treat the plaintiff with conjugal kindness. The defendant, by his testimony, interwove the 1906 incident with the occurrences of April, 1917. Speaking of the quarrel that led to his assaulting his wife on April 7, 1917, he said:

"She reminded me of our last quarrel (referring to the time in 1906 when he choked her), and I said, 'Yes, I wish I had killed you then, and then I would have served my sentence in San Quentin, and would have gladly done it instead of living with you.'"

And the plaintiff testified:

"He said he would do San Quentin gladly to see me lay dead at his feet. And I told him it would not be his first trip there. And he said: 'By God, no, and I will kill you;' and he struck me two heavy blows. I raised my arm. He struck me on it, and it was swollen to the elbow the next day. He struck me with his fist, and said he was proud of it."

The witness, Effie Eyster, referring to the same incident, testified:

"As I went through the hall to go into the bedroom I heard him say: 'I will kill you. I will kill you, by God; I will kill you'—and a muffled scream. I saw her the next morning, and her arm was swollen."

The defendant testified that on this occasion he did strike her, but only on the back of her hand and with his finger tips, and that she never screamed or let out a sound.

This reference to the testimony shows that plaintiff only referred to San Quentin in response to defendant's brutal expression of regret that he had not killed her in 1906 (when he choked her) and served out his time in San Quentin. It was only in this connection, and under these conditions, that the plaintiff referred to his prison career.

We are of the opinion that, for all of the reasons above suggested, the plaintiff is entitled to a new trial; and it is so ordered.

We concur: BURNETT, J.; HART, J.

45 Cal. App. 623

KARST v. SELLER et al. (Civ. 2082.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1920.)

1. VENUE ⟸41—COMPLAINT HELD TO STATE CAUSE OF ACTION AGAINST BOTH DEFENDANTS.

A complaint alleging that defendants were engaged in business of selling motortrucks, and conspired to deceive and did deceive plaintiff in the sale of a motortruck, states a cause of action against both defendants, so that venue cannot be changed to county of nonresident defendant, unless joinder of defendants was fraudulent.

2. VENUE ⟸41—IN SUIT FOR RESCISSION OF CONTRACT ONLY CONTRACT PARTIES CAN BE JOINED.

In a suit to recover purchase price after rescission of a contract for fraud, only the parties to the sales contract can be joined, and the joinder of a resident defendant not a party to such contract does not prevent change of venue, though he may be liable in damages for assisting the fraud.

3. VENUE ⟸78—CANNOT BEGIN NEW ACTION AGAINST THE SAME PARTIES AFTER CHANGE.

Where an action against a nonresident and two resident defendants had been removed for trial, plaintiff could not begin a new action in the same county against the nonresident defendant and one of the residents.

4. VENUE ⟸41—STATING CAUSE OF ACTION AGAINST RESIDENT DEFENDANT IS NOT CONCLUSIVE.

Under Code Civ. Proc. § 395, authorizing change of venue, though a resident defendant was joined solely to prevent the change, the fact that the complaint states a cause of action against both defendants is not conclusive, but it may be shown that the cause of action stated does not in reality exist.

5. VENUE ⟸78 — FINAL DETERMINATION OF APPEALABLE ORDER IS CONCLUSIVE.

The trial court's ruling granting a motion for change of venue after trial of issues of facts, from which an appeal will lie, is a final adjudication of all matters involved in the motion.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Fred J. Karst against H. A. Seller and another. From an order changing the place of trial, plaintiff appeals. Order affirmed.

Stewart & Stewart and Wm. H. Holmes, all of Los Angeles, for appellant.

Norman A. Eisner, of San Francisco, and Overton, Lyman & Plumb, of Los Angeles, for respondents.

SLOANE, J. Plaintiff appeals from an order changing the place of trial of this action from the county of Los Angeles to the city and county of San Francisco.

The order was made on the application of the defendant Seller on the grounds that he is a resident of San Francisco; that no cause of action exists in favor of plaintiff against the other defendant, J. E. Armstrong; and that the attempt to state a cause of action against said Armstrong was fraudulent, and for the sole purpose of having the action tried in Los Angeles county, where said plaintiff and the defendant Armstrong reside.

[1] The complaint is on an action to recover money paid, notes given, and damages incurred by reason of a rescinded contract of sale of a motortruck to plaintiff by alleged fraudulent and false representations. It is alleged that the two defendants were engaged in the business of selling motortrucks and conspired together to deceive, cheat, and defraud plaintiff; that they falsely, fraudulently, and willfully represented the truck to be a two-ton truck, entirely new, in perfect running order, whereas it was only a ton and a half truck, was not new, and had been misused and damaged; that these facts were known to defendants and unknown to plaintiff; that he had no knowledge of motortrucks himself, but relied upon the representations and was induced thereby to make the purchase; and that he was damaged, etc.

For the purposes of the issue presented on motion for change of venue, or as against a general demurrer, this complaint states a cause of action against both defendants. If the order appealed from can be sustained, it must be on the alleged ground that the joinder of the defendant Armstrong was fraudulently made for the sole purpose of holding the action in the courts of Los Angeles county. It is provided in section 395, Code of Civil Procedure, that—

"If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county where he resides, his residence must not be considered in determining which is the proper county for the trial of the action."

Respondents, in support of the order granting the change of venue, rely upon certain facts appearing in the bill of exceptions. It appears that previous to filing this complaint plaintiff brought suit in Los Angeles county on this same cause of action against the defendant Seller alone. A change of venue was granted because of defendant's residence in San Francisco, and the papers were transmitted to the superior court of San Francisco county, whereupon plaintiff dismissed the action and brought another suit on the same cause of action, again in the county of Los Angeles, joining as defendants J. E. Armstrong and one Sanford Wixon, the latter being also a resident of the county of Los Angeles. A change of venue to San Francisco was ordered also in this case. It does not appear from the record on what ground, but it seems to be conceded by the argument that it was on the application of defendant Seller, and because of his residence in San Francisco. Whether the ruling of the court, however, was on the ground that the complaint did not state a cause of action against the Los Angeles defendants, or on the ground that no meritorious ground of action existed against them, is not indicated. Neither does it appear from the bill of exceptions on behalf of the plaintiff that the second action was dismissed. From all that appears from the record it may still be pending in the superior court of San Francisco. However, no issue is raised on this appeal as to another action pending, and all we have to consider is whether or not a valid cause of action, pleaded in good faith, is set out in the complaint here against J. E. Armstrong.

[2] We do not think the record on the order before us disproves the existence of a cause of action against Seller and Armstrong, jointly, on the alleged facts; but such cause of action, if it exists, is a cause of action for damages for fraud and deceit, and not for recovery on rescission of the contract. The complainant, in such a case as this, may rely on the rescission of the contract, and sue to recover the consideration and his damages in attempting to carry out the contract, or, recognizing the contract, he may sue for damages for the fraud perpetrated. The action in which the order here appealed from was made is on the rescission, and it is contended—we think rightly—that only the parties to such contract, or those in privity with them, can be joined. While the complaint in this action charges both defendants jointly on the contract, the record on the motion for change of venue discloses that the contract in question was one between the plaintiff and defendant Seller alone. The fact that defendant Armstrong fraudulently participated in inducing the execution of the contract, while it would render him liable in an action for damages, does not make him a party to the liability involved in the rescission.

[3] But, irrespective of the correctness of respondents' contention on this point, we are of the opinion that plaintiff was estopped by the order granting a change of venue in the second action from again renewing this

same action in the Los Angeles court. That action joined defendants Seller and Armstrong on the same state of facts as form the basis for the present suit. The court granted a change of venue to San Francisco on the application of defendant Seller because of his being a resident of that city and county. The facts pleaded in that case are shown to be the same as actually exist in this. If they would not justify the joinder of the two defendants then, they will not justify it now. The court, on a hearing of the matter, must necessarily have held that under that state of facts the defendant Armstrong was not a necessary party defendant. The record does not disclose on what showing of facts, outside the allegations of the complaint, the order changing the place of trial was made in that action, but we must presume it was such as to support the order.

[4] Under the provisions of section 395, Code of Civil Procedure, supra, and the decision of the Supreme Court in McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548, the mere fact that the complaint in this case states a cause of action against Armstrong is not conclusive. It may be shown that the cause of action stated does not in reality exist. As we have pointed out, the lower court, by the order made on the second suit, passed upon that point; and we are satisfied, whether the matter may be considered res adjudicata or not, that a defendant, having been determined to be an improper party on one application for change of place of trial, cannot again, and, perhaps, again and again, be made a defendant to give jurisdiction under the same state of facts, by merely camouflaging them in a different form of action which such facts will not support.

[5] The action of the court on the questions involved in the order for change of place of trial has all the characteristics of a final judgment. Issues of facts are presented and tried on their merits, and an appeal lies from the order. We find no California decisions on this point, but the general rule in other jurisdictions seems to be that if a motion involves a substantial right, and a full hearing is afforded thereon, and the order made on such motion is appealable, such order is a final adjudication of all matters involved in the motion. Ann. Cas. 1914D, 975; Hoge v. Norton, 22 Kan. 374; Truesdale v. Farmers' Loan, etc., Co., 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430; Bennett's Administrator v. Russell's Executrix, 39 Mo. 152, 90 Am. Dec. 457; Fitterling v. Welch, 76 Minn. 441, 79 N. W. 500; Rogers v. McCord-Collins Co., 19 Okl. 115, 91 Pac. 864; Smith v. Zalinski, 94 N. Y. 524.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

45 Cal. App. 578

HUNT, County Treasurer, v. CONTINENTAL NAT. BANK et al. (Civ. 3174.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1920.)

HIGHWAYS ⊂=113(4)—NO MATERIAL AND LABOR LIEN ON BONDS ISSUED TO CONTRACTOR FOR ROAD IMPROVEMENT.

The remedy provided for materialmen and laborers under Code Civ. Proc. § 1184, is not available to them in cases where their claim arises out of the doing of labor or the furnishing of material or appliances to and for a contractor having a contract for road work under the provision of Road District Improvement Act 1907 (St. 1907, p. 806); their only recourse being the bond of the contractor, and filing with the board of supervisors notice of their claims to withhold payment not effecting a lien on the bonds to be used in paying the contractor.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Interpleader action by John N. Hunt, as County Treasurer of the County of Los Angeles, against the Continental National Bank and others. From an adverse judgment, the named defendant appeals. Reversed, with instructions.

Kemp, Mitchell & Silberberg, of Los Angeles, for appellant.

A. J. Hill, of Los Angeles, for respondent Hunt.

James, Smith & McCarthy, of Los Angeles, for respondent Western Reinforced Concrete Pipe Co.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent Parsons & Gotshall.

Robert E. Abbott, of Los Angeles, for respondents Acme White Lead & Color Works and Richard Rothwell.

W. C. Petchner, of Los Angeles, for respondent Adams & McKee Hardware Co.

RICHARDS, J. This is an appeal from a judgment in favor of certain defendants in an action in interpleader brought by the plaintiff, as county treasurer of Los Angeles county, to determine certain conflicting claims to certain bonds issued by the said treasurer under the provisions of the Road District Improvement Act of 1907. The facts out of which the controversy arose are undisputed and are briefly these:

The supervisors of the county of Los Angeles undertook the construction of a road therein under the provisions of the Road District Improvement Act of 1907. St. 1907, p. 806. The contract was regularly let to a contractor, and the work completed thereunder and duly accepted by said board, and the bonds provided in said act to be issued in payment for such work were duly issued by the said treasurer of the county as required by the terms of said act. In the meantime,

and after the execution of the contract, and prior to the completion of the work, the contractor, in consideration of money advanced to him by the Continental National Bank to enable him to prosecute such work and as security for such advances, assigned to the said Continental National Bank his said contract and his rights thereunder to the issuance to him of the said bonds to be issued in payment for said work. Upon the completion of said work, various laborers and materialmen who had performed labor upon or supplied materials and appliances for use in the performance of said work, and whose claims had not been paid by the contractor, filed with the said board of supervisors notices of their claims, with notices to withhold payment to the contractor under the provisions of section 1184 of the Code of Civil Procedure, and thereby undertook to assert their respective claims of right to receive the amounts of their said claims out of the said bonds before any issuance of the same to or payments thereunder to the contractor or his said assignee. The Continental National Bank, as such assignee, also presented its claim of right to receive all of said bonds under and by virtue of its said assignment thereof from said contractor. To determine these adverse claims to the bonds in question, the plaintiff, as such treasurer, instituted this action, and the parties defendant, having been thus interpleaded, presented their respective claims to the trial court, which by its judgment undertook to declare that the said labor and material lien claimants had by virtue of their said stop notices under section 1184, Code of Civil Procedure, established their right to payment of their said claims out of said bonds and had liens thereon, which the trial court attempted to enforce and satisfy by directing certain of said bonds, amounting in value to the sum of $4,560.58, the aggregate amount of said labor and materialmen's claims, should be delivered to the sheriff of said county, to be collected by him as payable, the proceeds thereof to be applied in satisfaction of such claims.

The Continental National Bank appeals from such judgment and urges two main contentions upon such appeal. By the first of these it raises the question as to whether the remedy provided for laborers and materialmen under the terms of section 1184 of the Code of Civil Procedure is available to them in cases where their claims arise out of the doing of labor or the furnishing of materials or appliances to and for a contractor having a contract for road work under the provisions of the Road District Improvement Act of 1907. Upon an examination of the Road District Improvement Act in the light of the recent decision of the case of Adamson v. Paonessa (Sup.) 179 Pac. 880, we are constrained to hold that the contention of the appellant upon this question must be upheld. It is true that the above-cited case arose out of the doing of street work under the provisions of the Street Improvement Act of 1911, but otherwise the position of the respective parties to that case and to the case at bar is practically identical. Each is a case in interpleader; in each the plaintiff is the treasurer, entitled to issue the bonds in controversy; in each case the assignee of the contractor's rights under his contract is one of the claimants to the whole of the bonds to be issued in payment of the improvement work. The other claimant in the cited case is the bondsman of the contractor, who has paid certain claims for material and labor, and has by so doing become subrogated to the rights of said claimants; while in the instant case it is the labor and material claimants themselves who are directly insisting upon the application of a portion of the bonds to the payment of their claims.

In respect to the acts of the Legislature of 1907 and of 1911, providing for street and road improvements to be paid for upon what may be termed the bond issue plan, out of which the conflicting claims in each of these cases arose, they differ somewhat in their verbiage, but their general effect is the same. They each provide a method of payment for improvements undertaken thereunder, which is not that of payment in money, for which the public official body ordering the improvements of the county or municipality or district within and for the benefit of which the improvements are made are directly liable, but for which payment a plan of assessment of the property within the public subdivision benefited by the improvement in question is to be carried into effect, and out of the funds derived from such assessment the bonds to be issued in the first instance for such improvements are to be eventually paid. Each of these two acts of the Legislature contains a section requiring the contractor to give a bond which shall inure to the benefit of any and all performing labor upon or furnishing materials to be used in the improvement undertaken under each of said acts. In each of said acts it is specifically provided that the bonds to be issued thereunder are to be payable exclusively out of the funds derivable exclusively from the assessment of the area, and that the county or municipality issuing such bonds shall not be otherwise holden for the payment of the same. Such being the similarities of these two acts of the Legislature, the Supreme Court, in dealing with the question as to whether the provisions of section 1184 of the Code of Civil Procedure were available to laborers or materialmen having unpaid claims for such labor or materials supplied to contractors for street improvement work done under the provisions of the act of 1911 (St. 1911, p. 730), held that under the terms of the act there was no existing fund out of which the contractor was

to be paid, and hence no money provided in the hands of any official or body which could practicably be retained in order to meet the claims of those seeking to have such funds or money retained in order to meet their claims asserted through the method provided under section 1184 of the Code of Civil Procedure. The court quotes the provisions of said section as amended in 1911 (St. 1911, p. 1315), and then proceeds to say:

"This provision is clearly applicable only to cases where the contractor is to be paid either by the owner of the property upon which the work is done or by the person, public or private, by whom the contract was made. It cannot be applied where payment is not to be made in that manner, but is to be made by a number of different persons not parties to the contract each of whom pays independently his separate share of the amount due."

The court concludes that under the Improvement Act of 1911 the only recourse of unpaid laborers and materialmen is to the bond of the contractor, which is made to expressly inure to their benefit.

It may be claimed that a distinction can be drawn between the provisions of the Improvement Act of 1907 and those of the act of 1911, arising out of the fact that in the latter act the bonds are to be paid by assessments levied upon the individual property of each person benefited by the improvement of the street, while in the act of 1907 the bonds are to be paid by district taxation; but this is a distinction without a difference, since under each act the official body issuing the bonds does not bind the county or district or municipality to pay the same, but only to take the legal steps for the levy and collection of the special taxes out of which the bonds are to be paid. We can therefore perceive no escape from the application of the reasoning and conclusions of the Supreme Court in the foregoing case to the case at bar, and it follows therefrom that the laborers and materialmen who are the real respondents herein, having no rights under section 1184 of the Code of Civil Procedure which would enable them to reach and impound the bonds issued for the work done by the contractor under the provisions of the act in question, the court was in error in its attempt to sequester any portion of such bonds as against the claim of right of the Continental National Bank to receive the whole thereof as the assignee of the contractor.

This view of the case renders unnecessary any consideration of the merits of the several claims of the respondents as laborers and materialmen under the provisions of section 1184, Code of Civil Procedure, since none of them were entitled to relief in this case under said section.

Judgment reversed, with instructions to the trial court to enter a judgment directing the delivery of the bonds in question, and of all moneys collected thereon by the plaintiff, to the appellant, Continental National Bank.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 572

PALMER v. GUARANTY TRUST & SAVINGS BANK. (Civ. 2547.)

(District Court of Appeal, Second District, Division 1, California. Jan. 27, 1920. On Petition for Rehearing, Feb. 21, 1920.)

1. APPEAL AND ERROR ⊂=763—RESPONDENT CAN IMMEDIATELY ASK FOR SUPPLEMENTAL RECORD IF BRIEF IS DEFECTIVE.

Where the appeal is taken under the alternative method and the brief omits parts of record necessary to illustrate the points, respondent can avoid the delay which would otherwise result under Code Civ. Proc. § 953c, as amended, prohibiting adverse decision for insufficiency of the brief, and authorizing court to require a supplemental brief, by applying at once, on the service of defective brief, for an order directing the filing of a supplemental record.

2. WITNESSES ⊂=164(3) — PLAINTIFF SUING EXECUTOR CANNOT IDENTIFY HANDWRITING OF DECEDENT.

In an action against an administrator, where deceased's signature to a letter, admitting an absolute deed to be a mortgage, was disputed, it was error, under Code Civ. Proc. § 1880, to permit plaintiff to testify that the signature to the letter was that of deceased.

3. EXECUTORS AND ADMINISTRATORS ⊂=437 (7)—ACTION NEED NOT BE BEGUN ON INSUFFICIENT CLAIM.

Where, after a claim so defective that it could not be the basis for an action was rejected, a proper claim was filed within the time allowed, an action might be begun within three months after the rejection of that claim, though more than that time had elapsed since rejection of defective claim.

On Petition for Rehearing.

4. TRIAL ⊂=105(2)—INCOMPETENT TESTIMONY BY ADVERSE PARTY, NOT OBJECTED TO, CANNOT SUPPORT RECOVERY.

Testimony of plaintiff, in an action against an administrator incompetent under Code Civ. Proc. § 1880, though admitted without objection, is of no evidentiary value, and cannot support a judgment.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by George K. Palmer against the Guaranty Trust & Savings Bank, as executor of the last will of J. F. McDermott, deceased, to enforce a claim against the estate. Judgment for plaintiff, and defendant appeals. Reversed, and petition for rehearing denied.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Gilbert F. Wyvell, of Los Angeles, for appellant.

Thomas A. Sanson, of Los Angeles, for respondent.

SHAW, J. Appeal by defendant from a judgment entered in favor of plaintiff. The action is to recover upon a claim against the estate of J. F. McDermott, deceased, presented to the executor and by it rejected. As appears from the complaint, the claim grew out of the fact that plaintiff borrowed from deceased $300, and by grant deed, intended as a mortgage to secure same, conveyed to the lender a certain lot upon which the grantee gave a mortgage for a loan procured by him, and thereafter conveyed his equity in the lot in exchange for other property. The claim was for the sum of $1,154.40, alleged to be the difference between what McDermott received for the property and the sum due him on the loan so made to plaintiff.

The appeal is had and taken under the alternative method, and while appellant in its brief directs attention to a number of rulings which it insists are errors committed by the court, and upon which it bases an argument for reversal, it has neglected to print in its brief the parts of the record necessary to illustrate the points made, as required by section 953c, Code of Civil Procedure, and without reference to which its argument is unintelligible. Hence counsel for respondent, relying upon what is said in Miller v. Oliver, 174 Cal. 404, 163 Pac. 367, and Williams v. Hawkins, 20 Cal. App. 162, 128 Pac. 754, to the effect that the court will, in considering the questions presented, confine itself to an inspection of the portions of the record so printed in appellant's brief, and, unless they exhibit the error, will affirm the judgment appealed from, has, except as to one or two questions, submitted the case without serious argument. As a result of the action of the courts pursuant to the provisions of section 953c in affirming judgments on appeal upon what is printed in appellant's brief or supplement thereto, and without referring to the typewritten transcript, the Legislature in its wisdom, and to relieve such attorneys from the consequences of acts due to indolence or incompetency, amended the section by providing that no appeal should be decided adversely by reason of such omission, but that the court should direct the party to print and serve upon the adverse party and file with the court a supplement to his brief wherein should be set forth "in full that portion of the record relied upon by such party and not printed in any former brief," and which "may be desirable for the full presentation of the points at issue." It might be urged with some reason that under this provision the court should first acquaint itself with the points made in the brief and then, after a careful examination of the typewritten record, inform appellant's attorney just what parts of the record were necessary to illustrate the points made by him in his brief, which is about as practical as the Dutchman's flea powder, the efficacy of which depended upon catching the flea, choking its mouth open and administering the poisonous powder, which was guaranteed to kill. However this may be, it is clear that under the amendment of the statute the power of the court upon such defective record is restricted to a continuance of the hearing of the appeal, the purpose of which may be to delay respondent in collecting a righteous judgment, and grant appellant's counsel further time to present a record under an order therefor, and to such an extent as may be necessary to fully illustrate the errors of which he complains. Under this method, not only is little left to the attorney of an appellant, but it is well calculated to encourage indolence and relieve him of responsibility to his client, who, as a result, is, or may be, the victim of such negligence. That few attorneys bearing the reputation for painstaking care in prosecuting appeals have adopted this substitute method of presenting their records encourages the hope that if the Legislature does not repeal it attorneys generally will abandon it. There should be one, and only one, method of presenting a record on appeal, and this should be simple, clear, and free from uncertainty in its procedure.

[1] We may suggest, however, that counsel for a respondent might prevent such delay in the hearing of an appeal by at once, upon the service of such defective brief, applying to the court for an order directing appellant to serve and file a supplemental record, as required by the amended section, and, upon an order extending his time therefor, postpone the filing of his brief until a proper record is presented.

In the instant case, while the record is defective as illustrating most of the alleged errors, it is sufficient in presenting two points urged for a reversal, both of which are covered by respondent's brief, and since upon one of them we think the judgment must be reversed, we feel the interests of the parties will be best served by disposing of the question, rather than by continuing the hearing to the next calendar.

[2] It appears that the deed made by plaintiff to McDermott was a grant deed. Nevertheless he claims that it was intended by the parties as a mortgage to secure a loan. The burden was upon him to establish the fact that, though in form unconditional, it was intended as a mortgage. For this purpose he offered in evidence a letter purporting to be signed by J. F. McDermott, the effect of which was to prove plaintiff's contention. The genuineness of the signature thereto was not admitted, and plaintiff, over defendant's objection, was permitted to testify that he knew the handwriting of J. F. McDermott, and that the signature attached to the letter was that of McDermott, and thereupon it was

admitted in evidence. In so ruling the trial court erred. Section 1880, Code of Civil Procedure, provides that:

"The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

It clearly appears that the witness was a party to an action prosecuted by him against the executor of deceased, upon a claim arising in a transaction had by him with defendant's testator and made against his estate, and that the subject of plaintiff's testimony as such witness was the fact as to whether or not the deceased in his lifetime signed the letter, and without proof of which fact the contents of the letter could not be received in evidence. As to whether McDermott agreed to what was stated in the letter was made to depend upon whether he signed the same or authorized his signature thereto. Respondent directs our attention to the cases of Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221, and Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539, which decisions are to the effect that in an action upon a claim, proof of which appears in the books of account caused to be kept by deceased, such plaintiff, who, as bookkeeper for deceased, kept the books or is cognizant of their correctness, may, notwithstanding the provision of section 1880, Code of Civil Procedure, testify to facts the establishment of which is a necessary prerequisite to the admission of the books in evidence. To our minds, however, these cases cannot be deemed authority upon which to support the rulings of the court in permitting the testimony here received. While there was other testimony which, in a slight degree, bore upon the question as to whether or not the deed was intended as a mortgage, it was of a very meager nature, and hence it cannot be said that the court would have reached the conclusion it did without the added weight given by the contents of the letter.

[3] The claim which forms the basis of the action was presented on October 7, 1916, which was in due time, and following its rejection this action was instituted within three months thereafter, as provided by the statute. It further appears that theretofore, on March 9, 1916, the executor had forwarded to plaintiff, then in Florida, a claim which he executed and sent to the executor. This claim was defective and insufficient as the basis upon which to found an action, by reason of which fact the subsequent claim was presented within the time plaintiff was entitled to present the same. Nevertheless, plaintiff, upon the authority of Gillespie v. Wright, 93 Cal. 169, 28 Pac. 862, insists that the action should have been brought upon the claim first filed, and, since it was not instituted until more than three months thereafter, the action on the second claim was barred. On the contrary, if a party makes an improper attempt to present a claim to an administrator, particularly where it is so defective as to be insufficient to constitute the basis for a cause of action, he is not estopped from presenting one in due form, if within proper time, and upon which an action may be based. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Warren v. McGill, 103 Cal. 153, 37 Pac. 144.

For the want of a sufficient record upon which to consider them, other alleged errors are not discussed.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. Respondent's petition for a rehearing is denied.

[4] The decision is not based upon the ground that the testimony of Palmer was received over defendant's objection, but founded upon the fact that section 1880, Code of Civil Procedure, declares that a party in an action prosecuted against an executor upon a claim arising in a transaction with a deceased person cannot be a witness as to any matter of fact occurring before the death of the deceased. Hence, conceding, as claimed by petitioner, that no objection was interposed to the reception of the testimony given by Palmer, nevertheless the same must be deemed of no evidentiary value.

45 Cal. App. 611

SECCOMBE v. GLENS FALLS INS. CO.
(Civ. 2698.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

1. INSURANCE ⊜612(2)—FAILURE TO RENDER PRELIMINARY PROOFS OF LOSS BARS RECOVERY.

Failure of the owner of insured property to render preliminary proofs of loss to the insurer as required by the policy bars a recovery on the policy under a provision thereof that no suit or action for the recovery of any claim shall be sustained until compliance with the requirements therein.

2. INSURANCE ⊜612(2)—FAILURE TO RENDER PROOFS OF LOSS HELD NOT TO PREVENT RECOVERY BY MORTGAGEE.

An insurance policy, to which was attached a union mortgage clause making the loss payable to the holder of a trust deed, *held* to contain in effect two contracts, one with the owner and one with the mortgagee, on whom no duty of furnishing proofs of loss was imposed, and to permit a recovery by the mortgagee notwithstanding failure of the owner to furnish such proofs as required by the policy.

3. INSURANCE ⊜146(3)—POLICY CONSTRUED AGAINST INSURER AND SO AS TO AVOID FORFEITURE.

Uncertain language in a policy should be construed most strongly against the insurer, and so interpreted, if possible, as to avoid a forfeiture under Civ. Code, § 1442.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by A. H. Seccombe against the Glens Falls Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed.

Charles L. Chandler and Dexter & Ellis, all of Los Angeles, for appellant.

John R. Layng, of Los Angeles, for respondent.

SHAW, J. Upon the ground that the complaint did not state facts sufficient to constitute a cause of action, the court sustained an objection to the introduction of any evidence thereunder and gave judgment for defendant, from which plaintiff appeals.

The action is based upon a policy of fire insurance issued to May Prutsman upon property of which she was the owner, and upon which she had executed a deed of trust in favor of plaintiff to secure a promissory note executed by her to him, which policy contained a provision for his benefit as mortgagee. The policy, clause A, contains a statement that—

"Subject to all the conditions of this policy, loss, if any, on building, payable to A. H. Seccombe (who holds trust deed). Mortgage clause attached."

The mortgage clause so referred to reads as follows:

"Union Mortgage Clause. New York, New Jersey, Connecticut and Rhode Island Standard Mortgage Clause with Full Contribution. Loss or damage, if any, under this policy on building only, shall be payable to A. H. Seccombe (who holds trust deed) * * * as first mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee), only, therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property."

Clause C provides:

"This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to and made a part of this policy. * * *"

Clause D, headed "Duty of Insured in Case of Loss," provides that—

"When a loss occurs the insured must give to this company written notice thereof without unnecessary delay, * * *" and "within sixty days after the commencement of the fire the insured shall render to the company * * * preliminary proof of loss, consisting of a written statement signed and sworn to by him, setting forth" certain matters unnecessary to here specify.

Clause E provides that—

"No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all the foregoing requirements."

It appears from the complaint that the dwelling house covered by the policy was destroyed by fire on November 26, 1915, and that neither May Prutsman as owner nor plaintiff as mortgagee, within 60 days after the commencement of the fire, as provided in clause D, rendered to defendant preliminary proof of the loss.

[1] That such neglect and failure on the part of the owner constituted a bar to her right of recovery is not only declared by clause E, but sustained by numerous authorities, among which see White v. Home Mutual Ins. Co., 128 Cal. 131, 60 Pac. 666.

[2] As held by the trial court, respondent insists that the same rule applies to plaintiff as mortgagee, and that, since neither he nor the owner complied with the provision as to rendering the required proofs, his right to maintain the action is likewise barred. As to this question, due in some cases, perhaps, to the difference in interpretation of the language of the contract, the authorities are not in harmony. Thus, in Southern H. & B. Loan Ass'n v. Home Insurance Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147, where the mortgage clause was identical with the one here involved, it is held that the mortgagee could not recover, where neither

he nor the owner complied with the provision in rendering proofs within the time specified. Other courts, however, have adopted the rule announced in section 2795 of Joyce on Insurance, that—

"The mortgage clause making the mortgagee the payee, and stipulating that the insurance should not be invalidated by the mortgagor's acts or neglect, constitutes an independent contract between said mortgagee and insurer, and in such case the subject matter of the insurance is the mortgagee's insurable interest, and not the real estate, and the risk will not be avoided by any acts of the mortgagor, whether done prior or subsequently to or at the time of the issue of the policy."

To the same effect is Clement on Fire Insurance, volume 1, p. 208, where it is said:

"The failure of the mortgagor and owner to furnish such proofs, either wholly or within the stipulated time, constitutes one of the neglects, from the invalidating consequences of which the mortgagee is exempted."

In Reed v. Firemen's Insurance Co., 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343, the court construes a like mortgage clause as a contract between the insurer and the mortgagee separate and independent from the policy upon which it is ingrafted, reference to which, however, is had only for the purpose of showing the contract to which the mortgage clause refers, and in deciding the point said:

"The express terms of the policy limit the furnishing of such proof to the insured. Therefore a demand upon the mortgagee to do so is without the express agreement contained in the contract, and is not binding upon the mortgagee."

To the same effect are the cases of Eddy v. London Assurance Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686, Heilbrunn v. German Alliance Ins. Co., 202 N. Y. 610, 95 N. E. 823, Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882, and Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719.

Upon the authority of the cases cited we are constrained to hold that the policy in effect contained two separate contracts of indemnity: One insuring the risk of the mortgagor who by the terms of the contract was bound by the stipulation contained in clause D under which, as a condition of recovery, she was required in case of the insured property being destroyed by fire to render proof thereof within 60 days from the commencement of the fire, and the other insuring the risk of the mortgagee which, since it contained no provision requiring him so to do, could not as a condition of his right to recover for his loss be required to render preliminary proof as to the destruction of the property. As to his rights in the contract, it was expressly provided by the union mortgage clause that no act or neglect of the mortgagor or owner, upon whom by clause D was imposed the duty of making such proof, should invalidate the mortgagee's interest in the insurance. This conclusion is unaffected by the fact that clause A declares that, "subject to all the conditions of this policy," loss is payable to plaintiff, for the reason that such provision is qualified by what is said in clause B, referred to in clause A as the "mortgage clause attached."

[3] If this were not so, and conceding the stipulations inconsistent, the uncertain language used should be construed most strongly against the insurance company, and so interpreted, if possible, as to avoid a forfeiture. Section 1442, Civ. Code; Welch v. British American, etc., Co., 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; Harp v. Firemen's Fund Ins. Co., 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299.

While clause E provides that no suit or action on this policy for the recovery of any claim shall be sustained until after full compliance by the insured with all the foregoing requirements, it has reference to the owner to whom the policy was issued, and not to rights under the contract made with the mortgagee.

While section 2541, Civil Code, provides that where the mortgagor as insurer neglects the performance of acts necessary to the validity of the insurance, the mortgagee named in a policy as being entitled to idemnity in case of loss may perform them, such provision is restricted to acts "prior to the loss," which, if not performed, would avoid the insurance.

In our opinion, the complaint is sufficient in stating facts to constitute a cause of action, and hence the court erred in refusing to permit plaintiff to introduce evidence thereunder.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 641

GARDNER v. CITY OF GLENDALE.
(Civ. 3122.)

(District Court of Appeal, First District, Division 2, California. Jan. 29, 1920.)

1. PRINCIPAL AND AGENT ⊂=172—PRINCIPAL CANNOT RATIFY IN PART.

If a principal ratifies any portion of an unauthorized transaction of his agent, he must be deemed to have ratified the whole of it.

2. PRINCIPAL AND AGENT ⊂=171(1)—ACCEPTANCE OF BENEFITS IS RATIFICATION.

A principal cannot accept the benefits of his agent's acts and escape liability thereon.

3. PRINCIPAL AND AGENT ⊂=171(6)—PRINCIPAL HELD TO HAVE RATIFIED COLLECTION OF PURCHASE PRICE BY AGENT.

Where a fire engine manufacturer notified the city to pay for fire engine directly to him, but billed the engine to the agent, who made the contract so that the city had to pay him to obtain delivery, and thereafter the manufacturer received part of the proceeds from his agent, and gave him credit for his commission, stating to the city that he had made a settlement with the agent, he ratified the payment to the agent and could not thereafter collect any portion of it from the city.

Appeal from Superior Court of Los Angeles County; Curtis D. Wilbur, Judge.

Action by Charles G. Gardner as trustee in bankruptcy of the estate of Knox Automobile Company, against the City of Glendale Judgment for defendant, and plaintiff appeals. Affirmed.

Benj. E. Page and Arthur C. Hurt, both of Los Angeles, for appellant.

Jones & Evans and Muhleman & Crump, all of Los Angeles, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant in an action brought by plaintiff, as trustee in bankruptcy of the Knox Automobile Company to recover the purchase price of a combined hose and chemical fire apparatus sold to the city by the Vance-Canavan Motor Company, as agents for the Knox Automobile Company. The defendant alleged payment and facts upon which it claimed an estoppel against plaintiff. The court found that all the allegations of the plaintiff's complaint were true, excepting those with reference to nonpayment of the purchase price of the apparatus, and also found that the acts of the agents of plaintiff in collecting the amount of plaintiff's demand from the city were thereafter fully and completely ratified by the plaintiff, and constituted full payment by the defendant of plaintiff's claim. As conclusions of law, the trial court found that plaintiff was estopped from the right to recover against the defendant and that the acts of the agents of plaintiff in collecting the amount of plaintiff's demand from the city were thereafter fully and completely ratified and confirmed by the plaintiff, and constituted full payment of the claim.

The facts of the case are that in May, 1913, plaintiff's agents, the Vance-Canavan Motor Company, procured from the city of Glendale a contract for the purchase of certain fire apparatus from the Knox Automobile Company. Thereafter the latter company was adjudged bankrupt, and the plaintiff was appointed trustee of its estate. The apparatus was constructed according to specifications under his direction, and on September 19, 1913, he addressed to the city of Glendale a letter, stating that he was shipping the apparatus to his agents for delivery to the city, and requested that the payment be made directly to him, and not to his agents. Four days later plaintiff shipped the apparatus to his agents, and at the same time addressed them a letter inclosing an invoice which read in part as follows:

"Sold to Vance-Canavan Motor Car Co., Los Angeles, Cal., 1 Model M 3 Combination #5240 $6,250.00 Less 20%, $1,250.00, $5,000.00. Less 5%, $250.00, $4,750.00. For Glendale Fire Dept."

The apparatus was received by the agents in Los Angeles, who paid the freight thereon. When delivery was tendered to the city authorities they exhibited to the agents plaintiff's letter of September 19th, directing that payment be made to the receiver, whereupon the agents declined to make delivery. The time for delivery specified in the original contract having long since expired, the city authorities demanded that immediate delivery be made, and, in order to secure delivery, they took from the agents an agreement to indemnify the city against any claim which the trustee might make against it, and thereupon made payment to the agents of the full sum of $6,250, and accepted the apparatus. Some time thereafter the plaintiff wrote to the city authorities, inquiring when payment would be made to him, and in reply thereto the city clerk notified him that payment in full had been made through his agents, and that the city had taken security to satisfy any claims which the plaintiff might make against it. On February 27, 1914, plaintiff wrote to the city authorities that he had not received the warrant from his agents, and that he, therefore, made demand upon the city for a duplicate warrant. In March of the same year plaintiff came to Los Angeles, and conferred with the city authorities and his agents, at which time he was informed by the city authorities that unless an adjustment was made the city would commence suit against him and his agents to have the controversy legally determined. A few days thereafter plaintiff notified the city authori-

ties that some settlement had been made with his agents, but the details of the settlement were not made known to defendant until after this proceeding was instituted. The trial court found that, as a result of his visit in March, 1914, the plaintiff received from his agents the sum of $2,202, which he then agreed should be applied on the money collected by his agents from the city of Glendale, and that at the same time he gave to his agents credit for the sum of $1,500 as commissions due them on account of the sale of the apparatus to the city. The court also found that in March, 1914, one of plaintiff's agents was the owner of certain property and property interests, both real and personal, and that defendant's attorney was aware of those facts at the time, and forbore to sue by reason of the statement of plaintiff made at that time regarding the settlement which he had made with his agents; that since said time said agent had disposed of or lost his property, and was, at the time of the filing of this action, insolvent. Upon these facts the trial court found that the defendant had made full payment of the purchase price of the apparatus to plaintiff's agents, that the receipt of the purchase price was ratified and confirmed by plaintiff, and that plaintiff was estopped from any right to prosecute the action against the defendant.

If any one of these special defenses is sound, the judgment in favor of the defendant must be affirmed. That the act of the agents in collecting the purchase price of the apparatus was fully ratified by their principal cannot be doubted. The sale was actually made by the agents with the approval of the principal; and thereafter, and before delivery, the principal notified respondent that it should make payment directly to him; but four days later he shipped the goods to the agents and billed them to him for $4,750, rather than $6,250, the agreed purchase price. He did not bill the apparatus at any time to the city of Glendale, but required the agents to pay the freight on arrival, and left it to the agents to make delivery and receive payment without any notice to the agents of the previous instructions to the city authorities that payment should be made directly to him. It was not until after the agents failed to remit to the receiver that he complained of the transaction, or made any demand upon the city for the purchase price. Then, without notice to the city authorities, other than to say that some settlement had been made with the agents, he received from them $2,202 in cash, and allowed them $1,500 on account of their commissions due from this sale.

[1, 2] If a principal ratifies any portion of an unauthorized transaction of his agent, he must be deemed to have ratified the whole of it. A principal may not receive the benefits and at the same time disclaim responsibility for the methods adopted by his agent. The acceptance of the benefits of the transaction by the principal constitutes the ratification of the acts of his agent. The Supreme Court aptly stated the rule in Gribble v. Columbus Brewing Co., 100 Cal. 67, 71, 34 Pac. 527, 529, as follows:

"And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter."

[3] The facts of this case are controlled by the rule stated, and further discussion of the points raised is unnecessary.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

45 Cal. App. 788

HACKETT v. MORSE, Public Health and Safety Com'r, et al. (Civ. 3218.)

(District Court of Appeal, First District, Division 2, California. Feb. 5, 1920.)

1. MUNICIPAL CORPORATIONS ⊂⊃63(1)—WISDOM OF CIVIL SERVICE PROVISION IS NOT COURT QUESTION.

The wisdom of provision in a city charter authorizing appeals from orders discharging civil service employés is not a question which the courts can consider.

2. MUNICIPAL CORPORATIONS ⊂⊃218(9)—CIVIL SERVICE BOARD ON APPEAL OF DISCHARGED EMPLOYÉ CAN REVISE THE PUNISHMENT; "MATTER UNDER INVESTIGATION."

The power given the civil service board by Oakland Charter, §§ 81, 82, to determine the "matter under investigation" on appeal by a discharged employé includes the power to determine not only the guilt of employé, but also the punishment he should properly receive, and the board could reinstate the employé with loss only of pay for the time since his discharge.

3. EVIDENCE ⊂⊃83(2)—MUNICIPAL CORPORATIONS ⊂⊃218(9)—POSSIBLE ABUSE OF POWER DOES NOT DISPROVE POWER, SINCE OFFICERS WILL PRESUMABLY DO THEIR DUTY.

That civil service board may abuse its power on appeal from orders discharging employés does not show that the power was not granted by the charter, since the presumption that public officials will do their duty applies to the board.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Case submitted to trial court on agreed statement by Thomas Hackett against F. F. Morse, as Commissioner of Public Health and

Safety of the City of Oakland. Judgment for plaintiff, and defendant and the City of Oakland appeal. Affirmed.

H. L. Hagan, City Atty., and John J. Earle, Asst. City Atty., both of Oakland, for appellants.

Wm. B. Smith, of Oakland, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff in the sum of $1,764.78 against the appellant city of Oakland, which judgment also directed the issuance of a writ of mandate commanding appellant F. F. Morse, as commissioner of public health and safety of the city of Oakland, to reinstate plaintiff and respondent to his position in the fire department of the city of Oakland. The case was submitted to the trial court upon an agreed statement of material facts, from which it appears that on May 27, 1918, the plaintiff was a member of the fire department of the city of Oakland; that the said position of the plaintiff was at all times mentioned herein, and now is, in the classified civil service of said city of Oakland; that on May 27, 1918, plaintiff was suspended by the chief of the fire department for refusal to obey an order of the said chief of the fire department; that on June 3, 1918, without having had a hearing or trial, and without having been served with a copy of any charge or charges against him, plaintiff was informed by the commissioner of public health and safety that he was discharged from the fire department on the ground of insubordination. Plaintiff filed a notice of appeal from the order of said commissioner with the civil service board within the time prescribed by the city charter. The matter was heard by the civil service board; the commissioner of public health and safety and the plaintiff both being represented by counsel. Thereafter the civil service board rendered its decision by which the plaintiff was found not guilty of insubordination that would warrant his discharge from his position, and that such penalty would be unjust, and it was ordered that he be retained in his said position, and that he report for duty and resume his work in said position upon August 1, 1918. The board further stated in its decision:

"That it is the opinion of the board that for making any objection to being transferred to Engine Company No. 6 that said Thomas Hackett should not be entitled to or receive any compensation from the city from June 3, 1918, to August 1, 1918."

A certified copy of the findings and decision of the civil service board were served upon the commissioner of public health and safety, as provided for in the city charter. The plaintiff reported to the said commissioner several times and requested to be assigned to his position in said fire department, and was refused. The amount of salary that would have been earned by the plaintiff in his said position from August 1, 1918, to September 30, 1919, as prescribed by the city charter, is $1,764.78, the amount for which the plaintiff secured judgment against the city.

[1] The defendants concede the plaintiff's right to appeal to the civil service board, and their only contention is that said board has no power to revise the punishment imposed upon an employé by the commissioner; that the civil service board merely has the power to inquire whether or not the employé is guilty of the offense charged, and if it be found that he is guilty of such offense, then the civil service board has no power to change the punishment inflicted by the commissioner. Many arguments are made upon both sides of this controversy based upon governmental efficiency and political expediency. There is much to be said upon both sides of this question; but the arguments are not pertinent here and will not be discussed by us, because the city charter of Oakland expresses the will of the people with relation to this matter, and it is not within the power of the courts to reconsider and weigh the considerations which should have actuated the people in placing certain power with the civil service board. Section 81 of the city charter of Oakland provides:

"All persons holding positions in the classified civil service shall be subject to suspension, fine, and also to removal from office or employment by the commissioner in whose department they are employed, * * * but subject to the appeal of the aggrieved party to the civil service board as herein provided."

Section 82 provides:

"Any person suspended, fined or discharged * * * may within five days from the making by a commissioner of the order suspending, fining or discharging him * * * appeal therefrom to the civil service board, which shall fully hear and determine the matter. The accused shall be entitled to appear personally, and to have counsel and a public hearing. The finding and decision of the board shall be certified to the official from whose order the appeal is taken, and shall forthwith be enforced and followed by him."

[2] The civil service board has acted under the authority of the above-quoted sections. It has fully heard and determined the matter of the discharge of the plaintiff. It has found that he should not have been discharged; that for his failure to obey the order of his chief he should forfeit two months' salary and be reinstated at the expiration of that time. It is our opinion that, since the board shall fully hear and determine the matter, it must hear and pass upon all questions involved in the controversy. The question of what is a reasonable punishment for an offense is as important as the question of

whether or not an employé committed an offense, and it is as necessary for the accomplishment of the purposes of the civil service system that the board have power to investigate the one as the other. There being no restriction upon the civil service board, we must hold that power fully to "hear and determine the matter" means power fully to hear and determine all parts of the "matter." The "matter" under investigation is the discharge of the plaintiff by the commissioners; the offense leading to his discharge, the surrounding or extenuating circumstances, the need of discipline in the department in which the plaintiff was employed, and the effect of the example of the plaintiff's conduct upon other employés, are all parts of the larger question to be investigated by the board.

[3] It is not an answer to the views expressed herein that the civil service board may at some time abuse its power and render unjust decisions. The presumption that public officials will do their duty applies to the civil service board. Furthermore, the delegation of any power carries with it a possibility of abuse if the power is exercised by unscrupulous persons, but it is also true that an abuse of power carries within itself the seed of its own destrction. The people have seen fit to intrust a civil service board with power to hear and determine fully disputes of this character between employés and the commissioners, and when they find this method unsatisfactory in its results, they will doubtless be wise and ingenious enough to supplant it with a better one.

It is argued by the appellants that the people could not have intended to confer upon the civil service board power to alter the judgment of the commissioner, because it is asserted by appellants that the exercise of such power would be followed by a long train of evils, disrupting the internal government of the various departments of the city government. While it has no bearing upon the decision of this case, yet it may not be inappropriate to remark here that this argument is not persuasive in view of the fact that under the charter of the city and county of San Francisco the civil service commission is given express power to affirm, "reverse or alter" the findings of the appointing officer upon an appeal from his decision discharging an employé. Section 12, art. XIII, Charter City and County of San Francisco. The results of the exercise of such power by the civil service commission have not been such, apparently, as to call for an amendment of the charter in this particular.

The commissioner of public health and safety should have obeyed the order of the civil service board.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

45 Cal. App. 628

McKEY v. MacINTOSH et al. (Civ. 2480.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

1. EVIDENCE ⟸178(9)—COPY OF LOST ASSIGNMENT ADMISSIBLE.

A copy of a deed of assignment, whereby the payee of the note sued on transferred all its assets to plaintiff, is admissible; loss of the original, shown to have been duly executed by officers of the payee with its seal affixed pursuant to resolution of its board of directors, being fully established.

2. BILLS AND NOTES ⟸524—POSSESSION OF NOTE UNINDORSED PRIMA FACIE SHOWING OF OWNERSHIP.

Plaintiff's possession of note sued on, even if not indorsed, is sufficient as a prima facie showing of his ownership.

3. APPEAL AND ERROR ⟸1050(1)—ADMISSION OF EVIDENCE HARMLESS IN VIEW OF OTHER EVIDENCE.

Any error in admitting, in action on note, a copy of transfer to plaintiff of all the payee's assets is harmless, the note being indorsed by the payee, and plaintiff's possession of it, even if it were unindorsed, being sufficient as a prima facie showing of his ownership.

4. SALES ⟸347(2)—EVIDENCE NOT SHOWING FAILURE OF CONSIDERATION.

That after an auto company sold a machine to defendants for the note sued on, with agreement to sell them more, it transferred to plaintiff its good will, plant and assets does not tend to show failure or want of consideration.

5. WITNESSES ⟸236(1) — QUESTIONS NECESSARILY CALLING FOR IMMATERIAL EVIDENCE PROPERLY REFUSED.

Sustaining objection to questions asked to show failure of consideration of note sued on is not error; they not being calculated to elicit evidence tending to making such showing, whatever the answer might be.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Frank M. McKey against E. D. MacIntosh and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Perry F. Backus, of Los Angeles, for appellants.

Frank W. Wheeler, of Los Angeles, for respondent.

SHAW, J. This is an appeal by defendants from a judgment in favor of plaintiff upon a promissory note executed by E. D. and R. B. MacIntosh, payment of which was guaranteed by defendant Duffet.

The court found that plaintiff was the legal owner and holder of the note, which by its terms was made payable to the Chicago Electric Motor Car Company.

[1-3] Error is predicated upon the fact

that the court, in support of this finding, admitted in evidence a copy of a deed of assignment whereby the Chicago Electric Motor Car Company duly transferred to plaintiff all its assets, including the note herein sued upon. The loss of the original deed, shown to have been duly executed by officers of the corporation and the seal affixed thereto pursuant to a resolution adopted by the board of directors, was fully established, and hence it was not error to admit the copy thereof. Moreover, not only was the note indorsed by the payee named therein (Meyer v. Foster, 147 Cal. 166, 81 Pac. 402), but plaintiff's possession of the note, though not indorsed, was sufficient as a prima facie showing of his ownership (Berri v. Minturn, 1 Cal. Unrep. 50); hence defendants could not have been prejudiced by the evidence complained of, even were it deemed incompetent.

[4, 5] Another alleged error is based upon the rulings of the court in refusing to admit evidence offered by defendants for the purpose of showing want of consideration for the note, which was given as the purchase price of a Chicago electric motor car sold and delivered by the company to the makers of the note. While appellants at all times retained possession of the car, they, nevertheless, insist that they should not be required to pay for the same, for the reason that on June 17, 1914, they, subject to cancellation at its pleasure, entered into a contract with the Chicago Electric Motor Car Company, whereby it agreed to sell and they agreed, on or before June 17, 1915, to buy from said motor company "as many * * * of the electric pleasure cars manufactured by the Chicago Electric Motor Car Company," at the prices therein specified, which said contract further provided that the MacIntoshes should at all times keep on hand for demonstrating purposes one model of the motor car so manufactured by said company, and pursuant to which provision it is claimed the car in question was purchased. It is further alleged in the answer that shortly after the purchase of said car the motor company made an assignment of its good will, franchise, plant, and all its assets to the plaintiff herein, by reason of which fact it was unable to furnish defendants with cars. It is not alleged nor claimed, however, that defendants, under and pursuant to the terms of said contract, ever at any time tendered the payment or made the deposit required as a condition of their right to demand delivery of cars, or sought to purchase any cars from the motor company or its assignee, or that either of them committed any breach whatsoever of the terms of the contract. From aught that appears to the contrary, the assignee, as successor in interest to the contract, was prepared to and would have complied with the terms thereof had demand therefor been made by defendants.

The fact that the motor company transferred its good will, plant, and assets to another constituted no defense to the payment of the note so given in the purchase of the electric car which defendants received and retained for their own use and benefit. The questions asked by defendants, so far as pertinent to the issues, and whatever the answers might have been, were not calculated to elicit evidence tending to show the failure or want of consideration for the note; hence the court did not err in sustaining the objections.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 703

W. J. SOMERS CO. v. SMITH. (Civ. 3284.)

(District Court of Appeal, First District, Division 2, California. Feb. 2, 1920.)

1. APPEAL AND ERROR ⊂=801(4)—MERITS NOT CONSIDERED ON MOTION TO DISMISS APPEAL.

On motion to dismiss appeal from an order denying appellant's motion for an order to set aside a prior order by which settlement of appellant's proposed transcript of the record on appeal from judgment was denied, the appellate court cannot consider the merits of the appeal or controverted questions of fact, but only the right of the appellant to prosecute the appeal.

2. APPEAL AND ERROR ⊂=10 — NO APPEAL FROM ORDER REFUSING TO APPROVE RECORD UNLESS DISCRETION INVOLVED.

If the condition of the record on appeal from a judgment was such that it should have been certified by the trial judge, the appellant had no right of appeal from an order refusing to approve the record, the only remedy in such event being by mandamus to compel the settlement; but where it appeared that the respondent contended that the record was not complete and that appellant had not strictly complied with the requirements of the statute in preparing the same, mandamus would have been a wholly inadequate remedy, as the discretion of the court was involved, and its order denying settlement could be reviewed on appeal.

3. APPEAL AND ERROR ⊂=801(1)—PRESUMPTION OF REGULARITY HAD NO BEARING ON MOTION TO DISMISS APPEAL.

Although a motion under Code Civ. Proc. § 473, for an order to set aside a prior order by which settlement of appellant's proposed transcript of the record on appeal from the judgment was denied, based on contradicting affidavits, was presented to the discretion of the trial judge, and every presumption would be in favor of the action of the trial judge, if the court were dealing with the merits of the appeal, such presumption has no bearing on a motion to dismiss the appeal which has for its purpose the review of the propriety of the exercise of discretion by the trial judge.

4. APPEAL AND ERROR ⊂⊃82(1)—ORDER DENYING MOTION TO SET ASIDE PREVIOUS ORDER RELATING TO TRANSCRIPT APPEALABLE AS "SPECIAL ORDER AFTER JUDGMENT."

An order denying a motion made under Code Civ. Proc. § 473, for an order to set aside a prior order by which settlement of appellant's proposed transcript of the record on appeal from the judgment was denied, based on conflicting affidavits as to strict compliance by appellant with the statute, a matter addressed to the discretion of the trial court, was, under the circumstances, a special order made after judgment, from which appeal could be prosecuted, under section 963, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

5. APPEAL AND ERROR ⊂⊃801(1) — APPEAL FROM JUDGMENT LEFT PENDING ON REFUSAL TO DISMISS APPEAL FROM ORDER DENYING SETTLEMENT OF TRANSCRIPT.

Where a motion was made to dismiss an appeal from a judgment and an appeal from an order denying appellant's motion for an order to set aside a prior order by which settlement of the appellant's proposed transcript of the record on appeal from the judgment was denied, denial of the motion to dismiss the appeal from the order left the appeal from the judgment, with proceedings to establish the record, still pending, and the motion to dismiss the appeal from the judgment, on the ground that the transcript was not filed in time, must be denied.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the W. J. Somers Company against J. L. Smith, as trustee for the creditors of the Force-Hewitt Company. From a judgment for plaintiff, and an order denying defendant's motion for an order to set aside a prior order by which settlement of defendant's proposed transcript of the record was denied, defendant appealed. On motion to dismiss appeals. Motions denied.

J. L. Smith, of San Francisco, for appellant.

McNair & Stoker, of San Francisco, for respondent.

PER CURIAM. [1] The respondent moved to dismiss the appeal from a judgment entered against the appellant, and also to dismiss a second appeal from an order denying the appellant's motion for an order to set aside a prior order by which settlement of the appellant's proposed transcript of the record on the appeal from the judgment was denied.

Logically, the second motion should be first determined. Voluminous affidavits have been filed in connection with the motion to dismiss the second appeal, upon which the respondent, in effect, seeks to have determined on this motion the merits of the appeal from the order rather than the right of the appellant to prosecute the appeal. On such a motion the court will not consider the controverted questions of fact. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Woodbury v. Nevada, etc., Ry. Co., 120 Cal. 367, 52 Pac. 650; Coonan v. Loewenthal, 122 Cal. 72, 54 Pac. 388.

[2] The appellant sought to have the record on appeal made up under the alternative method, and there was delay on the part of the court reporter in the preparation of the record. The record was finally presented to the court for settlement, which was resisted by the respondent, and the trial court refused to settle and approve the record. The appellant contended that he had done everything required of him under the statute and the rules of court, and that the delay in filing the record was the fault of the official reporter. If the condition of the record was such that it should have been certified by the trial judge, the statute gave the appellant no right of appeal from the order refusing to approve the record. The appellant's only remedy in that event would have been by mandamus to compel the settlement. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176.

It appears from the respondent's showing on the motion that when the record was presented for settlement the respondent contended that the record was not complete, and that the appellant himself had not strictly and fully complied with the requirements of the statute in preparing and presenting the record. In such a case mandamus would have been a wholly inadequate remedy, because the discretion of the court may not be coerced. Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50. If the court erred in the exercise of its discretion on the application for settlement, its order denying settlement might have been reviewed on appeal. Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Banta v. Siller, 121 Cal. 414, 53 Pac. 935.

[3, 4] After the refusal of the trial court to approve the record, the appellant moved for relief from that order, under section 473 of the Code of Civil Procedure, upon affidavits setting forth facts which, if uncontroverted, would have, or at least might have, supported an order setting aside the order refusing to certify the record. The respondent made a counter showing, and the trial judge, upon controverted facts, made the order refusing to set aside the former order. Section 473 of the Code of Civil Procedure, in terms, provides for the relief sought by the appellant. While it is true the matter was presented to the discretion of the trial judge, and if the court were dealing with the merits of the appeal every presumption would be in favor of the action of the trial judge, that presumption has no bearing on the motion to dismiss an appeal which has for its purpose the review of the propriety of the exercise of discretion by the trial judge. On the motion to settle the

record the appellant claimed he was not negligent, and there was no order then in existence from which he could be relieved under section 473 of the Code of Civil Procedure. Banta v. Siller, 121 Cal. 414, 53 Pac. 935. Under the circumstances, the order refusing relief was a special order made after judgment from which an appeal may be prosecuted. Code Civ. Proc. § 963, subd. 2; Mitchell v. California, etc., S. S. Co., 156 Cal. 576, 105 Pac. 590. The motion to dismiss the appeal from the order refusing to vacate the former order is denied.

[5] The motion to dismiss the appeal from the judgment rests solely on the ground that the transcript was not filed in time. In support of the motion it is urged that the order refusing to settle the record has made it impossible to file the transcript. The denial of the motion to dismiss the second appeal leaves the appeal from the judgment, with proceedings to establish the record, pending.

Under these circumstances, the motion to dismiss the appeal from the judgment must be denied.

45 Cal. App. 596

SCHWARTZ v. ARATA et al. (Civ. 2070.)

(District Court of Appeal, Third District, California. Jan. 28, 1920.)

1. INJUNCTION ⊂=173—AFFIDAVIT TO DISSOLVE NEED NOT SHOW SOURCE OF TITLE.

Affidavit in support of motion to dissolve an order restraining defendant from working mines need not show the source of defendant's title if it shows to the court's satisfaction his right to possession and actual possession for some time.

2. INJUNCTION ⊂=135—TEMPORARY ORDER RESTS IN COURT'S DISCRETION.

The granting or refusal of a restraining order or an injunction pendente lite rests largely in the discretion of the trial court.

3. INJUNCTION ⊂=136(3)—TEMPORARY ORDER EXTRAORDINARY REMEDY.

The granting of an injunction pendente lite is an extraordinary remedy, to be exercised always with great caution, and only where it fairly appears to be necessary to prevent irreparable injury or to preserve the estates of the parties.

4. INJUNCTION ⊂=137(2)—DENIAL OF TEMPORARY ORDER AGAINST WORKING MINE HELD PROPER IN VIEW OF LOSS TO DEFENDANT.

Where defendant had been in possession of property claimed by plaintiff for some time and had made extensive improvements thereon to enable him to extract the ore therefrom, the value of which would be lost if the ore could not be taken while the war demand for it existed, and defendant was able to respond in any damages plaintiff might suffer, the denial of an injunction pendente lite was proper.

5. INJUNCTION ⊂=147—VERIFIED ANSWER UNNECESSARY TO DENIAL OF TEMPORARY ORDER IF PROPER AFFIDAVIT BY DEFENDANT.

Under Code Civ. Proc. § 527, authorizing an injunction pendente lite on a verified complaint or affidavit, and authorizing defendant to present affidavits relating thereto, affidavits by defendant are sufficient basis for a denial of the temporary injunction asked for by verified complaint, though no verified answer was filed.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Samuel L. Schwartz against P. A. H. Arata and another. From an order dissolving a restraining order previously issued, and denying a motion for an injunction pendente lite, plaintiff appeals. Affirmed.

A. H. Ricketts, of San Francisco, and M. R. Van Wormer, of San Luis Obispo, for appellant.

C. P. Kaetzel, of San Luis Obispo, for respondents.

HART, J. The appeal is by the plaintiff from an order dissolving a restraining order and denying a motion for an injunction pendente lite.

This complaint is verified and is in two counts. In the first thereof it is stated that one Charles Margaroli is the owner of certain land in the county of San Luis Obispo; that, on August 14, 1917, said Margaroli "let the said premises to plaintiff for ten years from said day; that the defendants withhold possession thereof from the plaintiff, to the great damage of the plaintiff in the sum of $5,000."

In the second count, the allegations of the ownership and letting of said premises are repeated, and it is then alleged that the sole value of the land is for the mineral deposits therein contained; that the defendants withhold the possession thereof from plaintiff; that they had invaded and were invading the mining excavations made therein by the plaintiff's predecessors in interest; that they threatened to continue to invade said excavations, to extend the same and make other excavations in said land for the purpose of mining the said premises; and that they had converted and were converting and threatening to continue to convert the mineral deposits therein to their own use against the will and consent of plaintiff and to his irreparable injury.

Upon the filing of the complaint an order was granted restraining the defendants from mining upon the premises described in the complaint and an order to show cause why an injunction pendente lite should not issue was made.

In opposition to the motion there was filed an affidavit of defendant Arata. It was therein denied that Charles Margaroli was the owner in fee simple of the premises in

question, and it was stated that defendants are the owners of all minerals in said lands and are entitled to the possession of said lands for the purpose of extracting ore therefrom and have been so entitled to possession for more than 15 months last past, at which time they commenced mining operations which have been continuously prosecuted; that they have expended in the improvement and development of said mine large sums of money, and that the same has been made a valuable producing mining property by their said work and expenditures; that for several months last past plaintiff and said Margaroli had actual knowledge of said mining operations, and made no objections thereto; that the continuance of said mining operations would not impair the value of said mining ground, but would enhance the value of the same and would not destroy the value and substance of said mining ground; that unless defendants are permitted to continue their work and care for said mine it will, by the caving of tunnels and the falling of earth, become impossible to work and—

"defendants' work and improvements thereon will be ruined and lost, said mine will become unworkable, and they will suffer damage to the extent of $25,000 or $50,000.

"That the market price of the ore (chromate of iron) produced from said mine is at present high, but that the present price thereof is due to war conditions and may at any time drop, and that said mine cannot be operated at a profit should said price fall to the point it was before the commencement of the present European war. That it is greatly to the advantage of the owners of said mine that as much as possible of said ores be extracted and sold while the price is high; that great loss will be sustained by defendants and their entire investment doubtless be lost if they are prevented from operating said mine during the present period of high prices. That defendants are solvent and able to respond in damages should judgment be had against them."

A hearing was had, at which the restraining order was dissolved and the application for a temporary injunction denied.

[1] The defendants do not assert that they claim ownership of the lands in dispute, nor is it made to appear from the affidavit filed by them in support of their application to dissolve the restraining order and of their opposition to the motion for an injunction pendente lite in what way or from what source they obtained the right to the possession of the property in controversy for the purpose of extracting therefrom the minerals deposited in said lands or how they acquired ownership of the said minerals. But we deem this immaterial, as we can conceive of no reason why the source of a party's title to property should be shown on an application for a restraining order or an application to dissolve such an order, where previously made, affecting the right of the party in possession to use such property pending the determination of the question of ownership or the right to the possession of the same as between litigants in an action brought for that purpose. As to this feature of a showing for or against the issuance of a restraining order or the granting of an injunction pendente lite, it is sufficient, if the court before which the application is made accepts it, if it be made to appear therefrom that the party making the application denies the adversary party's ownership of or right to the possession of the property as to which the application for a preliminary injunction or the dissolution of a restraining order is made, and it further is likewise made satisfactorily to appear that the applicant for or against the temporary relief sought has some claim of right to the property involved or the possession thereof. Hence, we repeat, it is not indispensably essential that in an application for such preliminary relief the party making it should disclose the source of his title to the fee in the property, if he has such title, or how his right to the possession thereof arose. The affidavit of the defendants in the present case, upon which the court below manifestly predicated its order dissolving the restraining order previously made and refused to grant a preliminary injunction, unequivocally states that the defendants have for a long period of time prior to the institution of this action had rightful possession and still have such possession of the lands in controversy and the right to extract mineral ores therefrom. It is further shown by said affidavit other facts, of which a fair synopsis is given above, and which, therefore, need not be specifically repeated here, which not only tend to show that irreparable injury to the physical properties of the mine, but to the defendants in a financial way, would inevitably ensue from an order stopping the operation of the mine by the defendants. It is likewise further shown, it will be noted, that the plaintiff, for several months prior to the filing of the affidavit by defendants, had actual knowledge of the working of the mine by the defendants and the large expenditures of money made by the latter in making improvements and furnishing mechanical and other equipments essential to the proper and profitable operation of the mine.

To hold that the court below erred in its action dissolving the restraining order in this case and refusing to order a preliminary injunction, it would be necessary for us to declare that the court abused its discretion in that regard. Upon the showing made by the defendants, we cannot say that the order dissolving the restraining order and refusing further to tie the hands of the defendants involved an abuse of the discretion committed to trial court in such a proceeding.

[2] It is as firmly settled as is any rule of law that whether in a particular case a re-

straining order or an injunction pendente lite should be granted or refused is a matter resting largely in the discretion of the trial court before which the application is made and heard. See Raub v. Los. Angeles T. Ry. Co., 103 Cal. 473, 37 Pac. 374; Rogers v. Tennant, 45 Cal. 184; Patterson v. Board of Supervisors, 50 Cal. 344; Parrott v. Floyd, 54 Cal. 534; White v. Nunan, 60 Cal. 406; Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, 754, 115 Pac. 951. The rule as thus stated results from the extraordinary nature of the power to grant temporary or provisional relief to litigants by way of a preliminary injunction and the consequences following from the exercise of such power.

[3] It is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears "upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties, or some sufficient cause showing that need of hasty action exists." Joyce on Injunctions, § 109. The power, therefore, should rarely, if ever, be exercised in a doubtful case. "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction." St. Louis S. F. M. Co. v. Sanitary S. F. Co., 161 Fed. 725, 88 C. C. A. 585; Willis v. Lauridson, 161 Cal. 106, 117, 118 Pac. 530.

[4] The court below was within its rights in concluding that it was at least very doubtful whether the power should be exercised in behalf of the plaintiff here. The court could also well conclude from the showing that there was no need for hasty action, and that, since it was made to appear that the defendants are solvent and able to respond in damages for any injury which the plaintiff might suffer, the element of "irreparable injury" was wanting as the basis for the provisional injunctive relief prayed for.

The very early case of Real Del Monte M. Co. v. Pond M. Co., 23 Cal. 83, closely resembles this in its facts. Therein the main ultimate question involved was as to the ownership of a certain quartz ledge which the defendants were working. A temporary injunction had been granted on the complaint, and upon the filing of their answer, denying the averments and therefore all the equities of the complaint, the defendants moved for an order dissolving the preliminary injunction, which motion the trial court disallowed. On an appeal from the order denying the motion, the Supreme Court, by its opinion, by Crocker, J., reversed the order, saying:

"It appears that the defendants have been in possession of the quartz ledge in question for several months, have expended large sums of money in developing and working the same, and were, at the time of the granting of the injunction, and had, for some time previously, been working the mine as their own. In such case it requires a very clear and strong showing to induce a court of equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and, as a general rule, the title and right of the plaintiffs should be shown to be clear, well-established and not in dispute. The application should also be made promptly, and not delayed until large expenditures have been made by the defendants. Clavering v. Clavering, 2 Pierre Wm. 388; Anonymous, Ambler, 209; 18 Vesey, 515; Norway v. Rowe, 19 Vesey, 144; Field v. Beaumont, 1 Swanston, 203; Hilton v. Granville, 1 Craig & Phillips, 283."

The similarity between the above and the present case is manifest. Here, as there, the restraining order was based entirely on the complaint. Here, as there, the ownership of the plaintiff of the property and his claimed right to possession are disputed, and therefore cannot be said to be clear and well established. Here, as there, the plaintiff, although for several months in possession of actual knowledge of the operation of the mine by the defendants, did not proceed against the latter until they had expended large sums in the improvement of the property for the purpose of facilitating the proper operation of the mine. In other words, the plaintiff delayed asking for the provisional relief involved in the temporary restraining order and in an injunction pendente lite until large sums had been, with his knowledge, expended by the defendants in the equipment of the mine for its proper operation as such.

[5] But it is intimated by counsel for the appellant that resistance to a motion for a preliminary injunction pending the determination of the litigation must be supported by a verified answer, and cannot be supported by affidavits only. We see no merit in the point and nothing in the cases cited by the appellant which supports it.

Section 527 of the Code of Civil Procedure provides that an injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits, if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. Thus it will be observed that an application by a plaintiff for a preliminary injunction may be made either upon his verified complaint or upon affidavits, and upon principle, since the matter is one merely of evidence, we can see no reason for holding that the section does not contemplate that the defendant is entitled to resist the application by either means; that is, either by a verified answer or by affidavits. But the same section goes further, and expressly declares that "the defendant may, in response to such order to show cause [the order requiring cause to be shown why the preliminary injunction should not be granted], present affidavits relating to the granting of the preliminary injunction."

This identical point was touched upon in Gagliardo v. Crippen, 22 Cal. 362, which was an appeal from an order granting a preliminary injunction. The injunction there was granted on the verified complaint, to which reply was made by defendants in the form of an affidavit. The court, in reversing the order, said:

"So far as the merits are concerned, we think the injunction was improvidently granted. The allegations of the complaint are fully and specifically controverted by the affidavit. It is claimed that the complaint itself is insufficient; but as the equities, whatever they may be, are denied, it is unnecessary to pass upon the objections to the complaint."

The subsequent cases generally, so far as we are advised, have regarded it competent to support resistance to a motion for an injunction pendente lite by affidavits only. Indeed, we are of the opinion that, so far as proof of facts relating to the question is concerned, affidavits would be more satisfactory than the averments and denials of the pleadings, inasmuch as the facts stated in a complaint are the ultimate and not the probative facts, and the answer merely is a denial of those facts, whereas, the facts stated in an affidavit are required to be probative. It has always been the rule that where a preliminary injunction is granted on a complaint unsupported by affidavits or an affidavit and an answer is filed denying all the equities of the complaint, a motion based upon the pleadings in such case to dissolve the injunction will be granted (Real Del Monte M. Co. v. Pond M. Co., supra; Willis v. Lauridson, supra); and this must follow from the fact that the court granting such injunction is then without sufficient proof before it to justify the exercise of so extraordinary a power.

The appellant, in his somewhat elaborate brief, cites a large number of cases and other authorities as supporting his position that the court erred or abused its discretion in refusing to grant a preliminary injunction and in dissolving the temporary restraining order. But the facts in the cases referred to will be found, upon examination, radically at variance with those of the case at bar. We may refer specifically to two of the cases only so cited—the principal ones relied upon by appellant—as illustrative of the distinction between this and all the cases mentioned in counsel's brief. In Hunt v. Steese, 75 Cal. 620, 17 Pac. 920, the plaintiff acquired title to the lands in controversy by deed from the Central Pacific Railroad Company on June 5, 1883, the said lands being portions of a grant from the government to said company and held by said company under a patent from the government to the company, dated February, 1875. The plaintiff went into possession of the land in the year 1877, and remained in peaceable, undisputed, and uninterrupted possession thereof, and used the same for grazing purposes until the fall of 1884, when the defendants, claiming the lands to be mineral, and filing a notice of location of the same for mining purposes, began digging up and washing away good soil on the lands without authority from plaintiff. The title of plaintiff to the lands was shown by documentary evidence and his possession and use thereof for grazing purposes by his own testimony. The complaint disclosed the nature and the extent of the injury which the defendants had done and threatened to continue to do to the lands by digging the same up, building reservoirs and digging ditches thereon, and plowing up the soil. It was alleged that the defendants were insolvent; that the lands are valuable for agricultural and grazing purposes, and thus it was clearly shown that the plaintiff had suffered irreparable injury by the trespasses of the defendants, and would continue to suffer such injury if the trespasses were not restrained. The defendants did not answer the complaint, but by affidavits and oral testimony were permitted to show the mineral character of the lands. They did not deny that they were washing away the soil for gold, or that they were insolvent, or that they intended to continue their mining operations, or that the injury was and would be irreparable. The attack upon the patent in that case was clearly collateral, but the court said it was unnecessary for it to determine therein whether "we shall adhere to the rule of decision that a patent may be collaterally attacked under such circumstances." It was held, however, that the injunction should have been issued in that case, and that the court below, upon the showing presented, had abused its discretion by refusing plaintiff a preliminary injunction. It is to be noted that in that case the vital question upon the merits was as to the character of the lands in dispute—whether they were mineral or nonmineral. Upon the determination of that issue rested the rights of the parties. If mineral in character—that is, if more valuable for mining than for agricultural or grazing purposes—then, so the defendants claimed, the lands were not within the patented grant to the railroad company. That issue called for a much fuller trial or investigation than could be expected in an ancillary or interlocutory proceeding looking to provisional relief. The patent or deed to the plaintiff constituted prima facie evidence of title, and the most that was shown by the defendants in impeachment of said title was that the lands, at the time of the application for the injunction and prior to the issuance of the patent, "were valuable for mining purposes when water could be had to work it," and "it was shown that after 1864 there was no water there to work with, except from rains," and that "it took very heavy rains to accumulate water sufficient to amount to anything." Under all these circumstances, it was clearly the duty of the

court to protect the prima facie title or right of plaintiff to the lands through the preventive power of injunction pending the determination of the ultimate question whether the lands were mineral or agricultural in character, and the burden was upon the defendants to show that the prima facie title of plaintiff was in fact an insufficient title. In the case at bar, the defendants were and are, not only in possession, but declared under oath that they had the right of possession, and reinforced their sworn declaration to that effect by the statement, undenied, that, with the actual knowledge of plaintiff for several months prior to the hearing of the application for the preliminary injunction they (defendants) had expended large sums of money in equipping the property with machinery and other works so that the mineral ore therein deposited could be properly and profitably extracted therefrom.

The other case referred to—Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362—merely holds that the affidavit of the secretary of the corporation defendant, which was filed before an answer to the complaint was interposed, and which consisted entirely of admissions and denials and statements of ultimate facts or conclusions, was not an answer and was, as an affidavit, wholly insufficient to controvert the allegations of the complaint, upon which a preliminary injunction was granted. The Supreme Court, inter alia, said:

"Clearly, the affiant had no power to admit, deny, or allege any fact, and until an answer was filed, how could he know what defendant [the corporation] admitted, denied, or alleged? An affidavit is simply and only written proof, taken ex parte, of the facts stated in it; and, as in giving oral testimony, the facts stated should be probative, and not ultimate facts or conclusions. We think it must be held, therefore, that the said affidavit was not sufficient to prove the facts attempted to be proved thereby, or to sustain the defendant's motion"

—which was a motion to dissolve a preliminary injunction.

In this case, as has been shown, the affidavit was made by one of the defendants, and, while the statement therein as to the right of the defendants to the possession of the property may in a measure involve an ultimate fact or conclusion, said statement is aided and supported by the statement in the affidavit that the defendants "more than fifteen months last past commenced mining operations thereon [said property], having continuously prosecuted the same thereafter up to the commencement of this action, and have extensively improved the same so as to make it capable of production," etc.

Thus it will readily be perceived that there is a pronounced distinction between the case of Marks v. Weinstock, Lubin & Co. and the instant case as to the facts.

We conclude, as declared above, that, upon the record before us, we cannot justly say that the court, by dissolving the temporary restraining order and refusing to grant an injunction pendente lite, abused its discretion.

The order appealed from is, accordingly, affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

45 Cal. App. 733

SHANNON v. AAGAARD et al. (Civ. 3049.)

(District Court of Appeal, Second District, Division 2, California. Feb. 2, 1920.)

1. DEEDS ⊂=208(1) — PERSON DELIVERING DEED PRESUMED TO INTEND THAT IT BECOME OPERATIVE.

An owner of land, who signed and delivered a deed, *held* not entitled to recover the land from a subsequent innocent purchaser, although such owner testified that he never knowingly executed the deed, and did not acknowledge the same, since, in the absence of a showing that the third person obtained the deed by trick or device, there was a legal presumption that it was delivered with the intent that it should become operative as such, and hence, by force of Code Civ. Proc. § 1948, was prima facie evidence of complete execution.

2. DEEDS ⊂=56(2) — DELIVERY MUST BE ACCOMPANIED WITH INTENT THAT DEED BECOME OPERATIVE.

It is a legal prerequisite that the delivery of a deed must be accompanied with the intent that it shall become operative as such.

Appeal from Superior Court, Los Angeles County; J. W. Curtis, Judge.

Action by Eliza Shannon against J. Herman Aagaard and another. Judgment for plaintiff, and defendant Maebelle D. Traylor appeals. Reversed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellant.

E. S. Janes, of Los Angeles, for respondent.

THOMAS, J. This is an action to quiet title. Defendants Aagaard and Talcott defaulted. Defendant Traylor appeared and answered, denying plaintiff's claim of title, and alleging ownership in herself, in fee simple, of the property in controversy, and, as such owner, asking that title be quieted in her as against any claims of plaintiff. After trial, the court having considered all the evidence introduced, findings were entered in favor of plaintiff on all the issues. Among other things, the court found:

"* * * That plaintiff is the owner in fee simple and entitled to the immediate possession of" the property in controversy; "that on or about the 15th day of December, 1915, and while plaintiff * * * was the owner of the premises described in her complaint herein, *she signed her name to and delivered to the defendant Aagaard a paper purporting to be a grant deed of said premises* * * * to defendant Talcott; that thereafter, on or about December 21, 1915, defendant Talcott sold said premises to defendant Traylor for the sum of $450.00, and thereupon executed and delivered her grant deed to said premises to defendant Traylor; *that defendant Traylor is an innocent purchaser of said premises for value;* that the signature of the plaintiff to the said paper * * * was obtained thereto by trick and device of the defendant Aagaard, and without any knowledge on the part of the plaintiff that she was signing a deed or any instrument affecting her real property, and without any intention on her part to convey said real property, or in any way to affect it; that she never appeared before the notary, Parmelee, and acknowledged it, and never acknowledged it at all; and, as said defendant Myrtle Talcott had no title to said premises which she could convey, said defendant Maebelle D. Traylor took nothing by said deed." (Italics ours.)

A decree quieting title to said property in plaintiff was entered accordingly. This finding is challenged as not supported by the evidence, thus raising the only point to be considered on this appeal.

The plaintiff, in part, testified as follows:

"I never signed a deed at all—never signed a deed for that lot at all. All that I have signed was my investment company certificates, and I did sign those, and that is all I ever signed. * * * I don't know what I did sign. I supposed it was for the investment company. He asked me twice, I think, to sign papers for him, and I signed them, but I supposed that they were for the investment company. * * * If I did sign that deed, it must have been one of those that he gave me for that stock. I never saw Mr. Parmelee before yesterday at all. I am positive of that."

Defendant Aagaard testified, in part, as follows:

"I made out a deed and brought Mr. Parmelee to her [plaintiff's] house to sign it, and she signed it and turned it over to me."

The witness Parmelee, the notary public, testified that—

"The plaintiff, Mrs. Shannon, acknowledged the execution of the deed at the time the certificate was affixed. She signed the deed in my presence. She was at her home at the time. She gave the document to defendant Aagaard after signing it."

We have italicized certain portions of the finding referred to above. The record has been carefully read by every member of this court. We have looked in vain for any testimony which might support a finding, even by inference from the other evidence given in the case, that the defendant Aagaard, or any one else, had obtained plaintiff's signature "to a paper purporting to be a grant deed of the said premises * * * by trick or device."

[1, 2] Under these conditions, coupled with the fact that the court expressly finds that the plaintiff signed and delivered the instrument identified in the record as the deed to this property, we are confronted with the query: Is the plaintiff estopped to set up her title as against an innocent purchaser of the property, such as the defendant Traylor is conceded to be? We think she is. The principle of equity that, "where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to cause the loss must bear it," in the absence of any showing whatever that trick or device or trick and device has been practiced by the defendants, or any of them, we think is applicable to the case at bar. We are not unmindful of the fact that it is a legal prerequisite that the delivery of a deed by plaintiff must be "accompanied with the intent that the deed shall become operative as such." Kenney v. Parks, 137 Cal. 527, 70 Pac. 556; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898; Burkett v. Doty, 176 Cal. 94, 167 Pac. 518. But, we think, in the absence of a showing, as hereinbefore intimated, the legal presumption that it was so delivered has not been overcome here, and hence is, by force of section 1948 of the Code of Civil Procedure, prima facie evidence of complete execution; that is, of delivery with intent to make it operative immediately as a transfer of title. Burkett v. Doty, supra.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 588

BRADY et ux. v. FOWLER et al.
(Civ. 3177.)

(District Court of Appeal, First District, Division 1, California. Jan. 28, 1920.)

1. EVIDENCE ⊂⊃462—CIRCUMSTANCES ADMISSIBLE TO SHOW NATURE OF AMBIGUOUS INSTRUMENT.

Where the provisions of an original instrument and of the supplemental instrument, expressly intended to clarify the former, were so ambiguous that it could not be determined whether they gave simply an option or were a lease with option to purchase, the trial court properly admitted evidence of the circumstances under which they were made to aid their construction, under Code Civ. Proc. § 1860.

2. APPEAL AND ERROR ⊂⊃548(1)—SUFFICIENCY OF EVIDENCE TO CONSTRUE AMBIGUOUS INSTRUMENT IS NOT REVIEWABLE ON JUDGMENT ROLL.

The sufficiency of the evidence admitted to aid in the construction of ambiguous instruments cannot be reviewed on appeal from the judgment roll alone.

3. VENDOR AND PURCHASER ⊂⊃198 — OPTION HELD TO IMPOSE LIABILITY FOR TAXES ONLY DURING EXISTENCE.

An option for the purchase of land which required the purchaser to pay monthly interest on the purchase price, and to pay all taxes assessed on the property, requires the purchasers to pay only taxes accrued before the termination of the option, not those accrued between such termination and the entry of vendor into full possession of the premises.

4. TRIAL ⊂⊃396(3)—FINDINGS NECESSARY TO CONSTRUE INSTRUMENT HELD WITHIN ISSUES.

Where the pleadings raised the issue as to the correct construction of writings set out in the complaint, and the court properly admitted evidence of circumstances to aid in construing the instrument, its findings of fact as to such circumstances are within the issues.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by J. L. Brady and wife against R. A. Fowler and another. From a judgment for plaintiffs for part of the amount claimed, plaintiffs appeal. Affirmed.

See, also, 188 Pac. 320.

E. L. Brady and De Witt J. Brady, both of Los Angeles, for appellants.

Goudge, Robinson & Hughes, of Los Angeles, for respondent Goudge.

J. Wiseman Macdonald, of Los Angeles, for respondent Fowler.

RICHARDS, J. Appeal by plaintiffs from a judgment in their favor for the sum of $1,306.94. The appeal is taken upon the judgment roll alone; and from the facts found by the court it appears that the plaintiffs, husband and wife, on October 1, 1912, entered into a written agreement with the defendant R. A. Fowler, by which they granted to Fowler an option to purchase certain real property situate in the city of Los Angeles for the sum of $110,000, the latter agreeing, until the exercise by him of said option, during the term of the agreement, to pay to the plaintiffs on the 1st day of every month the sum of $550, these payments aggregating annually the sum of $6,600, and being 6 per cent. upon the said purchase price. Said agreement, or option, also provided that Fowler should pay all taxes assessed upon the property during the term of the option. This writing was variously referred to therein as a "lease and option" and a "lease or option," and much of its verbiage was evidently taken from the form of a lease pure and simple. In the month of July, 1913, the defendant Goudge desiring to succeed to the interest of Fowler under said agreement, but not being willing to do so if it should be claimed by the plaintiffs that it created as between the parties to it the relation of lessors and lessee, the plaintiff J. L. Brady, and defendant Fowler, on July 12, 1913, entered into what is termed in the complaint and findings a "memorandum of auxiliary agreement," the terms of which, however, are just as, if not more, ambiguous than those of the instrument that it purported to clarify. Said plaintiff received from Fowler the sum of $1,000 for entering into this auxiliary agreement, and the court finds that it was entered into for the purpose of satisfying Goudge that the original agreement of October 1, 1912, was an "option to purchase and not a lease," and that it was mutually understood between plaintiff J. L. Brady and the defendants, at the time said auxiliary agreement was executed, that the original agreement and the auxiliary agreement together constituted an option to purchase and not a lease, and that the monthly installments of payments of $550 were intended to be paid as interest on an option purchase price of $110,000 while the option was in force. In this connection the court also found that these two writings were ambiguous and uncertain, but that when construed in the light of the circumstances surrounding their making they constitute an option to purchase said real property, and not a lease and option, as contended by the plaintiffs.

The court further found that defendant Goudge never personally entered into possession of the real property forming the subject of said option, but that at all times mentioned in the amended and supplemental complaints it was occupied by one Jennie Boyd, as a tenant from month to month, at a rental of less than $80 per month, and that

its rental value did not exceed said sum. The court also found as facts that between July 17, 1913, and November 30, 1914, the defendant Goudge paid to the plaintiff J. L. Brady the monthly sum of $550 as interest on said option purchase price; that no payments were made by either of said defendants after November 30, 1914; that between October 1, 1912, and July 17, 1913, defendant Fowler received the benefit of the rentals collected from the occupant of said real property, and that between said last-mentioned date and September 1, 1915, the defendant Goudge received such benefit; and that said option terminated on November 30, 1914. The court concluded as matter of law that each of said defendants was liable to the plaintiffs for unpaid taxes up to the time of the termination of said option, the amount of which it found to be the sum of $1,306.94, and for which the plaintiffs recovered judgment.

[1, 2] The appellants' first contention in support of their appeal is that the court erred in finding that the written agreements above referred to constitute an option to purchase said real property and not a lease thereof with option to purchase, and they refer to certain provisions of the instruments as bearing out this contention. It is very plain, however, that, in view of the ambiguity appearing upon the face of the agreement of October 1, 1912, which was in no wise removed by that of July 12, 1913, ostensibly prepared and executed for that purpose, the trial court was justified in resorting to evidence of the circumstances under which these instruments were made, "including the situation of the subject of the instrument, and of the parties to it." Code Civ. Proc. § 1860. Having admitted evidence upon these points, it has found upon such evidence that the instruments do not constitute a lease. As we have said, the appeal is here upon the judgment roll alone. This appellate court therefore must assume that the evidence thus admitted fully supports the findings of the court (Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Peck v. Noe, 154 Cal. 351, 97 Pac. 865); so that the appellants are in no position here to argue that the writings in question bear the dual character of lease and option.

[3] It is next urged by the appellants that the court erred in restricting plaintiffs' recovery of unpaid taxes to those due up to December 1, 1914, contending that all taxes payable to the 15th of April, 1916, ought to have been allowed; the latter being the date when, according to the court's finding, the plaintiffs resumed control and dominion over the real property. But the trial court having, upon consideration of the evidence received, construed the written agreements which created the rights and obligations of the parties hereto to be an option merely, concluded —and we think correctly—that only those taxes which became due during the life of the option were payable by defendants. They having had the full benefit of said option up to the 1st day of December, 1914, they could not avoid payment of such taxes as were then due; their interest in the option then terminating, there was no further obligation resting upon them to discharge taxes thereafter accruing against the property. Gordon v. Swan, 43 Cal. 564; Smith v. Bangham, 156 Cal. 359, 104 Pac. 689.

[4] It is finally contended by the appellants that there were no issues in the case supporting certain of the findings of the court. The findings thus attacked are those which the court made as to the circumstances surrounding the transaction. But since there was an issue as to the correct interpretation to be given to the writings set out in the complaint, and upon which the plaintiffs based their alleged right of recovery, and the court properly admitted evidence of facts relevant to this issue, its findings touching those circumstances cannot be said to be outside of the issues made by the pleadings.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 592

BRADY et ux. v. FOWLER et al. (Civ. 3181.)

(District Court of Appeal, First District, Division 1, California. Jan. 28, 1920.)

1. VENDOR AND PURCHASER ⊂=198—HOLDER OF OPTION HELD LIABLE UNDER CONTRACT FOR TAXES PAYABLE AT DATE OF FORFEITURE.

A holder of an option under an agreement to pay taxes payable during existence of option was liable to seller for taxes which became payable during the existence of the option, although not required by law to be paid until the day on which the option was forfeited for failure to pay an installment due.

2. VENDOR AND PURCHASER ⊂=214(6)—NO EXPRESS ASSUMPTION BY ASSIGNEE OF OPTION NECESSARY WHERE MADE BINDING UPON ASSIGNS.

Where an option to purchase land by its terms expressly made the obligations thereof binding upon the successors and assigns of the parties, no express assumption of such obligations by an assignee of the option was necessary to bind him and render him liable thereof to the seller of the option, especially where assignee enjoyed the use of the premises.

3. VENDOR AND PURCHASER ⊂=207—HOLDER OF OPTION UNDER AGREEMENT TO PAY TAXES LIABLE TO SELLER FOR TAXES FALLING DUE AFTER ASSIGNMENT TO THIRD PERSON.

A holder of an option to purchase land, part of consideration for which was the payment of

taxes that would fall due during the existence of the option, was liable to the seller of the option for taxes falling due on the property after assignment of the option to a third person, in the absence of a showing that the seller of the option released the purchaser of the option from such obligation.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by J. L. Brady and Mary J. Brady, his wife, against R. A. Fowler and Herbert J. Goudge. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 188 Pac. 319.

J. Wiseman Macdonald, of Los Angeles, for appellant R. A. Fowler.

Goudge, Robinson & Hughes, of Los Angeles, for appellant Herbert J. Goudge.

E. L. Brady and De Witt J. Brady, both of Los Angeles, for respondents.

RICHARDS, J. The plaintiffs brought suit against the defendants to recover from them an amount alleged to be due under the terms of a written instrument claimed by plaintiffs to be a lease with option to purchase, and relating to certain real property in the city of Los Angeles. The defendants denied any liability, claiming in their answers that the writing in question was not a lease with option to purchase, but an option merely, which, by its lapse, had terminated any further liability on their part. The immediate parties to said instrument were the plaintiffs and defendant R. A. Fowler, and the latter, after complying for some time with the terms of the instrument, assigned it to his codefendant Herbert J. Goudge. In its findings of fact the court established the character of this instrument in accordance with the contention of the defendants, and found that it terminated on December 1, 1914, through the nonpayment of a certain sum due to the plaintiffs on that date, and being one of a series of monthly payments required to keep the option in force. The court further found that the writing also imposed upon the holder of the option thereunder an obligation to pay city, county, and state taxes upon the property concerned, and that up to and including the time when the option terminated by the nonpayment of the monthly installment called for there was due as such taxes the sum of $1,306.94, and rendered judgment in favor of the plaintiffs and against each of the defendants for this amount.

[1] Each of the defendants has appealed from the judgment. The record before this court consists of the judgment roll alone, and the court's findings are set out more at length in the opinion of this court filed this day in the plaintiff's appeal from the same judgment and being numbered Civil 3177. For the purpose of the appeals now being considered, however, the brief reference to the findings already made is sufficient.

The first contention in support of the appeal, and which is made by each of the appellants, is that, inasmuch as the court found that said option lapsed on December 1, 1914, there was no obligation upon them to pay taxes due upon that date, citing authorities to the effect that the person to whom an option is given is under no obligation to avail himself of it, and if he permits it to lapse by the nonfulfillment of its conditions it is at an end and fully discharged, and they argue that it is illogical to hold that the option was terminated by the failure of its holder to pay the monthly sum due on December 1, 1914, and at the same time to hold him responsible for the payment of taxes due on that date. This argument derives whatever force it has from the appellants' assumption that the finding of the court is that the taxes in question became due upon said date, but the language of the court in its finding relating to these taxes indicates clearly that they were payable before the day when the option terminated. Moreover, the court found, in effect, that defendant Goudge was in possession of the property by virtue of said option and received the benefit of the rents arising therefrom up to a date ulterior to the termination of the option. There was no obligation upon the part of the defendant Goudge to pay these taxes immediately they became due. He could, if he chose, wait until the last day allowed for their timely payment, but said defendant having, since he took an assignment of the option, made all monthly payments necessary to keep it in force until December 1, 1914, and consequently having enjoyed its benefits until that time, his continuing interest therein having been recognized by the plaintiffs up to said 1st day of December, he cannot be allowed to treat his obligation to pay taxes as if it only arose upon said date, and be heard to say that his neglect to pay them should be given the same legal effect as his failure to make further monthly payments. The court having found that the taxes for which it rendered judgment against him were payable during the life of the option, the payment of these taxes was part of the consideration for that portion of the term of the option which defendant Goudge had already enjoyed when he allowed it to lapse.

This defendant further urges in support of his appeal that there was no express assumption by him of any obligation to pay taxes, or, indeed, to pay the plaintiffs any sum whatever.

[2] The written instrument which the court declared to constitute an option is set out in full in the plaintiffs' complaint, and by its terms the obligations thereof are expressly made binding upon the successors and assigns of the parties thereto. No ex-

press assumption of those obligations by an assignee thereof was therefore necessary. Moreover, as we have said, this appellant having enjoyed the rights arising from his making of the monthly payments therein provided, he cannot escape the burdens coincidentally imposed during such period of enjoyment.

[3] The defendant Fowler in his appeal makes the additional point that as the taxes in question became due after his assignment of the option to Goudge, and during the time that Goudge received the benefit of the rents derived from the property, he ought not to be held liable for them. But there is no finding that the plaintiffs released this defendant from his obligations arising from the option, and it is elementary that his mere assignment of it did not have such effect. So far as the plaintiffs are concerned, both Fowler and his assignee were bound by the conditions of the option. "The obligations of an assignor of a contract continue to rest upon him, and he will be required to respond to the other party to the contract in the event of a default on the part of the assignee." 5 Corpus Juris, 977; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Civ. Code, § 1457.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

182 Cal. 447

Ex parte HARTMAN et al. (Cr. 2300.)

(Supreme Court of California. March 13, 1920.)

CONSTITUTIONAL LAW ⊜82—ORDINANCE, PROHIBITING DISPLAY OF FLAG OF ORGANIZATION ANTAGONISTIC TO FORM OF GOVERNMENT, UNCONSTITUTIONAL.

An ordinance of the city of Los Angeles, making it unlawful for any person to display, or to cause, or to permit to be displayed, publicly or privately, any flag or device of any nature representative of any nation, sovereignty, society, association, etc., which in its purposes, practices, official declarations, or by its constitution, by-laws, or regulations, espouses for the government of the people of the United States of America principles or theories of government antagonistic to the Constitution and laws of the United States of America, or to the form of government thereof as now constituted, is invalid and unconstitutional in so far as it prohibits inhabitants of the United States from individually and collectively advocating peaceable changes in our Constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis.

In Bank.

In the matter of the application of Anna Hartman and Dave Weifman for a writ of habeas corpus, prayed to be directed against the sheriff of Los Angeles county to secure release after conviction of violating an ordinance of the city of Los Angeles. Petitioners discharged.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

J. H. Ryckman, of Los Angeles, for petitioners.

Erwin W. Widney, City Prosecutor, and J. D. Taggart, Deputy City Prosecutor, both of Los Angeles, for respondents.

KERRIGAN, Judge pro tem. Petition for writ of habeas corpus. The petitioners are serving a term of 120 days imprisonment for violating the provisions of an ordinance of the city of Los Angeles which enacts:

"Section 1. It shall be unlawful for any person * * * to display, or to cause or permit to be displayed, publicly or privately, or to have in possession, within the city of Los Angeles any flag, insignia, emblem or device of any nature whatsoever representative of any nation, sovereignty, society, association or organized or unorganized effort of any nature whatsoever which in its purposes, practices, official declarations, or by its constitution, by-laws or regulations, espouses for the government of the people of the United States of America * * * principles or theories of government antagonistic to the Constitution and laws of the United States of America, or to the form of the government thereof as now constituted. * * * "

(Here follow certain exceptions irrelevant to the question involved in this proceeding.)

The ordinance provides that any violation of its provisions above quoted is a misdemeanor punishable by fine or imprisonment or both.

In the month of May, 1919, under this ordinance these petitioners were charged and convicted of unlawfully displaying and having in possession a flag, insignia, emblem, and device representative of an organized effort antagonistic to the Constitution of the United States of America and the form of government thereof. In passing it may be said that the ordinance was passed prior to the enactment of the statute of 1919, defining criminal syndicalism and sabotage, and the latter differs essentially from the former in providing that unlawful acts of force or unlawful methods of terrorism as a means of accomplishing industrial or political changes shall constitute a felony, while the former attaches the quality of criminality to acts which under the federal Constitution are, it is quite apparent, permissible and within the law. Under this ordinance a person would be guilty of the crime defined therein who should have in his possession a flag or emblem representative of an organization which advocated or espoused any change of principle or theory of government, merely because such principle or theory is antagonistic to our present Constitution and form of government. The language of the ordinance is so broad and comprehensive as to render criminal the display or possession of the flag or emblem of a peaceful organization or society which espoused or advocated amendment of the federal Constitution or of our form of government, national or state, in respects admittedly proper from a legal point of view, although giving rise to differences of opinion as to such amendment or change, as, for example, an amendment providing for the recall of members of Congress, or for the introduction into the national legislative machinery of the initiative and recall, or an amendment providing for the extension or restriction of the powers of the president, such as conferring upon him exclusive authority in our relations with foreign countries, or, on the other hand, conferring that exclusive authority upon the United States Senate; or a similar extension or restriction of the authority of the judicial branch of the government. Such proposals would be more or less antagonistic to our present theory and form of government, and yet under our present Constitution their advocacy is not and cannot be made criminal; equally so the display or possession of the flag or emblem of an organization peaceably engaged in such propaganda. Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act.

It follows that the ordinance under consideration, so far as it attempts to make the acts enumerated criminal, is invalid, and that the imprisonment of the petitioners for having engaged in one or more of those acts is in violation of the rights guaranteed to them by the Constitution of this country.

The petitioners should be discharged from custody; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

182 Cal. 360

COLLINS v. RAMISH. (L. A. 4674.)

(Supreme Court of California. March 5, 1920.)

1. CONTRACTS ⟸290—REQUIREMENT OF ARCHITECT'S CERTIFICATE MAY BE WAIVED BY OWNER.

A building contract provision as to architect's certificate evidencing completion of the work as prerequisite to contractor's right to recover balance on his contract was a provision for the owner's benefit which might be waived by him.

2. CONTRACTS ⟸322(3)—EVIDENCE HELD TO SHOW WAIVER OF ARCHITECT'S CERTIFICATE.

In contractor's action for balance due, evidence *held* to support finding that defendant owner waived contract requirement of architect's certificate.

3. CONTRACTS ⟸290—WAIVER OF ARCHITECT'S CERTIFICATE NOT NULLIFIED BY SUBSEQUENTLY SEEKING CERTIFICATE.

That long after owner had waived contract requirement of architect's certificate of completion of the work the contractor, the objection being then raised for the first time, sought such certificate to cure the alleged defect, and it was refused him, did not nullify the prior waiver.

4. CONTRACTS ⟸295(1)—LACK OF SUBSTANTIAL PERFORMANCE OF $3,130 CONTRACT NOT SHOWN BY DEFECTS REMEDIABLE FOR $300.

Where marble and tile work in a theater building was contracted for at the price of $3,130, a finding that the owner should be allowed $300 for imperfections in the work did not require a conclusion that the contract was not substantially performed by the contractor.

5. CONTRACTS ⟸294—QUESTION OF SUBSTANTIAL PERFORMANCE DEPENDS ON FACTS OF EACH CASE.

The question of substantial performance is one to be determined in each case with reference to existing facts and circumstances.

6. TRIAL ⟸404(2)—FINDING OF ABANDONMENT OF ACTION ONE OF FACT AND NOT LAW.

A finding that former action between the parties involving the same subject-matter had been abandoned and was not pending in abatement of the instant action was a finding of fact and not a conclusion of law.

7. ABATEMENT AND REVIVAL ⟸16—PRIOR ACTION HELD "PENDING" UNTIL DECISION ON APPEAL.

In view of Code Civ. Proc. § 1049, providing that an action is pending until determination upon appeal, an action was pending where, after judgment of nonsuit, plaintiff appealed and the appeal had not been decided; it being immaterial that appellant was not in fact diligently prosecuting the appeal, or had practically abandoned it, and that the judgment appealed from was one of nonsuit merely, which could not operate as a bar to another action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pending.]

8. ABATEMENT AND REVIVAL ⟸15—ON DISMISSAL OF PRIOR PENDING ACTION PLEA OF PRIOR ACTION FAILS.

A dismissal of the action pending at the time of the commencement of the instant action, made at any time before the trial of the instant action, or even before the conclusion of such trial, completely disposes of the plea of prior action pending.

9. APPEAL AND ERROR ⟸1178(6)—ON REVERSAL OF JUDGMENT FOR ERROR IN OVERRULING PLEA OF PRIOR ACTION CASE WILL NOT BE DISMISSED BUT NEW TRIAL WILL BE ORDERED.

Where a finding of former action not pending was erroneous, in that the former action was pending on appeal when such finding was made, but the defense of former action pending was very technical, in that the prior appeal had been practically abandoned, and it appeared probable that since such finding such appeal had been dismissed by formal order of court, the instant case will not be ordered to be dismissed on reversal on appeal, but a new trial will be ordered upon the issue of prior action pending.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by B. V. Collins against Adolph Ramish. From judgment for plaintiff, defendant appeals. Reversed, and a new trial ordered on one issue alone.

Alfred H. McAdoo and James E. Mahon, both of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

ANGELLOTTI, C. J. This action was brought by plaintiff, a contractor, to recover certain money alleged to be due from defendant on account of certain marble and tile work done in a theater building in Los Angeles belonging to defendant, which was then being constructed for said owner. The complaint was in three counts, of which it is necessary to consider only one—the second—that being the count on which the action was tried and determined. The action was tried by the court without a jury and judgment was given for plaintiff in the aggregate sum of $1,830, with interest. This is an appeal by defendant from said judgment.

The claim of plaintiff was based upon a written contract of date July 21, 1911, by which he agreed to furnish the labor and materials necessary to complete the marble and tile work in accord with the specifications therefor, under the direction and subject to the approval of the architect, for $3,130, payable in installments. There was a provision that when any payment or installment became due, and at the final completion of the work, a certificate in writing shall be obtained from the architect stating

the amount due. It was further provided that progress payments shall not be construed as an absolute acceptance of the work up to the time of payment, "but the entire work is to be subject to inspection and approval of the architect at the time when it shall be claimed by the contractor that the contract and works are complete." The complaint (filed May 28, 1915), alleged that plaintiff fully completed said contract about January 10, 1912, all in accord with the plans and specifications. It did not allege the issuance of any certificate by the architect, and did allege substantially that said certificate was willfully and without just cause refused by the architect and under the direction of and in collusion with the owner. It further alleged that defendant, who took possession of the premises shortly after January 10, 1912, based his refusal to pay the balance of the contract price on the ground that there was a series of slight depressions in the tile floor and on the further ground that some of the marble slabs did not match, and never objected on account of any failure of plaintiff to secure a certificate from the architect, but based his refusal solely on other grounds, and that defendant waived the production of any such certificate. No question was presented in the trial court as to the sufficiency of the allegation to present the issue of waiver, and the trial court found in accord with the allegations of the complaint in regard thereto. Defendant claimed that the contract was not substantially performed, in that the tile flooring in the lobby was not properly laid and that the marble work did not comply with the specifications. The trial court found that the plaintiff did substantially perform and complete all of the terms and conditions imposed on him by the contract; that the marble work as furnished by plaintiff complied completely with the requirements of the contract; that there are certain "depressions" in the tile floor, but that the tile floor as constructed substantially complies with the conditions of the contract and is a substantial performance thereof; and that "said tile floor is damaged by said trivial defects in the sum of $300, and that said defects can be remedied, and the reasonable cost of remedying said defects is $300." (The judgment was for the sum remaining unpaid on the contract, less said $300.) The trial court further found in accord with the allegations of the complaint in regard to the architect's certificate and the waiver of the same by defendant. In his answer defendant set up the plea of a former action pending, and the finding of the trial court was substantially that, although there had been a previous action, such action was no longer pending. The judgment of the trial court was for the sum remaining unpaid on the contract price, less the $300 allowed defendant as the cost of remedying the defects in the work.

[1-3] With relation to the question of the sufficiency of the evidence to sustain the finding of substantial performance of the contract, appellant's principal reliance, as evidenced by his briefs, appears to be based on the failure of plaintiff to obtain the architect's certificate evidencing completion of the work; the theory being that, in view of the provisions of the contract relative to approval of the work by the architect and the issuance of a certificate to that effect, such certificate constitutes a necessary prerequisite to the right to recover. The provision of the contract as to an architect's certificate was, of course, a provision for the benefit of defendant which might be waived by him. See Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 63, 73 Pac. 740; Valley Lumber Co. v. Struck et al., 146 Cal. 266, 270, 80 Pac. 405; Kling v. Bucher, 32 Cal. App. 679, 163 Pac. 871. There was ample evidence to sustain a conclusion that the want of an architect's certificate was never suggested by defendant as a ground for refusing payment until upon a trial of a previous action, brought by plaintiff against defendant long after defendant had taken possession of the premises, he raised the objection on motion for a nonsuit, and that he had not based his refusal to pay, prior to such action, wholly or in part upon any such ground. There was also evidence tending in some degree to show that the defendant had assumed to act throughout the matter without regard to this provision of the contract, and that the one progress payment that had been made was made by the owner without any certificate or request therefor. We think that upon the record it must be held that there was sufficient evidence to support the finding that defendant waived the requirement. It appears to be generally held in other jurisdictions that the necessary waiver may be inferred from such acts and conduct or declarations of the employer as are inconsistent with the purpose of exacting performance, and that where the refusal of the owner to pay is based wholly upon other grounds than the failure to produce a written certificate of the architect a waiver of that requirement may be inferred. Especially is this true where there is added a course of conduct during the progress of the work indicating that the owner ignores such a requirement, and there is shown a substantial performance by the contractor. See Steelman v. Ludy, 77 N. J. Law, 446, 72 Atl. 423; Lohr, etc., v. Ferguson, 223 Ill. 88, 93, 79 N. E. 35; Tilden v. Buffalo Building Co., 27 App. Div. 510, 50 N. Y. Supp. 511, 515; Quast v. Guetzkow, 164 Wis. 197, 199, 159 N. W. 810; Ashland Lime, etc., Co. v. Shores, 105 Wis. 122, 131, 81 N. W. 136; Masek v. Chmelik, 169 Ill. App. 589. The principle is fully

recognized in American-Hawaiian Eng., etc., Co. v. Butler, 165 Cal. 497, 515, 133 Pac. 280, Ann. Cas. 1916C, 44. That subsequent to the first trial, after this objection had been raised on the trial thereof, plaintiff did seek a certificate of completion of the architect in order to cure the alleged defect, and was refused such certificate, does not preclude the conclusion of waiver. The waiver, if any, had occurred long prior thereto. We see no force in the additional points on this question made for the first time in appellant's supplemental brief filed in this court.

[4, 5] Upon the question of substantial performance in fact we see no reason to doubt that the evidence was sufficient to support the findings. As to what is meant by the term "substantial performance" in such matters as this, the law of this state is clearly set forth in Connell v. Higgins, 170 Cal. 541, 556, 150 Pac. 769. See, also, Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686. The situation was such in this case as to warrant the conclusion of the trial court. The mere fact that defendant should be allowed $300 (the contract price being $3,130) on account of imperfections in the work, if that be the fact, cannot be held to necessarily require a different conclusion. There is no doubt of the sufficiency of the evidence in regard to the tile floor matter to warrant the conclusion that there was no willful departure by the contractor from the provisions of the contract, that he had acted in good faith throughout, and that the owner, who had received and was enjoying the fruits of the work, could be fully compensated by a recoupment for damages in so far as any defects were concerned. The alleged defects were wholly in relation to the manner in which the tiling had been laid; the claim being that the workmen had not laid it in such a way that it was entirely smooth and level, in that there were certain depressions. According to the contractor, these depressions were very slight and not at all serious in their effect. The trial judge had examined the premises and no objection has been reserved to his having so done. The question of substantial performance is one to be determined in each case with refenerce to the existing facts and circumstances. Connell v. Higgins, supra. Under all the circumstances we cannot say that there was error in the trial judge's conclusion.

The District Court of Appeal in deciding this case was of the opinion that there was not sufficient evidence on which to found a conclusion as to the reasonable cost of remedying the defects in the tile flooring; the court finding, as already noted, that while the tile floor was constructed substantially in accord with the conditions of the contract, "said tile floor is damaged by said trivial defects in the sum of $300, and that said defects can be remedied, and the reasonable cost of remedying said defects is $300." No useful purpose can be subserved by a discussion of the fragmentary evidence elicited by the trial court on this question. Suffice it to say that we find therein no evidence furnishing a sufficient basis for the conclusion as to the amount that should be deducted from the contract price on account of the defects. This, as we have noted, was the conclusion of the District Court of Appeal.

[6, 7] The briefs are largely devoted to the question of the defense of pendency of a former action. The court found that there was a former action between these parties involving the same subject-matter, in which a judgment of nonsuit was entered, and, further, that said action had been abandoned and was not pending in abatement of this action. We think the latter finding, while placed among the conclusions of law, must be deemed a misplaced finding of fact. It seems entirely clear that this finding cannot be held to find support in the evidence. The record must be held to show without conflict that, the judgment of nonsuit having been entered, plaintiff took an appeal therefrom to this court, and that such appeal was pending herein at the time of the trial of this action. We see no force in any of the claims to the contrary made by plaintiff.

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." See section 1049, Code Civ. Proc.

The appeal having been taken, it necessarily was a pending appeal until decided or dismissed by the appellate court. That the appellant was not in fact diligently prosecuting the appeal or had practically abandoned it is altogether immaterial. Until it was decided or dismissed there was no final determination of the action upon the appeal, and the action was therefore still pending. This being the situation, the finding of the trial court should have been to the effect that the former action was still pending, and such a finding would have required that this action abate. Plaintiff seeks to exclude this case from the effect of the general rule by reason of the fact that the judgment in the former action was one of nonsuit only, which could not operate as a bar to a second action. This fact is altogether immaterial. Notwithstanding it, the action was still pending by reason of the appeal, which had not been finally determined. The only question is whether the former action was still pending, and the nature of the judgment given from which the pending appeal was taken is altogether beside the question. Plaintiff relies in this contention upon Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141. Some of the language in that opinion may, upon a cursory reading, be misleading. The court there was not dis-

cussing a plea of former action pending, but a case of a former judgment pleaded in bar. After very properly concluding that a judgment of dismissal for failure of plaintiff to appear on the trial could not be held to operate as a bar to another action, the court said, in reply to some contention of appellant, that it necessarily followed that such a judgment cannot be pleaded in abatement and avoidance, that if the "judgment" is such that it cannot be pleaded in bar it cannot be pleaded in abatement, and that a "judgment" which has not the elements to constitute a bar has not the elements to support a plea in abatement. What the case really holds, and all that it has ever been cited for, is that a judgment of dismissal of action for want of prosecution for nonappearance of plaintiff at the time set for trial is not an adjudication of the cause on the merits and is in no way a bar to a subsequent action. Carr v. Howell, 154 Cal. 383, 97 Pac. 885; Hershey v. Bristol, 162 Cal. 110, 121 Pac. 371; Estate of Bump, 152 Cal. 279, 92 Pac. 643. If it could fairly be construed as holding that the character of the judgment in the former action, where judgment has been given in such action, as to its being capable of constituting a bar to another action, is at all material in determining an issue of pendency of former action, it would clearly be wrong and should not be followed.

[8, 9] Defendant insists that, in view of the situation with relation to this matter, the judgment of the superior court should be reversed, with directions to dismiss the action. This was the course followed in Fisk v. Atkinson, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498. There were no findings of fact in that case. Here, as we have seen, we have a finding of fact to the effect that the former action is not pending, and the authorities seem to preclude our ordering a judgment that would not find support in the existing findings. See Kellogg v. King, 114 Cal. 378, 389, 46 Pac. 166, 55 Am. St. Rep. 74; Gwin v. Calegaris, 139 Cal. 384, 391, 73 Pac. 851. But regardless of this we would not be warranted in giving a direction for dismissal or abatement of the action where it is clearly made to appear that the effect thereof would be to accomplish injustice. The record on appeal shows that in this case the defense of former action pending was very technical, inasmuch as the appeal in the former action had practically been abandoned by the plaintiff. All that was lacking to finally determine the former action was an order of this court dismissing the appeal, which formal order counsel for plaintiff apparently deemed unnecessary. It is asserted by counsel for respondent in his brief and admitted by appellant that on January 21, 1919, an order was made by this court, on the application of the plaintiff (appellant), that his appeal in the former action be dismissed. This court had the power to so dismiss the appeal on the appellant's application, and there would not be error in its so doing. The effect of such an order would be to finally end the former action. It is thoroughly settled in this jurisdiction that a dismissal of the former action pending at the time of the commencement of the subsequent action made at any time before the trial of the subsequent action, or even before the conclusion of such trial, completely disposes of the plea of former action pending. See Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; McDougald v. Hulet, 132 Cal. 154, 161, 64 Pac. 278; Balfour, etc., v. Woodworth, 124 Cal. 169, 56 Pac. 891; Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327. It thus appears that plaintiff now probably has a complete answer to the defendant's plea of former action pending available on the new trial, which would naturally be ordered where a judgment is reversed for insufficiency of evidence to sustain a finding. We think we are fully warranted in considering all this, for the purpose of determining whether in addition to reversing the judgment we should order the superior court to abate the action, assuming, of course, that we have the power to make any such order, in view of the findings, and that in view of the circumstances we would not be warranted in ordering a dismissal, even had we power to do so.

We find no other claim of material error that, in view of our conclusion on the points already noticed, merits discussion.

No good reason appears why the new trial that must be had should not be limited to to the matters in regard to which error has been shown. Learned counsel for defendant appears to think that injustice would be done by adopting any such course, in that he relied so confidently on his plea of former action pending that he did not fully develop his other defenses. He had no right to rely to any such extent on this technical plea, and in so far as we can see he did not lack in presenting fully to the court below such defenses as he had. It is a plain duty of appellate courts to facilitate to the extent of their capacity as speedy a disposition of litigation as is consistent with the doing of complete justice between the parties.

The judgment is reversed and a new trial ordered solely upon the issue of a former action pending, and upon the issue respecting the amount, if any, that should be allowed defendant by reason of defects in the tile work, the findings already made upon all other issues to stand as the findings upon such issues in so far as the new judgment to be given is concerned.

We concur: SHAW, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

182 Cal. 392

SAN GABRIEL VALLEY COUNTRY CLUB v. LOS ANGELES COUNTY. (L. A. 4534.)

(Supreme Court of California. March 12, 1920.)

1. WATERS AND WATER COURSES ⊂=38—LONG EXISTING CHANNEL MADE BY WATER ARTIFICIALLY CONCENTRATED HELD NATURAL COURSE.

Where a channel, formed by water which previously spread over the land and disappeared into the ground, but which was artificially concentrated, has continued to exist for more than 30 years, it may be considered as a water course wholly natural in origin.

2. WATERS AND WATER COURSES ⊂=38—INTERMEDIATE FLOW DOES NOT DISPROVE "WATER COURSE."

A channel with defined bed and banks and habitually used by water passing down as a collected body or stream in seasons during which streams in the region are accustomed to flow is a water course in the legal sense, although dry, except in the winter and spring, and at intervals during those seasons.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Water Course.]

3. WATERS AND WATER COURSES ⊂=176—COUNTY'S LIABILITY FOR DAMAGE FROM DRAINS HELD NOT AFFECTED BY CITY DRAIN ENTERING INTO IT.

A drain constructed by a city which merely carried into a county drain water which otherwise would have flowed into the wash into which the county drain emptied cannot affect the right to recover in an action against the county for damages resulting from the construction of its drain.

4. WATERS AND WATER COURSES ⊂=115—WATER IN DEFINED CHANNEL IS NOT "SURFACE WATERS."

"Surface waters" are those which fall on the land from the skies or arise in springs and spread over the surface of the ground without being collected into a definite body and do not include waters already gathered into a definite body flowing as a stream in a water course.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surface Water.]

5. WATERS AND WATER COURSES ⊂=168—COUNTY MAY CONSTRUCT DRAIN IN WATER COURSE INCREASING VOLUME AND VELOCITY.

A county can, as against a lower riparian owner, construct for the reasonable protection of its inhabitants a concrete drain following the general direction of a water course and emptying into it which merely provides a better channel for the water thereby increasing the volume and velocity of the flow below the drain, but does not discharge into the water course any water which naturally would not have entered it.

6. WATERS AND WATER COURSES ⊂=171(1)—IMPROVEMENT OF CHANNEL TO PROTECT LAND NOT ACTIONABLE THOUGH CAUSING OVERFLOW.

A reasonable improvement of the channel of a water course which gives no right of action to a lower riparian owner for damages by erosion is not actionable, though it causes an overflow of the lower channel.

7. EMINENT DOMAIN ⊂=2(1) — DAMNUM ABSQUE INJURIA NEED NOT BE COMPENSATED.

Const. art. 1, § 14, providing that private property shall not be damaged for public use without just compensation, does not make a county liable for an injury inflicted by it which would have been damnum absque injuria if inflicted by a private person.

In Bank.

Appeals from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the San Gabriel Valley Country Club against the County of Los Angeles for damages and an injunction. From a judgment awarding damages to plaintiff, but denying the injunction, both parties appeal. Reversed, with directions to enter judgment for defendant.

A. J. Hill, Co. Counsel, Roy V. Reppy, Asst. Co. Counsel, and Salisbury & North, all of Los Angeles, for appellant.

Hickcox & Crenshaw, of Los Angeles, for respondent.

OLNEY, J. This is an action by the plaintiff, the San Gabriel Valley Country Club, against the county of Los Angeles to recover damages for injury alleged to have been done the plaintiff's land by the construction of certain storm drains by the defendant county and to enjoin the further use of those drains. The trial court found that the plaintiff's land had, in fact, been damaged by the construction and the use of the drains and awarded the plaintiff damages, but refused an injunction. From this result both sides appeal. The trial court made detailed findings of facts, the correctness of which neither side disputes, the contention of the plaintiff being that upon the findings it is entitled to the injunction sought, as well as to damages, and the contention of the defendant being that upon the findings the injury done the plaintiff's land was damnum absque injuria and the plaintiff is entitled to neither damages nor injunction.

The material facts as they appear from the findings are not particularly complicated. The plaintiff's land is situate about six miles south of the base of the Sierra Madre Mountains. From the land to the base of the mountains the country rises on a gradual slope and is occupied in large part by the city of Pasadena. Back of the city there debouch from the mountains with their mouths close together two cañons known as Las Flores and Rubio. From the mouths of these cañons there extends fanlike over the plain for two or three miles a débris cone made up of material washed down by the cañon streams. These streams are dry ex-

cept during and immediately after the rainy season—that is, except during the winter and spring. During the rainy season, however, they at times of storm discharge onto the plain a very large volume of water. Prior to the building up of the locality these waters on emerging from the cañons spread out over the débris cone mentioned and were dissipated without reaching the plaintiff's land.

Between 1870 and 1880 the locality became somewhat settled, and the waters coming from the two cañons were confined and together formed a channel known as the Rubio Cañon wash, in which they flowed from 1881 until the construction in 1913 of the storm drains here complained of. This channel as it proceeds down joins other washes and ultimately passes through the plaintiff's land. The channels run through a porous and sandy soil, and much of the water passing down them was absorbed prior to 1913 before reaching the plaintiff's land. In times of heavy storm also the channels would overflow and a portion of their waters be lost in that manner without reaching the plaintiff's land.

In 1913 the defendant county through the instrumentality of two so-called protection districts constructed the drains, two in number, in question here. They really are but a single drain, since the second is but a continuation of the first. They, or rather it, is a concrete box of a capacity to carry all the waters of the Rubio wash, which it picks up by means of an intake dam near the head of the wash and empties into it again about a mile above the plaintiff's land. It follows the general direction of the wash, and for some of the distance is laid in it, but for some of the distance departs from it.

In the same year the city of Pasadena constructed a drain which apparently, although the findings are not entirely clear upon the point, picked up in similar fashion the waters of East Pasadena wash, one of the tributaries, so to speak, of the wash passing through the plaintiff's land, and emptied such waters into the county drain at or near the point of junction of the Rubio and East Pasadena washes, with the result that from there on the county drain carried the water of both washes, just as the wash below that point had previously done.

Following the construction of these drains, in January and February, 1914, extraordinary and unusual rains occurred in the region, and a great volume of water was passed through the drain and emptied into the wash below, and, continuing down it, very substantially damaged the plaintiff's land. The plaintiff thereupon brought this action because of the injury so done it and the danger of similar injury being done again.

The court further finds, in effect, that the action of the county drains is solely upon the water in the washes; in other words, the drains are substitute conduits for the washes. It follows at once, and the court so finds, that so far as augmenting the volume of the stream in the wash below and passing the plaintiff's land, the action of the drains is twofold, and twofold only: First, they prevent any water escaping from the channel above in time of flood and overflowing the surrounding country and thereby being in large measure dissipated and lost; second, they act as an impervious, and direct, smooth, and unobstructed, and therefore speedier conduit in place of the washes with their pervious bottoms and sides, and indirect, broken, and obstructed, and therefore slower channels. The amount of absorption by the porous bottoms and sides of the washes must have been considerable, and the court so finds, and it is plain that to the full extent of this the volume of water in the stream below the drains is increased. The speedier passage of the water through the drains would also of itself augment the volume below in times of storm, at least to the extent to which it brings more nearly together at one time in the channel the storm waters from the mountains and those from the plain immediately about. But the whole effect of the drains, so far as increasing the volume in the stream is concerned, may be summed up by saying that they add no water to that already in the channel and that which would come to it on the way, but merely serve to pass such waters more completely and more speedily from one point in the channel to another, all entirely above the plaintiff's land.

So far as the velocity of the water in the wash as it passes the plaintiff's land is concerned, it is apparent that the drains do not affect it otherwise than to the extent to which the velocity is increased by an increased volume of water. The plaintiff's land is a mile or more below the lower end of the drains, and any impetus the water may have as it emerges from the drains must be lost long before reaching the plaintiff's land. There is no increase in velocity, in other words, except such as is a necessary incident of an increased volume.

The case presented by the findings is therefore simply one where a public authority has constructed an artificial conduit which, to the extent of its length, but no further, acts as, and only as, a substitute for a natural channel which continues on down to and through the plaintiff's land a mile or so below. It should also be noted that there is no finding and there is nothing to indicate that this artificial conduit was not a reasonable improvement for the benefit and protection of the territory through which the natural channel for which it was a substitute ran, or that it was constructed in a manner more burdensome to the plaintiff

than was required for the purpose for which it was constructed. The question presented may be thus stated: Has the owner of land through which a natural water channel runs a right to complain of an improvement of that channel above his land (for the substitute conduit is but that) and has no other effect, when the improvement is a reasonable one for the benefit of the upper land through which the channel runs and is not constructed in an unreasonable manner?

[1] Before discussing this question, there are certain matters which should be disposed of preliminarily. We have referred to the Rubio Cañon wash and the continuation of it through the plaintiff's land as a natural water channel. In one sense it is not that. It did not exist as a definite water course, at least as far as the plaintiff's land, before the region was settled up, but was created as the result of settlement. Nevertheless it is natural in the sense that it was originally made by the waters themselves, and not by man, although it is possible that except for the acts of man the waters would not have been kept together so as to make a channel. In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin. City of Reading v. Althouse, 93 Pa. 400.

[2] Likewise it is a water course in the legal sense, although dry except in the winter and spring and very possibly at intervals even in these seasons. It is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow. It is wholly different from a swale, hollow, or depression through which may pass surface waters in time of storm not collected into a defined stream. Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Los Angeles, etc., Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

[3] Mention should also be made of the East Pasadena drain constructed by the city of Pasadena. Apparently from the findings it is of the same character as the drains constructed by the county; that is, it serves only to carry waters already collected in the East Pasadena wash and does not serve to collect other waters and add them to those already there. But, however this may be, the drain was not constructed by the county, and no relief in regard to it can be given in this action, which is against the county alone. While it discharges into the county drains, this fact is not material, since, if the latter were not there, it would discharge into the wash, and its waters would then, as now, pass down the wash to the plaintiff's land.

[4] It should also be observed at the outset that the present case is not concerned with surface waters. Such waters in the legal sense are those which fall on the land by precipitation from the skies or arise in springs and spread over the surface of the ground without being collected into a definite body. McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; 3 Farnham on Waters, § 278. As to such waters the rule has been established by numerous decisions in this state that a landowner may not gather them together on his land by artificial means and discharge them onto lower lying land in greater volume or in a different manner than they would naturally be discharged. Of this character are the following decisions cited on behalf of the plaintiff: Conniff v. San Francisco, supra; Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174; Shaw v. Sebastopol, 159 Cal. 623, 115 Pac. 213; Heier v. Krull, 160 Cal. 441, 117 Pac. 530; Cox v. Odell, 1 Cal. App. 682, 82 Pac. 1086; Peck v. Peterson, 15 Cal. App. 543, 115 Pac. 327; and Stanford University v. Rodley (App.) 177 Pac. 175. But the present case is not concerned with surface waters, and the foregoing decisions are not in point. The waters upon which the drains here in question act have lost their character as surface waters before they reach the drains and have already been gathered into a definite body flowing as a stream in a water course. The difference between surface waters and those collected and flowing in a water course is well recognized, and the same rules by no means apply to one as to the other.

Likewise the distinction should be observed at the outset between the present case and such decisions as Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400, Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143, Wood v. Moulton, 146 Cal. 317, 80 Pac. 92, and Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. 1085, which are also cited on behalf of the plaintiff. These cases were all concerned with water in water courses and with improvements or changes in drainage. So far they resemble the case at bar. But in all of them, unlike the present case, the improvement or change did not have the effect merely of passing down the water in a stream more completely and speedily from one point in its channel to another, but of diverting it entirely from its channel and discharging it either into a different channel in which it did not naturally flow or upon neighboring land where there was no channel.

Of these cases Rudel v. Los Angeles County is particularly relied upon, and we are referred so strongly to it as determinative

here that a statement of it may not be amiss. It involved an earlier attempt by the county to dispose of the same waters as those which are now disposed of by the present drains. Instead, however, of passing these waters down to a lower point in their channel as it is now attempted to do, it was planned to divert them entirely and to discharge them into another water course to the east in which they did not normally flow. So to do was to impose upon such other channel the burden of carrying the drainage of a watershed not tributary to it. Upon this ground the carrying out of the improvement was enjoined at the instance of a landowner through whose property the second channel ran. The question so presented and determined is manifestly different from the question here, where the channel involved is the natural drainage outlet for the water involved and the improvement complained of is one which, as we have said, merely passes the water more completely and more speedily from one point in the channel to another; both points being entirely above the plaintiff's land.

[5] Passing now to this question, the ultimate one in the case, it cannot be said that there is any decision in this state dealing with just such facts or which seems on a first reading to be directly in point. But when the plaintiff's position is analyzed, and the rule is ascertained upon which the plaintiff must depend as the law in order to have a cause of action, it appears clearly that such rule is opposed to previous decisions by this court and is not the law. The plaintiff's complaint is solely that the drains increased the volume and speed of the water in passing its land. No complaint is made of the manner in which the drains are constructed, or that they are not reasonable improvements for the district they are designed to protect, or that they are unnecessarily injurious to the plaintiff, or that they bring into the channel water for which it is not the natural drainage outlet, or, in a word, that there has been any wrong committed into which there enters any factor other than simply an increase in the volume of the stream and consequent increase of speed and height produced by artificial means. The plaintiff's position is, and must necessarily be, that the owner of land through which a water course passes has the right to have the stream flow by exactly as it would naturally flow and may complain of any increase of volume, no matter how caused, providing only it be caused by artificial means. But this position is directly opposed to the decisions of this court that a riparian owner may construct embankments or levees along the bank of the stream to prevent the overflow and erosion of his land. Barnes v. Marshall, 68 Cal. 569, 10 Pac. 115; Lamb v. Reclamation District, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; De Baker v. Railway Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

The inevitable effect of such an embankment which holds the waters of the stream within its channel and prevents them from widening the channel by erosion is to increase the volume and speed of the stream at times of high water both in front of and below the embankment. Such increased volume and speed may damage lands below and yet the decisions mentioned hold that such damage is damnum absque injuria. There is no essential difference between these cases and the present. Under them the county, without any liability to the plaintiff, could unquestionably have constructed dikes along the banks of the Rubio wash, which would have held within it all overflow waters and prevented seepage through the banks. Such dikes would have increased the volume of water below and consequently its rate of flow and would also have passed the water along more rapidly from one point in the channel to another. But the drains here complained of serve exactly the same purpose, that of protecting the lands on each side of the stream, and have identically the same effect and no other. The only difference between the drains and such embankments is that the former accomplish their purpose somewhat more completely and effectively than the latter would. But the purpose is the same, the manner of accomplishing it, that of restraining the waters, is the same, and the results are the same except for some difference in degree. Nor is this difference in degree material, since, to repeat, there is no contention that the drains are an unreasonable means of accomplishing the purpose for which they were built. The complaint is not against the means adopted, but against the necessary incidents of the purpose itself. But the purpose is a lawful one, and the decisions mentioned determine that no cause of action arises merely because of what is a necessary incident of the accomplishment of this purpose.

The plaintiff's position is based on the much-quoted maxim, "Aqua currit et debere currere ut currere solebat." But there are many departures from this rule, of which the right to a reasonable use of the water in the stream by an upper riparian owner is perhaps the most familiar. The exercise of this right in most cases diminishes the flow. But there are uses which at times increase it, as, for example, where dams are put in for the use of mills and the water is allowed to escape at times in greater volume than the stream would then otherwise carry. In such a case no right of action by a landowner below exists because of the increase of volume and consequent acceleration of flow, provided the use is a reasonable one and exercised in a reasonable manner. The reason for per-

mitting such departure from the maxim quoted is that not to do so would be largely to destoy the usefulness of the stream. 2 Farnham on Waters, §§ 475, 476.

The present case is not wholly analogous to those just mentioned, but the reason for it is much the same and is indeed stronger. Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy. Such a rule would seriously interfere with the development of the country. Because of this and because of the necessity of permitting the utilization for drainage of the means afforded by nature for the purpose, a very great preponderance of the decisions in other states go further than it is necessary to go in this case and hold that a riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. Furthermore, this rule is adopted regardless of whether the so-called common-law rule concerning surface waters prevails in the particular jurisdiction or, as here, the civil law rule, which forbids the gathering together of surface waters and discharging them as a stream upon adjoining lands. If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. Kauffman v. Griesemer, 26 Pa. 407, 67 Am. Dec. 437; Ludeling v. Stubbs, 34 La. Ann. 935; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Shaw v. Ward, 131 Wis. 646, 111 N. W. 671, 11 Ann. Cas. 1139; Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627; Vannest v. Fleming, 79 Iowa, 638, 44 N. W. 906, 8 L. R. A. 227, 18 Am. St. Rep. 387; Thompson v. Andrews, 39 S. D. 477, 165 N. W. 9; Mizzell v. McGowan, 125 N. C. 439, 34 S. E. 538; Id., 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705; Waffle v. N. Y. Central R. R., 53 N. Y. 11, 13 Am. Rep. 467. Mr. Freeman in his note in 85 Am. St. Rep. 727, reviews very thoroughly the authorities dealing with the right to accelerate or diminish the flow of water, and upon the particular point under discussion says (page 733):

"We have just noticed the difference between merely draining onto another's land, and draining into a natural channel or water course, which flows across such land. So far as streams or natural water courses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume without subjecting himself to liability for any damage suffered by a lower owner."

If a riparian owner cannot complain if surface waters be actually added by artificial drainage above to the volume of the stream, it must certainly be that he cannot complain of a drainage improvement which adds no water to the stream, but merely protects the adjoining lands against the water already in it. The cases in which this exact question is presented are not many, but so far as we have been cited to them they all, with one possible exception, so hold. Daum v. Cooper, 103 Ill. App. 4; Fenton, etc., Railroad v. Adams, 221 Ill. 201, 77 N. E. 531, 112 Am. St. Rep. 171; Dorr v. Simmerson, 127 Iowa, 551, 103 N. W. 806; Manteufel v. Wetzel, 133 Wis. 619, 114 N. W. 91, 19 L. R. A. (N. S.) 167; Steiner v. Steiner, 97 Neb. 449, 150 N. W. 205.

Of these cases Fenton, etc., Railroad v. Adams is perhaps the strongest. There a stream came onto the land of the defendants and spread out into a marsh, where its waters were delayed and the débris they carried in time of storm deposited, and thence continued on down to the plaintiff's railroad tracks beneath which it passed by a culvert. The defendants constructed a ditch which diverted the stream from its channel above the marsh and conveyed it by a more direct route with a higher gradient, avoiding the marsh, to a point in the channel below the marsh, but still upon the defendant's land. The railroad company sought to enjoin the maintenance of the ditch on the ground that it would largely increase the amount of water coming to its culvert in time of storm and would also bring to the culvert a large amount of débris which would otherwise be deposited above. It was held, however, that the defendants had the right to improve the course of the stream through their land; that the ditch, although it diverted the stream from its channel for a portion of its distance on the defendants' land, was nothing more than such an improvement, and that the railroad company had no cause of action. There is no material difference whatever between such facts and those of the case at bar.

The possible exception mentioned to these decisions is Grant v. Kuglar, 81 Ga. 637, 8 S. E. 878, 3 L. R. A. 606, 12 Am. St. Rep. 348. It is, however, not possible to ascertain just what the facts of this case were, and certainly the statement of Judge Freeman concerning it in 85 Am. St. Rep. 725, that the broad proposition it lays down is not universally true, is correct. If it is to be considered as in point here, it is opposed to the whole drift of the decisions generally and to the weight of authority upon the particular point.

When we say that the decisions upon the exact question here presented are not many, we are not unaware of the fact that there are a very large number of decisions in

which a change in natural conditions increasing the volume or accelerating the flow of a stream has been enjoined. But in these cases there entered factors other than those merely of a change reasonably made for the protection of land above and having the effect only of increasing the volume and to that extent the speed and height of the water in the channel when it reached the plaintiff's land. There was an unlawful encroachment upon the channel, or a diverting of the course or direction of the current, or a pollution of the stream, as where the drainage was of sewage as well as of water, or some other factor which imposed upon the plaintiff a burden other than merely that the channel should serve in an increased degree as the drainage outlet for the waters which would naturally drain to and through it. Our conclusion is that an improvement for the purposes of drainage of lands above does not give a lower riparian owner on the stream a cause of action merely because the improvement increases the volume of water coming to his land in the stream with the incidents necessarily accompanying such increase of volume, but without affecting the stream in any other manner. Such is the present case.

[6] There remains, however, one point which should be discussed. It is frequently stated, and some decisions perhaps hold, that the rule that no action lies simply because of an increase in the volume of a stream caused by improvements for drainage above is subject to the limitation that thereby the natural capacity of the channel be not exceeded; that is, that the lands below be not flooded. It does not appear from the findings in the present case whether the plaintiff's land was flooded or not. What does appear is that a considerable portion of it was washed away. This may well have happened without the land being actually overflowed. But, however this may be, we are of the opinion that no such limitation should be adopted. On the one hand, the authority for it consists largely of dicta and casual statements, and, on the other hand, it is wholly impracticable and in many cases destructive of the rule on which it is supposed to be only a limitation. This is very clearly pointed out and the limitation rejected in Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705. As is there said:

"Suppose the natural capacity of the water course was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains.

"Again, suppose the upper tenant were compelled to regard the natural capacity of the stream; how far down would this limitation extend? Naturally many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury how would he apportion his damages, and where would the liability of each tort-feasor begin and end? These questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such a state of perplexity as to seriously endanger their intelligent determination of the issues."

The reasons so stated may be multiplied many fold. To them also may be added the query: Why should there be any difference between injury done by flooding and injury done in any other manner by an increase in the volume of the stream. If it be the injury alone which constitutes the wrong, why should a recovery not be permitted whatever form the injury takes. On the other hand, if it be not the injury alone which constitutes the wrong, why permit a recovery because of it when it takes the form of flooding. The injury done by erosion, for example, is frequently much more serious than that done by flooding. It was undoubtedly so in the present case. No reason can be seen why, if injury by flooding is actionable in such a case as the present, injury by erosion should not be so likewise. Yet, if the rule stated, established by the great weight of authority and based on strong considerations of public good, be subject to the limitation that the increased volume of the stream caused by drainage improvements above, otherwise lawful, do not cause injury by erosion, the rule does not in reality exist, since there can be no increase in the volume of the stream without increasing its speed, and consequently its erosive effect, and the doing of a theoretical injury, at least, to the banks past which it flows.

Summing up the discussion, our conclusion, as we have stated, is that an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden, and further that the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel. The injury to the plaintiff's land comes directly within this rule, and is therefore not actionable.

[7] It is apparently contended on behalf

of the plaintiff that, even if the injury be damnum absque injuria as between private parties, yet, when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our Constitution (article 1, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in Gray v. Reclamation District, 174 Cal. 622, 163 Pac. 1024.

It follows that the plaintiff was not entitled upon the findings either to an injunction or to damages.

Judgment reversed, with directions to the trial court to enter judgment for the defendant with costs.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; KERRIGAN, Judge, pro tem.; LAWLOR, J.

182 Cal. 427

In re ELIZALDE'S ESTATE. (L. A. 5687.)

(Supreme Court of California. March 13, 1920. Rehearing Denied April 7, 1920.)

1. SUBROGATION ⟸7(1)—CODE PROVISION IS DECLARATORY OF COMMON LAW, AND NOT COMPLETE STATEMENT OF LAW OF SUBROGATION.

Civ. Code, § 2848, providing that a surety on satisfying the obligation of the principal is entitled to enforce every remedy which the creditor has against the principal is declaratory of the common law, and, though controlling so far as it goes, does not embrace the whole law on the subject of subrogation.

2. COMMON LAW ⟸11—STILL IN FORCE EXCEPT WHEN INAPPLICABLE OR MODIFIED BY STATUTE.

Under Pol. Code, § 4468, the common law, except so far as it is inapplicable to existing conditions or has been modified by statute, still remains in force.

3. STATUTES ⟸222—CIVIL CODE DOES NOT EMBODY WHOLE LAW ON MATTERS COVERED.

The Civil Code was not designed to embody the whole law of private and civil relations, rights, and duties, but is incomplete and partial.

4. STATUTES ⟸222—CIVIL CODE TO BE CONSTRUED IN LIGHT OF COMMON-LAW DECISIONS.

Except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject-matter, a section of the Civil Code, purporting to embody such doctrine or rule, will be construed in the light of common-law decisions on the same subject.

5. SUBROGATION ⟸8 — SURETY SUBROGATED TO PRINCIPAL'S RIGHTS AGAINST SURETY.

By the common law the surety upon satisfying his principal's obligation is subrogated, not only to the rights and remedies of the creditor against the principal connected with the debt, but also to the similar rights and remedies of the principal against the creditor.

6. SUBROGATION ⟸8 — ADMINISTRATOR'S SURETIES SUBROGATED TO HIS RIGHTS FOR ADVANCES TO DISTRIBUTEE.

Sureties of a deceased administrator who were required to pay the amount due from him to the estate were subrogated to his right to reimbursement on final distribution for amounts advanced by him to a distributee.

7. EXECUTORS AND ADMINISTRATORS ⟸501—NO PRESUMPTION THAT SERVICES ARE RENDERED GRATUITOUSLY.

There is no presumption that an administrator's services are rendered gratuitously.

8. SUBROGATION ⟸35 — SURETIES DID NOT LOSE RIGHT BY CONTESTING LIABILITY.

Sureties of a deceased administrator by contesting in court his liability for moneys misappropriated by him did not lose their right to be subrogated to his claim for commissions on final distribution of the estate.

9. EXECUTORS AND ADMINISTRATORS ⟸117—LIABILITY FOR MISAPPROPRIATION LIMITED TO AMOUNT APPROPRIATED WITH COMPOUND INTEREST.

The limit of liability for an administrator's failure to account for assets of the estate whether the misappropriation is willful or careless, in the absence of a showing that a larger profit was realized therefrom, is the return of the principal sum with legal interest, compounded annually.

10. JUDGMENT ⟸744 — JUDGMENT AGAINST ADMINISTRATOR'S SURETIES PREVENTS DEDUCTION OF ATTORNEY'S FEES FROM COMMISSIONS.

A judgment in favor of an estate against a deceased administrator's sureties was res adjudicata as to the extent of their liability, and prevented deduction of the amount paid an attorney for services in recovering such judgment from commissions due the administrator on final distribution.

11. EXECUTORS AND ADMINISTRATORS ⟸301, 479—ADMINISTRATOR MAKING ADVANCES ENTITLED TO CREDIT ON DISTRIBUTIVE SHARE.

Where an administrator, in anticipation of distribution, makes payment to distributees on account of their distributive shares, such payments are not a proper subject of final account, and his only right is, when distribution is ordered, to have the payment on account retired from the shares of such distributees.

12. SUBROGATION ⟸41(1)—RIGHT OF SUBROGATION OF ADMINISTRATOR'S SURETIES WORKED OUT ON FINAL DISTRIBUTION.

The right of subrogation of sureties on a deceased administrator's bond to the administrator's rights against distributees to whom he made advancements in anticipation of distribution can only be worked out upon final decree of distribution.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Proceedings to settle the final account of Elisa P. Curletti, administratrix of Marcos A. Elizalde, deceased. From an order settling the account and directing distribution, the administratrix and the widow, Victoria C. Elizalde, appeal, and Gaspar O. Marre, as administrator of Luigi Marre, deceased, and A. McAlister also appeal. Affirmed.

See, also, 163 Cal. 681, 126 Pac. 978.

B. F. Thomas, of Santa Barbara, for appellants.

Wm. Shipsey and S. V. Wright, both of San Luis Obispo, for respondent.

PER CURIAM. This is an appeal from a decree settling the final account of Elisa P. Curletti, administratrix of the estate of Marcos A. Elizalde, deceased, and ordering distribution of the estate.

Upon this appeal, taken by Victoria C. Elizalde, the widow of the deceased, and by the said administratrix, Elisa P. Curletti (née Elizalde), a daughter of the said decedent, they seek to have reviewed that part of the decree wherein the court ordered paid to the respondents, Gaspar O. Marre, as administrator of the estate of Luigi Marre, deceased, and A. McAlister, certain sums, representing advances and interest thereon made to said Victoria C. Elizalde, on account of her distributive share of said estate, by one Ernest Graves, a former administrator now deceased, and the amount of commission due Graves as such administrator, said respondents being respectively a surety and administrator of the estate of a surety upon the bond of said Graves as administrator of said estate, who had appeared and contested the settlement of said final account of said administratrix.

Growing out of different phases of the controversy four appeals have been taken and decided by the appellate courts of this state. Elizalde v. Murphy, 146 Cal. 168, 79 Pac. 866; 4 Cal. App. 114, 87 Pac. 245; 11 Cal. App. 32, 103 Pac. 904; and 163 Cal. 681, 126 Pac. 978.

So far as may be necessary for an understanding of the questions involved in the present appeal the facts giving rise to the differences between the parties may be summarized as follows: Marcos A. Elizalde died intestate on December 1, 1891, leaving as sole surviving heirs the appellants Victoria C. Elizalde, his widow, and Elisa P. Curletti, née Elizalde, his daughter. Ernest Graves, an attorney at law, was at different times special and general administrator of the estate of said deceased, being such general administrator from February 28, 1894, until July 15, 1900, on which day he died without having rendered a final account and leaving the administration of said estate unfinished. During his administration he had filed four separate accounts. In the last of these, which was filed on July 9, 1898, it appears that he had in his possession funds of the estate to the amount of $5,133. Thereafter, on April 8, 1901, Elisa P. Curletti was appointed administratrix of said estate, and during the course of her administration she commenced an action against the sureties on the bond given by Graves as administrator, to which suit the latter's administrator was subsequently made a party defendant. Final judgment in that action was entered in favor of the plaintiff and against the sureties (who at that time were Gaspar O. Marre, administrator of the estate of Luigi Marre, and A. McAlister) in the sum of $12,131.14, which was made up, according to the findings in this proceeding, of the sum of $5,133, balance in the hands of Graves, according to his last account, together with other moneys collected by him after filing that account, less certain credits to which he was entitled, making finally due from him to the estate the sum of $4,342.15, to which was added interest thereon at the rate of 7 per cent. per annum from July 15, 1900, to January 20, 1911, compounded annually. That judgment was paid by said sureties in fulfillment of the obligation of their bond, and it amounted, with costs and interest, at the time it was paid to $14,168.03. At the trial of that case said sureties sought to be credited with the amount of certain advances made by Graves to the widow of Marcos Elizalde, deceased, and with the amount of his administrator's commissions, but it was finally held upon appeal (Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245) that such credits, if proper, could only be allowed upon the settlement of the final account and decree of distribution.

On September 17, 1913, Elisa P. Curletti filed her final account as administratrix, and petitioned for distribution. To this account and petition said sureties filed their written contest, in which they alleged, in part, that Graves, as administrator, had advanced to Victoria C. Elizalde, who was entitled to have distributed to her a certain share of the estate, $930 out of the funds of the estate, which had not been repaid and for which no credit had ever been allowed to him. They also alleged that Graves, as administrator, was entitled to commissions, which also had not been credited or paid to him. The court found these allegations of the contestants to be true, and also that—

"In the accounting had between said administratrix and said contestants, Marre and McAlister as bondsmen aforesaid, in said equitable action of Elizalde v. Murphy et al., the court charged said contestants with said sum of $930, together with interest thereon at the rate of 7 per cent. per annum from July 15, 1900, to January 20, 1911, compounded annually, making $1,214.73 interest, and making a total of $2,144.73 for principal and interest, and said sum of $2,144.73 became and formed a part of

said judgment of January 20, 1911, for $12,131.14 which was paid by said contestants to said administratrix as aforesaid."

The court further found that the aggregate of the commission for which the estate was liable to the former administrator, Graves, and the present administratrix, Elisa P. Curletti, was the sum of $2,358.68, of which sum the former was entitled to $1,604.95. The court also found that Graves rendered to the estate extraordinary services, as alleged in the amended contest, but that he was not entitled to any additional compensation. Continuing its findings, the court proceeds:

"By reason of the facts herein found, said contestants have become and are subrogated to the rights of said administrator to recover from and have paid to them out of said estate the aforesaid part of said commissions to which said administrator was entitled, namely, the sum of $1,604.95.

"By reason of the facts herein found said contestants have become and are subrogated to the rights of said administrator to recover from said Victoria C. Elizalde the aforesaid sum of $930 advanced to her by said administrator as aforesaid, with interest thereon from July 15, 1900, to January 20, 1911, amounting to $1,214.73, making a total of $2,144.73, and said contestants have become subrogated to the rights of said administrator to have said sum of $2,144.73 paid to them by said administratrix out of the distributive share of the money of said estate belonging to said Victoria, and if such distributive share of money be insufficient, then to have a lien for the balance of said $2,144.73 upon the distributive share of said Victoria of the real property of said estate."

It is earnestly urged by the appellants in support of their appeal that the court committed error in concluding that the contestants were entitled to be subrogated to the rights of their principal to a set-off against the estate for the amount of his earned commission, and to have distributed to him out of the distributive share of Victoria C. Elizalde the amount of his advances to her. In passing it should be noticed that while the court in Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245, said that whatever rights to subrogation the sureties might have should be adjudicated upon the hearing of the petition for settlement of the final account and for distribution, still it did not decide that they were in fact entitled to subrogation. The denial by appellants of this right of subrogation on the part of the respondents is based on the theory that section 2848 of the Civil Code defines and limits the right of subrogation of sureties in this state, and that as so defined and limited it will not permit these respondents to claim the benefit of any rights which their principal might have had against the estate of Marcos A. Elizalde or a distributee thereof to whom said principal had made advances. That section reads:

"A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his cosureties to contribute thereto, without regard to the order of time in which they became such."

[1, 2] The appellants argue that the contestants, by virtue of their suretyship and the doctrine of subrogation, upon payment by them of the judgment obtained against them as sureties, became subrogated to only the remedies which Elisa P. Curletti, as administratrix, had against Graves or his estate, and not to any rights of Graves against the estate of Marcos Elizalde or against Victoria C. Elizalde. This, perhaps, would be true if, as asserted by appellants (section 2848, Civil Code) comprehensively and exclusively measures the rights of sureties to subrogation. This, however, we think is not the case. That section is merely declaratory of the common law on the subject, and controlling only so far as it goes. It does not appear to us that by it the Legislature intended to announce all the law on the subject. In this state the common law, except so far as it is inapplicable to our conditions, or has been modified by statute, still remains in force. This principle is referred to in the Estate of Apple, 66 Cal. 434, 6 Pac. 7, where the court said:

" 'The Code establishes the law of this state respecting the subjects to which it relates;' but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed having been * * * abolished here; but where the Code is silent, the common law governs."

[3, 4] The common law of England is declared to be the rule of decision in all the courts of this state so far as not repugnant to or inconsistent with our Constitution and statutes. Pol. Code, § 4468. The Civil Code was not designed to embody the whole law of private and civil relations, rights and duties; it is incomplete and partial; and, except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject-matter, a section of the Code purporting to embody such doctrine or rule will be construed in the light of common-law decisions on the same subject. Siminoff v. Goodman & Co. Bank, 18 Cal. App. 5, 11, 121 Pac. 939.

[5] By the common law a surety, upon satisfying his principal's obligation, is entitled to be subrogated, not only to the rights and remedies of the creditor against the principal connected with the debt, but is also entitled

to be subrogated to the similar rights and remedies of the principal against the creditor. In Sheldon on Subrogation, at section 1, it is said:

"Subrogation is a doctrine of equity jurisprudence although its principles are often applied in courts of common law; especially in those states in which equitable remedies are administered through the forms of law. It is a substitution ordinarily of another person in the place of a creditor. * * * More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim. * * * In this country its principles have been more widely developed and its doctrine more generally applied than in England. * * * It is so administered [here] as to secure real and essential justice without regard to form. * * *"

[6] A surety on an insolvent administrator's bond who has paid his principal's debt is entitled to be subrogated, not only to the rights of the creditor, but also to those of his principal. 37 Cyc. 434. See, also, Sheldon on Subrogation, § 100; Harris on Subrogation, § 551; Commonwealth v. Gould, 118 Mass. 300; Putney v. Fletcher, 140 Mass. 597, 5 N. E. 640.

It follows, therefore, we think, that the construction advocated by the appellants, which would confine the surety's rights of subrogation to those derivable from the creditor, is not the true rule, and that the court below correctly apprehended it in its adjudication in this proceeding.

[7] As to the commission due to Graves as administrator, the evidence in our view sustains the finding that Graves did not waive such commission. According to the terms of the last account rendered by him, he withdrew from consideration in that account the question of his compensation, and reserved it for settlement upon the final account. Indeed, there is no evidence in the case to sustain the view that Graves waived his commission, and, as there is no presumption that an administrator's services are rendered gratuitously, it is clear that appellants' contention that the trial court should have found Graves waived his commission as administrator cannot be successfully maintained.

Equally without merit, we think, is the assertion by appellants that the evidence fails to sustain finding No. 25. This finding correctly computes the total amount due as commissions upon the administration of the estate, makes a fair and just apportionment thereof between the two administrators, and also decrees that Graves was not entitled to an extra allowance for extraordinary services rendered as an attorney at law.

[8-10] Upon this subject there remains to be considered the appellants' contention that the contestants are entitled to no credit for commission earned by Graves for two reasons: First, because of his dereliction of duty; and, second, that there should be deducted therefrom the sum paid out of the funds of the estate as an attorney's fee for services in recovering from said contestants as sureties the amount of Graves' defalcation, and which fee amounted to more than the earned commissions. We think there can be no serious doubt that these contestants had a perfect right to their day in court for an adjudication of their rights and obligations under the bond, without thereby losing their equitable right of subrogation in respect of payments made as the result of the judgment obtained against them in that action, or of commissions to become due to their principal. And as to the failure of the administrator to account for assets of the estate, assuming that the misappropriation thereof was willful instead of careless, still the limit of his liability where, as here, it was not shown that a larger profit was realized therefrom, is the return of the principal sum with legal interest thereon compounded annually (Estate of Cousins, 111 Cal. 441, 445, 44 Pac. 182; Estate of Carver, 123 Cal. 102, 104, 55 Pac. 770), which, as we have seen, was recovered by the estate. But aside from all this, the claim of the estate of Marcos Elizalde, deceased, arising from the dereliction of its administrator, was heard and determined in the action against the sureties, and is hence res adjudicata.

We are also satisfied that the evidence supports the finding that the $930 advanced to Victoria C. Elizalde was out of the funds of the estate, and was not a personal loan by Graves. It is true that the latter did not, in any of his accounts, credit himself with the advances going to make up this sum, but the trial court was justified in inferring that this omission was due to the fact that the sums so advanced were not, strictly speaking, disbursements made in the course of administration, and hence, not to be credited in his accounts, but could properly be reserved until distribution of the estate was ordered. Moreover, Mrs. Elizalde in her testimony, taken upon this and previous trials, stated that she received the amount in question from Graves, and that it was not a personal loan.

[11, 12] It is also clear that this sum of $930 was included in the amount which the court in the previous trial had found that Graves had misapplied, and which his sureties were required to refund to the estate. As they were compelled to pay this sum, with interest compounded annually, they are entitled to be reimbursed therefor out of the distributive share of Victoria C. Elizalde, to whom the advances were made.

"Where an administrator, in anticipation of distribution, makes payments to the widow or other heirs on account of their distributive shares, such payments are not a proper subject of final account, and his only rights are, when distribution is ordered, to have the payments retired therefrom, and to receive a credit on ac-

count thereof from the distributive share to be charged. Whatever rights of subrogation the sureties on the bond of a deceased administrator may have to his rights against distributees, the same can only be worked out upon the final decree of distribution." Elizalde v. Murphy, 4 Cal. App. 114, syllabus, 87 Pac. 245.

The court below appears to have followed the rule laid down in the case cited; and, sitting as a probate court with exclusive jurisdiction in the matter of the settlement of the accounts of the administrator and the distribution of the estate, has allowed the sureties on the administrator's bond to receive from the estate upon such distribution sums advanced by their principal to a prospective distributee of the estate, or due to him as administrator's commissions, and the former of which by a prior judgment against them upon the bond on which they were sureties they had been compelled to restore to the assets of the estate.

Gaspar O. Marre, administrator of the estate of Luigi Marre, deceased, and A. McAlister, whom we have at times designated in this opinion as the respondents, have also appealed from the order settling the final account of the administratrix and ordering distribution of the estate. They question the court's action in the division of the commissions between the two administrators in its disallowance of extra compensation for extraordinary services by administrator Graves, and in refusing to allow their demand for interest upon the judgment paid by them in favor of the estate of Marcos A. Elizalde, deceased. The correctness of the decision of the first two mentioned of these questions depended upon the evidence presented to the trial court, and its decision thereon will not be disturbed upon appeal. As to the remaining point, no argument or authority is presented in its support, and it appears to be without merit.

For the reasons given the order appealed from is affirmed.

182 Cal. 415

ROSSINI v. ST. PAUL FIRE & MARINE INS. CO. OF ST. PAUL, MINN.

(L. A. 6275.)

(Supreme Court of California. March 13, 1920.)

1. TRIAL ⟸398—FINDINGS AS TO CAUSE OF DESTRUCTION OF INSURED PROPERTY HELD INCONSISTENT.

A finding that all of the property described in an insurance policy was destroyed by an explosion is inconsistent with a finding that a material part of the building fell as the result of a fire, and will not support a judgment exempting a fire insurer from liability on the ground that the damage was the result of the explosion.

2. INSURANCE ⟸421—INSURER LIABLE FOR DAMAGE FROM FIRE THOUGH EXPLOSION CAUSED BUILDING TO FALL.

Where a fire policy exempts an insurer from liability for loss caused by explosion, unless fire ensues, the insurer, despite a further clause that, if the building shall fall as result of fire, all insurance shall immediately cease, is liable for damage resulting from a fire ensuing upon an explosion, though the explosion caused the building to fall.

3. INSURANCE ⟸421—INSURER LIABLE FOR DAMAGE CAUSED BY EXPLOSION RESULTING FROM FIRE.

Though a policy exempted an insurer from liability for loss from explosion, the insurer is liable for the whole loss where the explosion occurred after the commencement of the fire and was a resulting incident thereof.

4. INSURANCE ⟸646(6)—INSURER HAS BURDEN OF SHOWING THAT LOSS FELL WITHIN EXEMPTION OF POLICY.

Where a fire policy exempted from liability for explosion, the insurer has the burden, fire and loss having been shown, to prove that the loss falls within the exemption, but, if such burden is sustained, and it is shown that an explosion occurred prior to the fire, the insured is called upon to show the damage suffered from the resulting fire.

5. APPEAL AND ERROR ⟸996—ULTIMATE FACTS NOT NECESSARILY FOLLOWING FROM FACTS FOUND CANNOT BE INFERRED FROM FINDINGS.

While findings of the trial court should be construed so as to uphold rather than defeat the judgment, and from facts found ultimate facts may be inferred in support thereof, it is not within the province of the appellate court to infer from the findings ultimate facts which would support the judgment when such facts do not necessarily follow from the facts found.

6. INSURANCE ⟸670—FINDINGS THAT PROPERTY WAS DESTROYED BY EXPLOSION HELD NOT TO SUPPORT JUDGMENT FOR INSUBER IN VIEW OF OTHER FINDINGS.

In an action on a fire policy exempting from liability for loss from explosion, a finding that all the property described in the policy was destroyed by an explosion will not support a judgment for the insurer, where the court also found that a material part of the building fell as the result of the fire, and there was no finding as to the sequence in which the explosion and fire occurred.

7. INSURANCE ⟸665 (4) — FINDING THAT PROPERTY WAS DESTROYED BY EXPLOSION NOT WARRANTED.

In an action on a fire policy exempting from liability for explosion a finding that all the property described was destroyed as a result of explosion *held* not warranted.

8. INSURANCE ⟸326 (3) — "PREMISES" IN GASOLINE CLAUSE INCLUDED ONLY BUILDING OR BUILDING CONTAINING INSURED PROPERTY.

The word "premises," as used in a fire policy declaring that the company shall not be liable

for loss while there be used or allowed on the premises gasoline exceeding one quart, means only the insured building or building in which the insured property is situated, and cannot be construed as coextensive with the lot upon which the building is constructed; hence the fact that 150 gallons of gasoline was kept in an underground tank on an adjacent lot is not a violation of the provision, and the insurer cannot escape liability on that ground.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Premises.]

9. INSURANCE ⟸326(3)—INSURER CANNOT ESCAPE FOR "INCREASED HAZARD" UNLESS HAZARD WAS INCREASED.

A fire insurer cannot escape liability on the ground of increased hazard resulting from the keeping of 150 gallons of gasoline in an underground tank on an adjacent lot, where the hazard was not increased over and above that which existed at the time of the issuance of the policy; the term "increased hazard" denoting an alteration or change in conditions.

10. INSURANCE ⟸333(1)—CONTINUING EXISTING RISKS NOT AN INCREASED HAZARD.

A fire policy protects the insured against existing risks, and in the absence of fraud or concealment the hazard in respect to the risk assumed cannot be enhanced or enlarged by the mere continuation of the conditions and uses existing at the time the policy was issued.

11. INSURANCE ⟸646(2)—INSURER HAS BURDEN OF SHOWING INCREASE IN THE HAZARD.

The burden is on the fire insurer to show that the hazard was increased so as to avoid the policy.

12. INSURANCE ⟸326(3)—TO ESCAPE LIABILITY UNDER INCREASED HAZARD FROM GASOLINE, INCREASE MUST HAVE BEEN WITHIN CONTROL OF INSURED.

Where a fire policy exempted the insurer while the hazard shall be materially increased by means within the control of the insured, the insurer cannot escape liability on the ground of keeping a large quantity of gasoline on adjacent premises where such premises were not under the control of the insured.

13. INSURANCE ⟸624(1)—ASSIGNMENT HELD NOT TO PRECLUDE INSURED FROM SUING.

Where an insured assigned sums due under a policy, empowering the assignee to adjust the claim and apply the proceeds in settlement of debts owing by the insured, the assignee secured no personal interest, and the insured remained the real party in interest and entitled to sue on the policy.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Edward Rossini against the St. Paul Fire & Marine Insurance Company of St. Paul, Minn. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

Carter & Torchia, of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

LENNON, J. The plaintiff in this action sought to recover a loss alleged to have been occasioned by fire under a policy of insurance, standard in form, issued to him by the defendant, and which covered and carried insurance in the sum of $1,000 on a stock of general merchandise and $400 on household furniture. The policy declared that the insured property was contained in a frame building described as being situated at 2104 East Ninth street in the city of Los Angeles, and the complaint averred that the insured property was all contained in the same building at the time of the fire. The defendant denied liability upon the ground that it was exempted therefrom pursuant to the provisions of the policy because: (1) The property insured was destroyed by the explosion of a bomb or other explosive substance, the exact nature of which was unknown to defendant; (2) the building in which the insured property was located fell at the time of the explosion, and the falling was not the result of fire. As a further defense to the action defendant pleaded that the plaintiff, in violation of the terms and conditions of the policy, prior to the fire and at the time of the fire, kept, used, and allowed on the "premises" described in plaintiff's complaint and in the policy of insurance gasoline in excess of one quart, to wit, 100 or 150 gallons thereof, and that, by reason thereof, "the hazard in respect of said fire was thereby materially increased within the control of said insured." Upon the issues thus framed the trial court, save as to the claim that a material part of the building did not fall as the result of fire, found in favor of the defendant, entering its judgment accordingly, and plaintiff appeals.

The clauses of the contract of insurance upon which the defense of the defendant is dependent are these:

(1) "This company will not be liable for loss * * * unless fire ensues (and in that event for damage by fire only), by explosion or any kind of lightning."

(2) "Unless otherwise prescribed by agreement, * * * if the building or any material part thereof fall, except as a result of fire, all insurance by this policy on such building, or its contents, shall immediately cease."

(3) "Unless otherwise provided by agreement, * * * this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured; * * * (e) while there be kept, used or allowed on the described premises * * * gasoline * * * exceeding one quart."

[1] The trial court, among other things, found as a fact that:

"All of the property described in said insurance policy was destroyed by a bomb or other explosion and that a material part of the building wherein said property was kept fell at the time of said explosion."

Among the conclusions of law purporting to have been deduced from the foregoing findings of fact is the misplaced finding of fact:

"That a material part of said building fell as the result of said fire."

It is manifest that the latter finding is in conflict with the preceding and properly placed finding that a material part of the building fell "at the time of the explosion." While a material part of the building might have fallen from the combined effects of the explosion and the fire, it does not necessarily follow that the explosion and the fire occurred simultaneously, or that both did in fact contribute simultaneously to the falling of a material part of the building. If they did, then the findings should have clearly and unequivocally shown that fact. On the other hand, if it was the purpose of the trial court, as counsel for respondent suggests, to find, as might have been consistently done, that a material part of the building fell at the time of the explosion, and not as the result of fire, the fact remains that the trial court did not so find, and, of course, not being permitted to make or unmake findings, our consideration of the case must be controlled by the findings actually made. Accentuating the inconsistency in the findings under discussion is the fact that the finding that a material part of the building fell as the result of fire is directly opposed to the exemption claimed under the "fallen building" clause of the contract of insurance, and consequently cannot be rightly resorted to in support of the judgment in favor of the defendant.

[2] Even if these findings were capable of reconciliation, nevertheless they will not suffice to warrant and support a judgment for the defendant grounded upon either the "explosion" or "fallen building" clauses of the contract of insurance. Where the contract of insurance contains a "fallen building" clause, and also a clause exempting the company from liability for loss caused by an explosion of any kind unless fire ensues, and in that event limiting the liability to the damage caused by the fire only, it is the settled rule that the company is liable for the damage resulting from a fire ensuing upon an explosion, even though the explosion cause the building to fall. Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706; Dows v. Faneuil Hall Ins. Co., 127 Mass. 346, 34 Am. Rep. 384; Davis v. Ins. Co., 115 Mich. 382, 73 N. W. 393; Clement on Fire Insurance, vol. 1, p. 129.

[3-6] Under the "explosion exemption" clause of the policy, if the explosion preceded the fire, plaintiff would be entitled to recover for the damage resulting from the fire alone; on the other hand, notwithstanding the destructive effect of the explosion, the whole loss would be a loss by fire within the meaning and protective purpose of the policy if the explosion occurred after the commencement of the fire and was a resulting incident of the fire. German-American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; 14 R. C. L. p. 1218; Clement on Fire Insurance, vol. 1, p. 123, and cases cited. The burden of proof under the "explosion exemption" clause of contracts of insurance devolves as follows: There having been shown the execution of a contract, the occurrence of a fire with a resulting loss, and notice to the insurer, if the insurance company claims exemption by reason of the breach of a proviso or condition subsequent, the burden rests upon the company to prove that a loss, or part thereof, falls within one of the prohibitive clauses of the policy. In other words, the company must plead and prove the exception or breach which it sets up as defeating plaintiff's prima facie right of recovery. If such burden is sustained, and the case proved, for example, to be within the explosion exemption clause by a showing that the explosion occurred first in point of time, plaintiff is then called upon to prove the extent of damage, if any, suffered from the subsequent and resulting fire. German-American Ins. Co. v. Hyman, supra; Western Assurance Co. v. J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561. Under the facts of this case it thus became the duty of defendant to show that the explosion preceded the fire. For this reason, the mere finding that all of the insured property was destroyed by an explosion is not, in and of itself, sufficient to support the judgment upon the theory that the loss came within the explosion exemption clause of the contract of insurance. It is an undisputed fact in the case that an explosion did occur, and consequently the pivotal point of the controversy is involved in the question whether the explosion preceded or followed the fire; for upon the determination of that question must depend the determination of the correlated question of segregating the loss suffered by fire from that resulting from the explosion alone. Therefore the findings as made are vitally defective in not disclosing the sequence in which the fire and explosion occurred. This is so because, as we have seen, the plaintiff's right to recover and the defendant's obligation to indemnify plaintiff for any loss resulting from fire is materially affected by the determination as to whether the explosion which destroyed the goods occurred prior to or subsequent to the fire, and consequently a specific finding on this phase of the case should have been made.

In arriving at this conclusion we are not unmindful of the general rule that "the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment," and that from the facts

found ultimate facts may be inferred in support of the judgment. Breeze v. Brooks, 97 Cal. 72, 77, 31 Pac. 742, 22 L. R. A. 257. Nevertheless it is not within the province of this court to infer from the findings ultimate facts which would support the judgment when such facts do not necessarily follow from the facts actually found. Emmal v. Webb, 36 Cal. 197; Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Estate of Benton, 131 Cal. 472, 63 Pac. 775; Holzheier v. Hayes, 5 Cal. Unrep. 965, 52 Pac. 838; Ellis v. Bonebreak, 179 Pac. 893. The finding that the goods were destroyed by an explosion and that a material part of the building fell at the time of the explosion does not necessitate the inference that the explosion preceded the fire. Non constat, but that the explosion may have followed the fire, and, if that be so, the explosion, even though it were the direct cause of the entire destruction of the insured property, would itself have resulted from the fire, and would therefore be an incident of the fire, which fire, in such case, must in the last analysis be held to be the agency which destroyed the insured property.

[7] Furthermore, the finding that all of the insured property was destroyed by an explosion is not supported by any evidence, directly or inferentially. The evidence shows that there were no witnesses to the inception of the fire, and that the witnesses who first discovered that the building was on fire were roused from their sleep by the noise of an explosion. They immediately looked out of the windows of their apartments and saw the building on fire. The fire seemed to them to be burning from the front of the building toward the rear thereof. One witness stated that when she first saw the fire there "didn't seem to be any frame standing." The following morning portions of the front of the building were found, unburned, scattered about the street, intermingled with some merchandise which was partially burned. By the time that the witnesses were able to secure an unobstructed view of the fire, about three minutes after the noise of the explosion, the entire structure was burning rapidly. None of the witnesses knew whether the building took fire prior or subsequent to the explosion. While, as stated, there was some testimony that a comparatively small portion of the merchandise was found in the street subsequent to the fire, partially burned, on the other hand, plaintiff testified that the merchandise (save that found in the street) and the household furniture located in the living rooms in the rear of the store were all destroyed by fire. This testimony of the plaintiff stands practically uncontradicted. In this situation of the evidence the trial court might have been justified in finding that a portion of the merchandise was destroyed by the explosion, but certainly there was no justification for the finding that all of the insured property was destroyed by the explosion.

[8] Upon the issue of defendant's exemption from liability because of the alleged violation of the clauses of the policy concerning the keeping of gasoline and the increase of hazard, the trial court found:

"That at the time of the destruction of said property as above mentioned and for some days prior thereto there was kept, used, and allowed upon the premises described in plaintiff's complaint and said policy of insurance gasoline in excess of one quart, to wit, 150 gallons thereof, and that no agreement consenting thereto was indorsed on or added to said policy of insurance."

From this finding the trial court deduced the conclusion of law that plaintiff violated the conditions of the policy of insurance, and that "the hazard in respect to said risk was thereby materially increased."

In considering the scope and effect of these findings and conclusions, reference must be had to the terms of the policy and the allegations of the complaint. The only "premises" there described are "the story frame building, with roof, now and while occupied as general merchandise and situated No. 2104 East Ninth street in Los Angeles, Cal." Admittedly the insured property was situated exclusively in these premises at the time of the issuance of the policy and at the time of the fire. The word "premises," as employed in fire insurance policies, means no more than the insured building or the building which contains the insured property, and cannot be held to be coextensive with the lot upon which the building is constructed or a lot contiguous thereto. Rau v. Westchester Fire Ins. Co., 36 App. Div. 179, 55 N. Y. Supp. 459; Fireman's Fund Ins. Co. v. Shearman, 20 Tex. Civ. App. 343, 50 S. W. 599; Clement on Fire Insurance, vol. 2, p. 334.

Upon this phase of the case the record shows that the evidence was all to the effect that the tank which contained the gasoline was situated on a separate lot 6 feet from the building described in the complaint and in the policy of insurance, 14 feet below the surface of the ground, and in no way connected with the said building. This being so, there is no escape from the conclusion that the finding that there was kept upon the premises which contained the insured property gasoline in excess of the quantity permitted by the policy is not supported by the evidence, and, as a consequence, this finding will not support the conclusion of law deduced therefrom that there was a violation of the provision of the policy concerning the keeping of gasoline on the "premises."

[9-12] This brings us to a consideration of the finding—misplaced in the conclusions of law—to the effect that the plaintiff materially increased the hazard of the risk insured against by the keeping of gasoline on the premises. This finding is not sustained by

the evidence, even though it be assumed in aid of the finding, as counsel for the defendant would have us do, that the court employed the word "premises" with the purpose of designating and including property of the plaintiff other than the building which contained the insured property, and that therefore the finding in question must be interpreted as meaning that the keeping of a large quantity of gasoline upon the contiguous premises violated the "increased hazard" clause of the contract. The answer to this is that the keeping of gasoline upon the contiguous premises cannot be held to have effected a forfeiture under the "increased hazard" clause of the policy unless it was in fact an "increase" of hazard over and above that which existed at the time of the issuance of the policy. "The term 'increase of hazard' denotes an *alteration or change* in the situation or condition of the property insured which tends to increase the risk" (italics are ours), and ordinarily refers only to such hazard as results from physical changes in the insured property after the issuance of the policy. Angier v. Western Assurance Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685; Hartford Fire Ins. Co. v. Dorroh, 63 Tex. Civ. App. 560, 133 S. W. 465; 4 Joyce on Insurance, § 2207. The policy is issued to protect the insured against existing risks, which are contemplated and covered by the premiums, and, in the absence of fraud or concealment, the hazard in respect to the risk assumed cannot be enhanced or enlarged by a mere continuation of the conditions and uses existing at the time the policy was issued. Williams v. People's Ins. Co., 57 N. Y. 274; Whitney v. Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Straker v. Ins. Co., 101 Wis. 413, 77 N. W. 752; 14 R. C. L. p. 1145. The burden is on the insurer to plead and prove affirmatively that there has been a violation of the provision against increasing the hazard. Ritter v. Sun, etc., Co., 40 Mo. 40; Tischler v. Cal., etc., Ins. Co., 66 Cal. 178, 4 Pac. 1169; Renshaw v. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; Greenlee v. Ins. Co., 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455; Merrill v. Ins. Co. (C. C.) 23 Fed. 245; Transatlantic Fire Ins. Co. v. Bamberger (Ky.) 11 S. W. 595; 5 Joyce on Insurance, § 3777; 7 Encyc. of Evidence, 522. Upon this phase of the case the evidence briefly stated, is as follows: The policy of insurance was issued December 28, 1915. In July, 1915, plaintiff and one Lo Bue engaged in the automobile repairing business, which business was conducted in the building adjoining plaintiff's general merchandise store which contained the insured property. In August, 1915, for the purpose of operating a gasoline station, plaintiff and Lo Bue installed a gasoline tank in the alley between the two buildings, and the board of fire underwriters were notified thereof. Some time in August or September, 1915, plaintiff and Lo Bue decided to discontinue their joint enterprise, and plaintiff assigned all his interest in the automobile and gasoline business to Lo Bue, including his interest in the gasoline tank. Gasoline was continually kept in the tank from the time of its installation up to and including the time of the fire, and at the time of the fire it contained between 100 and 150 gallons, having been filled two days before. It was stipulated at the trial that the gasoline was not the cause of the explosion and did not explode. The agent who negotiated the policy knew of the existence of the tank and its purpose prior to the issuance of the policy, and the plaintiff "was charged accordingly." In short, the uncontradicted evidence in the present case clearly shows that the use of the contiguous property as a gasoline supply station was not a new condition, but merely the continuation of a condition which, as an element of hazard, was contemplated and covered by the policy at the time of its issuance. It is a conclusive answer to the finding of the trial court upon this phase of the case that the "increased hazard" clause merely prohibits a new and different use of the property, by which the risk is materially increased, from that to which it was applied when the policy was issued, and that the continuance of an existing use, in the absence of warranty against such use or fraudulent representations or concealment, neither of which is alleged in the answer, is not a violation of the contract. Whitney v. Ins. Co., supra.

It further appears from the evidence that plaintiff was not the owner of, nor in control of the use of, the tank at the time the policy was issued nor at any time thereafter. Soon after the tank was installed, and several months before the fire, as previously noted, plaintiff transferred all interest therein to one Lo Bue. The gasoline was owned by Lo Bue, who ordered it placed in the tank, and, even if it could be said that the continued use of the tank was an increase of hazard, there is no evidence that its use by Lo Bue was within the control of the plaintiff. Defendant thus failed to sustain the burden of proof under this defense in another important particular; for, according to the wording of the policy, the increase of hazard is only material in giving rise to a forfeiture when the increase is due to "any means within the control of insured." Breuner v. Ins. Co., 51 Cal. 101, 21 Am. Rep. 703.

The view which we have taken as to the insufficiency of the evidence and findings to warrant a judgment for the defendant under the provisions of the "gasoline" and "increased hazard" clauses of the contract makes it unnecessary for us to discuss and decide the question of whether or not the "increase of hazard" clause of the California standard form fire insurance policy is limited in its operation by section 2755 of the Civil Code, which provides that a contract of fire insurance is not affected by an act even

though it increases the risk, unless the act violates the provisions of the policy.

[13] Prior to the institution of the action plaintiff made an assignment of the sums due under the policy in question to a third party, and it is urged that he thereby parted with his right to sue on the contract. The assignment, however, only purports to create an agency under which the assignee was empowered to adjust the claim and apply the proceeds in part settlement of debts owing by plaintiff. The assignee secured no personal interest in the benefits to be derived by collection of the insurance money; all authorized action being on behalf of plaintiff. Plaintiff, therefore, is still the real party at interest and has not lost his right to sue.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

182 Cal. 388

WOOLWINE v. THE SUPERIOR COURT OF LOS ANGELES COUNTY et al.

(L. A. 5993.)

(Supreme Court of California. March 10, 1920.)

1. COUNTIES ⟸113(5)—BOARD MAY EMPLOY ATTORNEY TO PROSECUTE OR DEFEND ACTION.

Under Pol. Code, § 4041, subd. 16, authorizing boards of supervisors to direct and control the prosecution and defense of suits to which the county is a party, and to employ counsel to assist the district attorney, the board may employ an attorney other than the district attorney to prosecute or defend an action to which the county is a party.

2. COUNTIES ⟸113(5)—EMPLOYMENT OF ATTORNEY BY BOARD NOT REVIEWABLE.

The employment of an attorney other than the district attorney by a board of supervisors to prosecute or defend an action is a matter of discretion, and not open to review by the courts, except possibly for fraud.

3. MANDAMUS ⟸22—SUBSTITUTION OF ATTORNEYS CANNOT BE COMPELLED WHERE NEITHER ATTORNEY NOR CLIENT SEEKS SUCH SUBSTITUTION.

Under the provision of Code Civ. Proc. § 284, authorizing the court to make an order changing the attorney of record for a party in certain cases, the court cannot be required by mandamus to substitute the district attorney for the county counsel in actions by and against the county, where neither the county nor the county counsel has asked or consented to such change, whether or not the provision of the county charter for a county counsel is valid.

In Bank.

Original application by Thomas Lee Woolwine for a writ of mandate directed to the Superior Court of Los Angeles County and another. Writ denied.

Thomas Lee Woolwine, Dist. Atty., F. W. Stafford, Deputy Dist. Atty., and Geo. E. Cryer, all of Los Angeles, for petitioner.

A. J. Hill, Co. Counsel, Robert B. Murphy, Asst. Co. Counsel, and Paul Vallee, Deputy Co. Counsel, all of Los Angeles, for respondents.

SHAW, J. This is an original proceeding in this court for a writ of mandate.

The petition prays for a writ to compel the superior court of Los Angeles county to make and enter an order in each of three certain actions pending in said court, to which the county of Los Angeles is a party, in one of them as a party plaintiff and in the others as defendant, substituting the petitioner, as district attorney of said county, as attorney for the county in said actions, respectively, in place and stead of A. J. Hill, Esq., who is now the attorney of record for the county in each of said actions.

The plaintiff seeks by this method to obtain an adjudication of the question whether or not the provision of section 7½ of article 11 of the Constitution, relating to county charters, declaring that "the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws" is controlling upon county charters to such an extent that any provisions of such charters purporting to prescribe the duties of the several officers of such county are invalid whenever they are in conflict with the general county government law on that subject. He contends that under this provision it is not competent in any county charter to take from any county officer the duties prescribed for him in the county government law and give the same to some other officer provided for in such charter. He also claims that the amendment of section 4153 of the Political Code, enacted by the Legislature of 1919 (Stats. 1919, p. 794), exempting from the operation of general laws the district attorneys of counties having charters creating the office of county counsel, is a special law, and therefore void. The matter is important; for, if the contentions of the district attorney are correct, all the provisions of the Los Angeles county charter prescribing the duties of the county officers would be annulled, so far as they conflict with the general laws.

[1, 2] Notwithstanding the importance of the question, we have reached the conclusion that it cannot be raised in this proceeding. The claim of the district attorney is that, under the general law prescribing the duties of district attorneys, that officer, and no one else, is authorized to appear in the courts to prosecute or defend actions on behalf of the county, and consequently that it is the legal

duty of the court to substitute him as district attorney for any other person who, by any means, has been entered as attorney of record for the county in any such action. Section 4041 of the Political Code, relating to the powers of supervisors, declares that they shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law, "to direct and control the prosecution and defense of all suits to which the county is a party, and, by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same." Subdivision 16. Under this provision it has become the settled law of the state that the board of supervisors has power to employ an attorney, other than the district attorney, to prosecute or defend an action to which the county is a party. "Not only are they empowered to employ counsel to assist the district attorney, but they may also employ counsel for the purpose of directing and controlling the prosecution and defense of any suit to which the county is a party. Whether, in any particular case, such employment shall be made is addressed to the discretion which they are to exercise in behalf of the public interests. If, in their opinions, the interests of the county require such employment, it is their duty to secure the services of a competent attorney therefor." Lamberson v. Jefferds, 118 Cal. 365, 50 Pac. 404. "This is rested upon the ground that the district attorney may be incompetent, or sick, or absent from the county, or engaged in any other business, so that he cannot attend to it, or the business to be transacted may be outside of the county." Lassen County v. Shinn, 88 Cal. 512, 26 Pac. 366. Other cases to the same effect are Hornblower v. Duden, 35 Cal. 670; Merriam v. Barnum, 116 Cal. 623, 48 Pac. 727; Merced Co. v. Cook, 120 Cal. 276, 52 Pac. 721. A distinction is made in Merriam v. Barnum between the power to employ other attorneys "to defend or prosecute a suit," which power is conceded to the board, and the power to employ an attorney to advise the supervisors concerning their duties in matters coming before them, which power, the case decides, does not exist. But all the cases hold that the exercise of the power is a matter of discretion and is not open to review by the courts, except perhaps for fraud. It is conceded that in the cases mentioned in the complaint herein the supervisors had authorized A. J. Hill to appear as the attorney for the county of Los Angeles and to conduct the prosecution and defense of said cases, and that he had so appeared.

[3] The mandamus is sought to control and direct the action of the superior court in the conduct of the cases pending before it. That court is, of course, bound by the provisions of law on the subject. Code Civil Procedure, § 284, provides that the court may make an order changing the attorney of record for a party in an action:

"1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

The county of Los Angeles is the client concerned in this matter in each of said actions. It has not consented to any change of attorney therein, but, on the contrary, it appears that it is insisting that Mr. Hill be continued as such attorney of record for the county. Neither Mr. Hill nor the county has made any application for an order to substitute any other person as attorney of record in said cases. Under these circumstances, and in this condition of the law, if the superior court is not bound to deny the application of the district attorney to be substituted as attorney of record in said cases, it is at least true that it cannot be compelled to do so by means of a writ of mandate from the supreme court. Inasmuch as the board of supervisors has discretion to refuse to make any application to apply for a change of attorneys in the cases, or to consent thereto, and as its action therein is not open to review by the courts, it would seem that the matter is foreclosed so far as this court and the superior court are concerned. The plaintiff, if he wishes to present the question first above mentioned, must resort to some other method of bringing it before the court.

The petition for a writ is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

45 Cal. App. 645

SHEPHERD v. CHAPIN, Superintendent of Streets, et al. (Civ. 3199.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=293(2)—RESOLUTION OF INTENTION HELD NOT INDEFINITE AS TO PLANS AND SPECIFICATIONS.

Resolution of intention to improve M street to D street "according to plans and specifications heretofore adopted and now on file" *held* not indefinite as to plans and specifications, though several years before, when D. street was S. street, plans and specifications for improvement to S. street were filed; those filed on the same day as the resolution alone corresponding with the resolution as to surface of improvement.

2. MUNICIPAL CORPORATIONS ⊂=293(2)—SPECIFICATIONS FOR STREET IMPROVEMENT NOT INVALID BECAUSE OF CALL FOR IRON OR STEEL.

Specifications for street improvement in resolution of intention are not invalid because calling for culverts of corrugated iron "or" steel, it not being shown what, if any, difference there is in the cost, or that it will injuriously affect the property owner, or that the condition of the industries may not make the alternative necessary to prevent unreasonable delay.

3. MUNICIPAL CORPORATIONS ⊂=293(2)—SPECIFICATIONS FOR STREET IMPROVEMENT NOT INDEFINITE AS TO QUALITY OF GRAVEL.

Specifications for street improvement in resolution of intention are not indefinite as to character of gravel, required to be "of sound trap rock or granite composition equal to the gravel found in the S. J. river," but it must be of sound trap rock or sound granite formation, though gravel of other quality be found in the river.

4. MUNICIPAL CORPORATIONS ⊂=293(1)—SPECIFICATIONS HELD NOT TO REQUIRE CONTRACTOR TO OBSERVE INSTRUCTIONS OF ANY PERSON.

Specifications for street improvement, providing "contractor shall be held liable for faithful observance of any instructions * * * delivered to him * * * on the work," do not require his observance of instructions given by "any person," the words being part of an entire paragraph, and preceded by: "The contractor shall be constantly on the work * * * or represented by a foreman competent to receive and carry out any instructions * * * given by * * * the street superintendent."

5. MUNICIPAL CORPORATIONS ⊂=293(1)—RESOLUTION OF INTENTION HELD NOT UNCERTAIN AS TO STATUTE UNDER WHICH BONDS SHALL BE ISSUED.

Resolution of intention to improve street *held* to sufficiently indicate that bonds for assessments are to be issued under the Improvement Act of 1911, and not under the Improvement Bond Act of 1915, especially as there can be no issuance of bonds under the bonding act unless such intention is declared in the resolution.

6. MUNICIPAL CORPORATIONS ⊂=293(1)—RESOLUTION OF INTENTION NOT REQUIRED TO STATE SPECIFIC TIME BONDS ARE TO RUN.

Improvement Act of 1911, § 61, does not require the resolution of intention to improve street to state specific time the bonds are to run, but it is enough that it states, in the language of the statute, that they "shall extend over a period not to exceed nine years from the second day of January next succeeding their date."

7. MUNICIPAL CORPORATIONS ⊂=318—DEFECTS IN PROCEEDINGS FOR STREET IMPROVEMENT WAIVED IN ABSENCE OF TIMELY OBJECTION.

By provision of the Improvement Act of 1911, § 26, no proceedings for street improvement prior to assessment are to be held invalid for defect after publication and posting of resolution of intention, and by section 16 defects are waived in absence of objection to the council in ten days after notice of award of contract.

8. MUNICIPAL CORPORATIONS ⊂=297(1)—RIGHT OF PROPERTY OWNERS TO STOP IMPROVEMENTS BY PROTEST ONLY SUCH AS STATUTE GIVES.

Right of property owner to protest against and avert further proceedings for street improvement is purely the creature of statute; and the privilege under Improvement Act of 1911 is a conditional one only, requiring, to be effective, the approval of more than a fifth of the board's members.

9. MUNICIPAL CORPORATIONS ⊂=323(1)—DEFECTS IN AMENDMENT OF STATUTE AS TO COLLECTION ON BONDS IMMATERIAL IN SUIT TO ENJOIN STREET IMPROVEMENT CONTRACT.

Defects in Act 1915 (St. 1915, p. 1464), in so far as attempting to amend Improvement Act of 1911, §§ 68, 70, 72, relating to proceedings to be taken for collection of the money due on a bond after a payment becomes delinquent, are immaterial in a property owner's suit to enjoin contracting for street improvement; they in no way affecting any proceedings to date.

10. MUNICIPAL CORPORATIONS ⊂=408(1)—DEFECTS IN AMENDMENT OF STATUTE AS TO COLLECTION ON BONDS FOR STREET IMPROVEMENT DECLARED REMEDIED.

Defects in Act 1915 (St. 1915, p. 1464), attempting to amend Improvement Act of 1911, §§ 68, 70, 72, as to proceedings to be taken for collection of the money due on a bond after a payment becomes delinquent, have been remedied by St. 1919, p. 554.

11. MUNICIPAL CORPORATIONS ⊂=269(3)—GRADE MAP CONSTRUED AS TO LOCATION OF POINTS.

The four points within circles at intersections of streets with Mariposa street, indicated on grade map adopted by ordinance of Fresno City, from which the grades are to be determined, are to be considered as at the four curb corners, under the rule as to avoiding absurdities in construction.

12. MUNICIPAL CORPORATIONS ⊂=294(3)—NOTICE OF IMPROVEMENT HELD NOT INVALID.

Posted notice of proposed street improvement is not invalid because of hairbreadth variation from prescribed size of letters.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by A. P. Shepherd against E. H. Chapin, Superintendent of Streets of the City of Fresno, and another. From an adverse judgment, plaintiff appeals. Affirmed.

Lewis H. Smith, of Fresno, for appellant.

Everts & Ewing and E. S. Van Meter, all of Fresno, for respondents.

WOOD, Judge pro tem. The plaintiff is the owner of certain property situate on Mariposa street in the city of Fresno. He brought this action to enjoin the superintendent of streets from entering into a contract with the improvement company pursuant to an award for the doing of certain work upon the street, and has appealed from a judgment entered after a demurrer was sustained to his complaint.

[1] On February 3, 1919, the board of trustees of the city passed its resolution of intention of ordering certain work on the street from the northeast line of M to the south line of Devisadero streets, which recited that it was to be done "in accordance with the plans and specifications heretofore adopted for doing said work and now on file in the office of the city clerk." The same day complete plans and specifications for the work were filed. On January 5, 1915, and some 15 months before the enactment of an ordinance changing the name of Silvia street to Devisadero, the board adopted plans and specifications for work on said Mariposa street between the northeast line of M street and the south line of Silvia street, which have never been specifically rescinded, altered, or abandoned. It is the contention of the appellant that, as the two sets of plans and specifications on file call for work materially and substantially different, the property owner is not informed of the character and nature of the contemplated work by the mere recital in the notice of intention that it is to be done in accordance with those on file. He does not question that the rule as to repeals by implication is applicable to municipal affairs, but claims that it applies to, what he terms, legislative acts only, and not to those of an administrative character such as are required in the improvement of streets. The distinction is unimportant here, as we are satisfied that in any event the contention of appellant cannot be sustained.

He does not suggest that any person was in fact misled by the reference. Strictly speaking, the plans and specifications filed with the resolution were the only ones for the doing of the work between the lines there mentioned, for, as we have seen, the earlier ones provided for work between M and Silvia street, and not between M and Devisadero. Aside from the very remote probability that any one would have ignored the complete and detailed plans and specifications filed immediately preceding the adoption of the resolution and resurrected those filed more than four years previously, there is further this significant circumstance to be considered: Appellant lays much stress upon the radical difference in the two sets of plans as to the type of pavement and the wearing surface. Specifically the earlier ones called for "a cement concrete base four inches thick, an asphaltic concrete binder course one inch thick, and an asphaltic wearing surface two inches thick." Now the resolution of intention provides that the street is to be paved with a pavement consisting of a cement concrete base 4 inches thick, and a bitulithic wearing surface 1½ inches thick. In the plans and specifications last filed the description and character of materials required for the wearing surface alone and the directions for mixing and laying the same fill seven pages of typewritten matter in the transcript. This work forms quite a substantial part of that contemplated in the resolution. Under all the circumstances it is incredible that there could exist any misunderstanding as to which plans and specifications furnished the description of the work to be done.

[2] The next objection is that the plans and specifications of February 3, 1919, call for culverts of corrugated iron or steel, and it is alleged that the cost or price of steel is materially and substantially less than corrugated iron. This allegation is a mere opinion. It does not show what the difference in cost is, or how it may injuriously affect the property owner. In Thoits v. Byxbee, 34 Cal. App. 226, 167 Pac. 166, it was held by this court that the specifications there considered were not invalidated by a provision authorizing the street superintendent to change the proportions of sand and rock in the concrete, for the reason that it appeared that it would not affect the cost of the work so far as these ingredients were concerned.

In Burnham v. Abrahamson, 21 Cal. App. 248, 131 Pac. 338, where the specifications provided that the cement should be composed in part of hard sandstone, granite, basalt, or other close-grained rock, it was said:

"One or the other kinds of material may be found when the work is commenced, not to be as available as the other. Indeed, many contingencies may arise in work of this character which cannot be foreseen, and which could not be met or overcome in the absence of some discretion committed to the superintendent of streets."

So, too, it may be that the conditions in the industries made it necessary here to provide in the alternative for the use of iron or steel in order to assure a completion of the work within a reasonable time, and, as we have said, it does not appear that it will injuriously affect the property owners.

[3] The next proposition advanced is that

the specification as to the character of the gravel required is indefinite and uncertain, in that it is provided that such gravel shall be "of sound trap rock or granite composition equal to the gravel found in the San Joaquin river." It is alleged in the complaint that in the San Joaquin river there is found gravel of great and substantial variations and differences in hardness, composition, durability, and tensile strength. The specifications, however, require that no work shall be accepted which may be defective in its construction or deficient in any of the requirements therein provided. The complaint does not aver that in the locality near Fresno gravel is found that is not of sound trap rock or sound granite formation; and we fail to see how the specifications can be complied with by the furnishing of any other quality of gravel merely because it may be equal to that, or be in fact found, in the San Joaquin river at some remote distance from Fresno.

[4] The next objection raised is that the specifications require that "the contractor shall be held liable for the faithful observance of any instructions which may be delivered to him or to his representatives on the work," and that the contractor is therefore made liable for the instructions given him by any person, as they do not specify for whose instructions he shall be held liable. As pointed out by respondent, a sufficient answer to this is that the words last quoted are a part only of an entire paragraph, and are preceded by the following:

"The contractor shall be constantly on the work during its progress, or shall be represented by a foreman who is competent to receive and carry out any instructions that may be given him by representatives of the street superintendent."

[5] It is claimed that the resolution of intention is defective in that it cannot be ascertained whether the bonds are to be issued under the Improvement Act of 1911 (St. 1911, p. 730) or the Improvement Bond Act of 1915 (St. 1915, p. 1441). The resolution of intention in substance recites that all of the proposed work shall be done under the former act; that serial bonds shall be issued to represent each assessment of $25 or more; that they shall extend over a period not to exceed nine years from the 2d day of January next succeeding their date, payable in equal annual installments on the 2d day of January each year thereafter. While there might have been a more definite reference to the act, yet this was sufficient, as there can be no issuance of bonds under the bonding act, unless such intention is declared in the resolution of intention. See section 4. Furthermore, under the latter act installments of principal are payable on the 2d day of July each year, and there is no limitation there as to the amount for which the bond may issue.

[6] It is insisted that a proper interpretation of section 61 of the Improvement Act requires that the resolution of intention shall distinctly specify a definite time in which the bonds are to run, and that it is not sufficient, as was done here, to state, in the language of the statute, that the bonds "shall extend over a period not to exceed nine years from the second day of January next succeeding their date."

This section is almost identical with section 3 of the Bond Act (St. 1885, p. 148) under consideration in Cohn v. Federal Construction Co., 171 Cal. 547, 153 Pac. 916, except that in section 61 there is no express requirement that the notice included in the warrant shall describe the bonds, as is made mandatory by section 3 of that act. In each act, however, the form of bond to be issued is set out at length, with a blank space provided to fill in the term that the bond is to run. In that case the court held that it was sufficient for the council to fix the term of the bond at any time before the warrant was issued, that being the earliest date at which the property owner was required to elect whether he would pay in cash or suffer bonds to issue. It also held that the language, "the like description of said bonds shall be inserted in the resolution ordering the work," etc., was not to be construed as requiring the resolution of intention to state the period the bonds are to run. The case was decided more than three years before the adoption of the resolution in the instant case, and may have been relied upon, not only by the Fresno board of trustees, but, perhaps, by other municipalities, as authority that the board can, at any time before the issuance of the warrant, fix the definite period for which the bonds are to run. Of course, as to what matters should be stated in the warrant, in order to comply with the statute, does not arise here.

[7] In passing, it may be further noted that section 26 of the act provides that no proceedings prior to the assessment shall be held invalid by any court for any error, informality or other defect in the same, after the actual publication and posting of the resolution of intention, and by section 16 all such errors, informalities, defects, and irregularities are waived unless objection be made to the council within ten days after the notice of the award of the contract.

[8] The point is made by the appellant that, inasmuch as the owners of 88 per cent. of the property liable to assessment protested against the doing of the work the board had no power thereafter, by a four-fifths vote or otherwise, to take any further proceedings for the improvement. The courts have repeatedly held, in substance, that no consti-

tutional rights are invaded in the enactment of statutes for special taxes for local improvements if, at some stage of the proceeding, the property owner has the right to a hearing upon the question as to what portion of the tax shall be assessed upon his land. The latest expression to this effect, to which our attention has been directed, is found in St. Louis Land Co. v. Kansas City, 241 U. S. 430, 36 Sup. Ct. 647, 60 L. Ed. 1072. This declaration, as to the constitutional right of the property holder to a hearing, implies that there is a power invested in some tribunal to decide against him. No case has been cited where it has ever been held that the property owner, or any number of the property owners affected, had the right, by protest or otherwise, to arrest further proceedings unless such right was conferred by statute. The case of Field v. Barber Asphalt Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, involved a provision of a law of Missouri giving to a majority of the resident owners of property liable to assessment a right to stop the proceedings, but afforded no opportunity to any nonresident owner to protest; and yet, the Supreme Court of the United States reached the conclusion that the law violated no constitutional rights of the latter. The effect of the decision is that cases may there arise in which none of the property owners have a right to stop the proceedings or to protest. It follows from what has been said that the right to protest and avert further proceedings is purely the creature of the statute, and that this privilege afforded to the landowner by the "Improvement Act of 1911" is a conditional one only, and in order to be effective requires the approval of more than one-fifth of the members of the board.

[9, 10] It is urged that the Act of 1915 (Stats. 1915, p. 1464), in so far as it attempts to amend sections 68, 70, and 72 of the Improvement Act of 1911, is unconstitutional and void. These sections relate to proceedings to be taken for the collection of the moneys due upon a bond after a payment becomes delinquent, and, as suggested by respondent, are in no way affected by any of the proceedings to this date. Moreover, we may add that the defects indicated have been remedied by the Legislature of California. Stats. 1919, p. 554.

[11] It is claimed that the ordinance of the city of Fresno, passed some years ago, adopting all grades by the adoption of a grade map, does not sufficiently indicate the points on Mariposa street from which the grades are to be determined. There is an ordinance relating to curbs, which is referred to but not inserted in the record, and it is not clear what bearing it may have upon the question. The copy of the portion of the grade map relating to Mariposa street, which is attached to the transcript, shows that at every street intersection there is a circle touching each corner, within which is placed a number purporting to denote in feet the elevation of the curbs at the points indicated, measured vertically from an established bench mark as a basis. From these points the ordinance provides that the grades are to be determined. The points indicated appear to be the four curb corners. The general rule is that, if reasonably practicable, an interpretation is to be avoided which results in an absurdity. Thus, any attempt to locate the points at any other places than at these corners would leave a portion of the curbs with no provision as to their elevations, and might result in a completion of the work without providing for an adequate drainage; while, in contrast, by assuming that the points are at the four curb corners, there is embraced a complete and harmonious system for all curb elevations, with a uniform drainage for this street and the intersecting ones.

[12] It is insisted that the NOTICE OF IMPROVEMENT posted by the superintendent of streets is fatally defective in that the length of each of said letters comprising said words is from one twenty-fifth to one sixty-fourth less than the one-inch required by statute. One of these notices, a copy of which is attached to the complaint, appears in the record, and has received our careful attention. Conceding, as claimed by appellant, that the case of Coleman v. Spring Construction Co., 182 Pac. 473, is not an authority to the point, we are of the opinion that the printed notice is in substantial accord with the law. While the letters "O" and "C" apparently are of less length than the others, it is more than likely that it is an optical illusion caused by their eliptical form. Persons of normal vision may honestly differ as to whether the letters in the notice are the full length required; but certainly it is not the intent of the act to invalidate a notice because a microscopic examination may demonstrate that they are a hairbreadth or two less.

This disposes of all the objections.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

46 Cal. App. 9

SOUTHWEST LAND CO. OF LOS ANGELES v. LOS ANGELES COUNTY.
(Civ. 3149.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1920. Hearing Denied by Supreme Court April 5, 1920.)

1. TAXATION ⟸438—ASSESSOR'S PENCIL ENTRY NOT SUFFICIENT TO AUTHORIZE CORRECTION OF VALUATION.

Under Pol. Code, § 3881, providing for correction of clerical omissions or errors in descriptions or in assessments when it can be ascertained from the assessment book or from the assessor's maps or block books what was intended to be assessed, where it appeared that the assessor made a new map of certain property on page 55 of the map book and on page 25 containing the old maps, made a reference to such new map and a pencil entry of the figures 100,280, not in a place for regular assessment, which figures were transferred by the clerk to page 55 as $10,280, such pencil entry did not justify correction of assessment so as to make the valuation $100,280.

2. TAXATION ⟸543(7) — PREVIOUS ASSESSMENTS INADMISSIBLE TO SHOW CLERICAL ERROR IN CORRECTING ASSESSMENT.

In a proceeding to recover taxes paid under protest where it appears that the assessor has corrected the assessed valuation, the valuation shown by the books against the property assessed for previous years is not receivable as evidence that the assessor committed a clerical error in assessing the property at a different amount in the subsequent year, the record for each year being in legal intent separate and complete.

3. TAXATION ⟸543(8)—INTEREST TO ENTRY OF JUDGMENT NOT RECOVERABLE ON TAXES ERRONEOUSLY ASSESSED AND PAID.

In a proceeding to recover taxes paid under protest under a corrected and increased assessment, a judgment awarding to plaintiff interest thereon from date of payment of the tax to date of entry of the judgment was erroneous.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Southwest Land Company of Los Angeles, a corporation, against the County of Los Angeles, to recover taxes paid under protest. Judgment for plaintiff and defendant appeals. Modified and affirmed.

A. J. Hill, Co. Counsel, of Los Angeles, and Robert B. Murphey, Hugh Gordon and Gordon Boller, Deputies Co. Counsel, all of Los Angeles, for appellant.

Fredericks & Hanna, of Los Angeles, for respondent.

CONREY, P. J. Action to recover the sum of $1,467 paid under protest to satisfy a purported tax levy for the year 1915 against real property of the plaintiff. Judgment for plaintiff, from which the defendant appeals.

On the original tax roll, duly verified by the assessor, the property was valued at $10,280, the tax thereon being a stated amount, which was paid and is not included in the amount sued for in this action. On the 22d day of September, 1915, which was about two months after adjournment of the board of equalization, the county assessor of Los Angeles county filed an application with the board of supervisors requesting permission to make an addition to or change in the assessment roll so as to change the assessment of said property, exclusive of improvements, from $10,280 to $100,280. This application was in writing, approved by the district attorney, and recited that the reason for making said change was because of a clerical error occurring in entering the assessed value of the property in the assessor's map book. Pursuant to a hearing upon that application, the board of supervisors made an order purporting to authorize the assessor to make the proposed change in the assessment. Thereafter, pursuant to such order, the assessor added the sum of $90,000 valuation to the assessment roll against said property, which authorization was filed in the office of the auditor of Los Angeles county. The additional tax thereafter paid by the plaintiff under protest is the amount sought to be recovered herein.

Section 3658 of the Political Code provides for maps and plat books to be kept by the assessor, which are required to show the private lands owned or claimed in the county, and are required to be in forms prescribed by the state board of equalization. These books are in form such that the right-hand page of the map book shows a map of the land within certain arbitrary districts. The left-hand page contains data descriptive of the lands shown on the opposite page. This information is written in by the assessor and is the basis of the assessment roll. In practice the valuations and descriptions of the assessment roll are copied from the descriptive pages of the assessor's map book. In the assessor's map book, volume 205, while the same was in course of preparation for the year 1915, on pages 23, 24, and 25, there was placed a map according to a subdivision of the property which had been used in previous years, together with the appropriate descriptive matter. Thereafter the assessor's attention was called to the fact that a new map of the land had been filed, showing it entirely as acreage. Thereupon the assessor made a new map on page 55 of the same book and noted on the page of the old map a reference to page 55 as follows: "For 1915 see pg. 55, Tr. No. 2783"—which was the number of the tract. The assessment as actually made is shown on page 55, where, under the head, "Value, 1915," the valuation entry of $10,280 was placed by the

assessor's clerk and the assessment so made was included in the assessment roll as verified by the assessor and approved by the board of equalization.

At the trial of this action it was shown by the testimony of the assessor that before the entry of $10,280 had been made he had decided to value the property at $100,280 and as indicating that fact had placed in pencil on page 25 (but not under any column or place for regular assessment) the figures "100,280." He said:

"I made the figures for him to place on the page where the new tract is as the valuation of that new tract. Q. For whom to place? A. For the clerk who called my attention to this matter."

Thereafter the clerk made the valuation entry $10,280 in the proper column and page, and this was the apparent assessment down to the time when the purported change was made by order of the board of supervisors pursuant to the application filed on the 22d day of September, 1915.

The validity of this assessment depends upon the construction to be given to section 3881 of the Political Code. That section is contained in chapter 11 of title 9 of part 3 of that Code. Title 9 contains the provisions governing assessments, levies, and collections of taxes; chapter 11 being entitled, "Miscellaneous Provisions." Section 3881 carries the subhead "Clerical Errors in Assessment Books; Corrections." It is provided therein that "clerical omissions or errors or defects in descriptions or defects in form in any assessment book, when it can be ascertained from the assessment book or from the assessor's maps or block books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment was made, prior to the sale for delinquent taxes," with provisos relating to notice, etc.

Appellant contends that the trial court was in error in overruling defendant's objection to the taking of testimony on the ground that the complaint did not state facts sufficient to constitute a cause of action, and also in denying defendant's motion for a nonsuit; that for the same reason the decision should be reversed on the ground that the findings do not support the judgment, and that the evidence clearly shows that there was a "clerical error" in the assessment, the correction of which was authorized by section 3881 of the Political Code, and for that reason the findings are not supported by the evidence. Counsel for appellant say that the effect of section 3881 is to extend the time for assessment; that the powers given thereunder are necessarily broad, and extend over all cases where the identity of the property to be assessed is definitely shown in the assessment book or in the assessor's maps or block books, or list furnished by the property owner; that, since in this case the property was correctly described in the books, it follows that any error in fact made in entering the valuation as the assessor intended to state such valuation may be corrected by proceedings under section 3881. They refer us to County of San Luis Obispo v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756, where the Supreme Court sustained the validity of a change in assessment made pursuant to section 3881, Political Code, which at that time provided that—

"Omissions, errors or defects in form in any original or duplicate assessment book, when it can be determined therefrom what was intended, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time prior to the sale for delinquent taxes, and after the original assessment was made. * * *"

In that case it was shown that the total tax, which included a special road tax, appeared on the assessment roll in column headed "Road Tax," but did not appear in the column headed "Total Tax." It was held that, since on the roll "It was clear what the omitted total tax was," the omission to enter that amount under the heading "Total Tax" might be supplied, by proceeding in the manner provided by section 3881.

[1] In the case at bar the fact that the assessor had intended to value plaintiff's property at any sum other than $10,280 did not appear from the assessment book or from the assessor's maps or block books, and no contention is made that such fact appeared from the list furnished by the property owner. The figures "100,280" in pencil on one side of the page 25 are no part of the tax record, and are not evidence of the alleged error sought to be corrected in the proceeding attempting to change the valuation stated in that record. The validity of that change cannot be upheld unless the act of the clerk was a clerical error, nor unless the board was authorized to go beyond the data which appeared on the books, and take direct testimony proving that the assessor instructed his clerk to make an entry showing a valuation different from the valuation as actually entered. But this would be an assumption of authority in excess of the limitation prescribed by section 3881. The power of assessment in matters involving discretion as to the amount thereof was exhausted when the board of equalization finally adjourned. The extension of authority over the making of the assessment, after that date, was given by section 3881 for narrowly defined purposes, and was expressly limited. Appellant insists that, since "what was intended to be assessed, or what should have been assessed," appeared on the books, by

correct description of the property, therefore the board of supervisors had power to ascertain other facts establishing error, by taking evidence outside the books, and so proving that the assessment as made on the books did not conform to the true intention of the assessor as verbally expressed by him to his clerk before the entry was made. Prior to 1901 the terms of section 3881 were as found in the foregoing quotation from County of San Luis Obispo v. White. Ever since 1901 (until the amendment found in Stats. 1917, p. 968, not applicable to this case) the corresponding terms of the section were as first stated herein; that is, instead of "omissions, errors, or defects in form in any original or duplicate assessment book, when it can be ascertained therefrom what was intended," the section as in force in the year 1915 covered only "clerical omissions or errors or defects in description or defects in form in any assessment book, when it can be ascertained from the assessment book or from the assessor's maps or block books * * * what was intended to be assessed," etc., to be supplied or corrected in the manner stated. As expressed by the amendment, the manifest intention of the Legislature was to more narrowly define the terms of the grant of power, so that after equalization no changes might be made except those of a purely clerical or formal nature, relating to matters of description or form, and then not unless the fact that there was an error could be ascertained from the sources named. If this was not the legislative intention, it is difficult to see that the amendment had any intelligible purpose.

[2] Counsel for appellant in their brief admit that—

"Perhaps the true measure of the authority to make changes in the assessment under Political Code, § 3881, is found in the plain records of the map book as they appeared to the deputy assessor, unaided by oral statements or informal pencil memoranda."

On this assumption they then rely upon the map book and the assessment of the same property, whereby it was indicated that the property was valued and assessed in 1914 for more than ten times the amount placed against it in 1915. We are convinced, however, that the valuation shown by the books as against property for the year 1914 or for any previous year is not receivable as evidence that the assessor committed a clerical error in assessing that property at a different amount in the year 1915. The assessment for each year is separately made, and the record thereof is, in legal intent, likewise separate and complete.

[3] In addition to the sum of $1,467, the judgment awarded to plaintiff interest thereon from date of payment of the tax to date of entry of the judgment. This was erroneously allowed. Spencer v. City of Los Angeles (Sup.) 179 Pac. 163, 168. It is ordered that the judgment be modified by striking therefrom said allowance of interest. As thus modified, the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

45 Cal. App. 634

BOND v. HOLLOWAY et al. (Civ. 3048.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1920.)

1. INSURANCE ⟸646(1)—COURT MAY ASSUME, IN ACTION ON CASUALTY POLICY THAT DEVIATION FROM ROUTE BY MOTORBUS WAS AUTHORIZED BY ORDINANCE.

In the absence of any evidence to the contrary, it may properly be assumed that deviation from its authorized route in the city of Los Angeles by a motorbus whose operator had taken out a casualty insurance policy sued on by an injured person was authorized by one or more of the clauses of the ordinance under which it was operated, permitting deviation to transport passengers to or from any public attraction or demonstration, etc.

2. MUNICIPAL CORPORATIONS ⟸703(1)—MOTORBUS OPERATOR WHO CHANGES STATE SERIAL NUMBER NOT REQUIRED TO SECURE NEW CITY PERMIT.

It was not necessary for new permit for operation of a motorbus to issue from the police commissioners of the city of Los Angeles every time a change was made by the operator in the state serial number of the machine.

3. INSURANCE ⟸145(1)—FILING WITH CITY CLERK OF RENEWAL OF MOTORBUS CASUALTY POLICY NOT ESSENTIAL.

Failure to have on file with clerk of city of Los Angeles various indorsements and extensions of casualty insurance policy issued to motorbus operator *held* not such a violation of the conditions of the city's motorbus ordinance as the casualty company could take advantage of to avoid its contract, when sued by a person injured by the operator's bus; filing with the city clerk after the accident of agreement of renewal entered into before the accident being sufficient.

4. INSURANCE ⟸146(3)—CASUALTY INSURER CANNOT INVOKE RULES FOR PROTECTION OF GRATUITOUS SURETIES.

Like a surety on a statutory bond, a casualty insurer cannot invoke the strict rules which courts and statutes devised for the protection of gratuitous sureties.

Appeal from Superior Court, Los Angeles County; Chas Monroe, Judge.

Action by Miles H. Bond against Joseph C. Holloway and the Pacific Coast Casualty Company of California, a corporation, resulting in judgment for plaintiff. From an order

denying defendant company's motion to vacate the judgment, it appeals. Affirmed.

Bowen & Bailie, of Los Angeles, for appellant.

Raymond E. Hoyt and George H. Moore, both of Los Angeles, for respondent.

SLOANE, J. Appellant, Pacific Coast Casualty Company of California, was sued by the respondent to recover damages suffered by collision with a motor jitney bus owned and driven by the defendant Holloway. The latter was insured against liability under a casualty insurance policy issued by the appellant, which policy, by its terms, inured to the benefit of any one having a cause of action arising out of the negligent operation of the defendant Holloway's motorbus. On the trial before a jury verdict and judgment were for the plaintiff in the sum of $2,290 and costs. Special findings were also returned by the jury; and this appeal is taken from the order of the trial court denying appealing defendant's motion to vacate the judgment on alleged grounds of inconsistency of the judgment with the special verdict of the jury, under sections 663, 663a of the Code of Civil Procedure.

Appellant relies, in its contention, upon an ordinance of the city of Los Angeles, where the cause of action arose, which makes it unlawful for any person to operate a motorbus without having first obtained a permit in writing from the board of police commissioners, and requiring certain formalities as a condition of such permit. Under the permit the person holding it is entitled to obtain a license from the city clerk to operate his car over a given route, to be designated in the permit. One of the conditions for the permit is that the applicant shall procure and, at all times while operating under such permit, maintain, in full force and effect, on file in the office of the city clerk, a good and sufficient bond or policy of insurance for the protection of any one who may suffer injury or damage through the negligent operation of such motorbus, such bond or policy in its terms to inure to and be for the benefit and protection of such injured persons, and to be made payable directly to the injured or damaged person.

The defendant Holloway applied for and obtained such permit from the board of police commissioners, secured and filed with the city clerk, in due form, as required, the insurance policy issued by the appellant company, obtained a city license and entered upon the operation of his motorbus line, which, by the terms of his permit, extending from the Plaza, by way of Main street and Moneta avenue, to Fifty-Eighth street. The accident sued upon occurred thereafter on the 28th day of January, 1916. The special verdict, which appellant contends is inconsistent with and fails to support the judgment, finds, in so far as material to the points presented in appellant's argument, substantially as follows: The policy of insurance was executed August 31, 1915, for a period beginning August 20, 1915, and ending November 20, 1915. By special indorsement dated October 1, 1915, and filed in the office of the city clerk on October 4, 1915, this policy was extended and continued in force from noon of the 1st day of October, 1915, to midnight of the 31st day of December, 1915; and by a second indorsement dated December 31, 1915, said policy was extended and continued in force from midnight of the 31st day of December, 1915, to midnight of the 31st day of March, 1916. Such latter extension was not filed in the office of the city clerk until February 3, 1916. The accident on which this suit was based occurred on the 28th day of January, 1916, at the junction of Slauson avenue and Moneta avenue, and some 200 feet beyond and outside the route described in defendant Holloway's permit. A permit dated August 30, 1915, was issued by the board of police commissioners to defendant Holloway, whereby he was granted permission to use his Ford car No. 150653 in carrying passengers over the designated route, and, on filing the permit in the city clerk's office, said clerk was authorized to issue the defendant Holloway a license. On December 31, 1915, a new state license, No. 89377, was issued for defendant Holloway's car, and the new number plate substituted for the old. By permit issued by the board of police commissioners, of date February 1, 1916, defendant Holloway was granted permission to use Ford auto No. 89377 in the business of carrying passengers for hire over the route as previously granted, and, in accordance with said permit, a license was issued therefor by the city clerk for a term of three months from the 1st of January, 1916, to the 1st of April, 1916. At the time of the accident said Holloway had no other permit or license for the operation of motorbus bearing state license No. 89377 than as last above described. By special indorsement on its policy hereinbefore described, and dated January 3, 1916, the appellant company agreed that the automobile designated in the policy bore the new state license No. 89377. Such agreement was filed in the office of the city clerk February 3, 1916.

The particulars in which it is claimed that these special findings fail to support and are inconsistent with the general verdict and the judgment are: (1) That the accident occurred 200 feet beyond the prescribed terminus of the motorbus route; (2) that at the date of the accident the original permit and license to defendant Holloway on his car bearing state license No. 150653 had expired, and the renewal under the new state number, 89377, dating back to January 1, 1916, and covering the date of the accident, was not made until February 3, 1916,

after the accident; and (3) that at the time of the accident the agreement of extension of the insurance policy and its application to the new state number of defendant Holloway's machine, which was entered into before the accident, was not filed with the city clerk. It is therefore argued that the defendant Holloway was, at the time of the injuries complained of, operating in violation of the ordinances of the city, as an outlaw on the public streets, and that, the insurance policy having been given under the ordinance to cover the operation of a motorbus under and in conformity to the law, no liability existed under the policy.

As a matter of fact, the policy, in its terms, is not conditioned upon and makes no reference to the operation of the insured automobile business under or in pursuance to any ordinance, permit, or license, or over any prescribed route. But, conceding appellant's claim that it executed this insurance policy as a statutory bond, and that it is therefore entitled to all the privileges of a surety upon a statutory bond, we find very flimsy legal support for its defense, and even less equity.

[1] In the first place, the ordinance under which the defendant Holloway was operating substantially covers the deviation by the autobus, on the occasion of the accident, from the prescribed route by the following section:

"It shall be unlawful for the driver of any motorbus to deviate more than three blocks from the route set forth in the permit granted by said board of police commissioners, except as in this section set forth. In case the motorbus is so deviated it must return to the point of deviation and proceed in the direction it was headed before such deviation. The driver of any motorbus may, without special permit, deviate from the route set forth in said permit for the purpose of transporting passengers to or from any public attraction or demonstration. If any route over which any motorbus is operated lies within five blocks of any church or public school, such motorbus may be diverted from such route and be operated to such church or public school and return to the point of diversion from such route and proceed in the direction in which such motorbus was headed before being diverted to such church or school. If any route over which any motorbus is operated extends into or passes through the business district of said city as said district is defined by the ordinances thereof, such motorbus may be diverted from such route while within said business district to any point within said district; provided, however, that such motorbus is driven to the terminal of said route before the return trip is made."

In the absence of any evidence to the contrary, it may be properly assumed that the deviation shown in this case comes under one or the other of these permissive clauses.

[2] Again, there is not a word of evidence, nor any finding of the jury, that this motorbus was operating at the time of the accident in violation of law. The ordinance says that it shall be unlawful for any person to engage in the business of transporting passengers by motorbus without complying with certain conditions and obtaining a permit. The defendant Holloway met these requirements and obtained his permit. So far as appears from the portion of the ordinance printed in the record, no requirement is made for renewing the permit, or making it unlawful to carry on the business without a license, or indicating how often a license must be renewed. It is provided that the police commissioners may suspend or revoke the permit for failure or neglect to observe the requirements of the ordinance; but in this case there seems to have been no such suspension or revocation. There is no finding of the jury, as appellant claims, that Holloway was running his autobus line without a permit at the date of the accident. The finding of the jury was that at the time of the accident "he did not have any other permit or license from the city of Los Angeles for the operation of Motorbus No. 89377." This was the new state serial number for the same machine covered by the original permit under state number 150653. We find nothing in the record, and our attention is called to no general law, which made it necessary for a new permit to issue from the police commissioners every time a change was made in the serial state number of the machine.

[3] There is no merit in the contention that there was any lapse in the policy of insurance merely because the agreement of renewal covering the period in which the accident occurred was not filed with the city clerk until after the accident, though duly entered into before the accident. The ordinance does not provide that it shall be unlawful to conduct any such motorbus business unless there shall be executed and remain in full force and effect at all times, and on file in the office of the city clerk, the required indemnity policy. But such policy was executed and filed with the city clerk and kept in full force and effect, and, so far as appears, continued on file with the city clerk up to and after the accident. It is not a fact that the policy at any time expired. The finding of the jury is that there was "an extension and continuation" of the policy by special indorsement attached to the policy and dated December 31, 1915, continuing it in force from midnight of the 31st of December, 1915, to midnight of the 31st of March, 1916, covering the date of the accident. It was the execution of this extension by the insurance company, not the filing thereof with the city clerk, that continued the policy in force. And the jury does not find that the policy was not on file with the clerk at the date in question. It finds that the extension or continuation was filed with the clerk on February 3d, after the accident. It was executed the 31st day of December. It was not necessary to its validity that it be attached to the policy at any given time to render it effective. In any

event, the failure to have the various indorsements and extensions of this policy on file with the city clerk is not such a violation of the conditions of the ordinance as the appellant could take advantage of to avoid its contract.

There is nothing in the findings of the jury to justify the conclusion that the defendant was not engaged in the lawful conduct of his motorbus business, under the protection of a valid indemnity insurance policy, at the time of the injuries complained of.

[4] If the argument of the court in this decision seems narrow and technical, it is at least no more so than the contentions of appellant. Even as a surety on a statutory bond, appellant cannot invoke the strict rules which the courts and statutes devised for the protection of gratuitous sureties. The trend of modern decisions is to place persons or corporations executing indemnity bonds as a commercial venture upon the same footing as the makers of ordinary contracts.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

45 Cal. App. 719

FREDENHALL et al. v. SHRADER et al. (BURRELL et al., Interveners).

(Civ. 2068.)

(District Court of Appeal, Third District, California. Feb. 2, 1920.)

1. REFERENCE ⊂=86—REPORT AND FINDINGS AUTHORIZED BY PARTIES' AGREEMENT THAT THEY MIGHT BE GONE INTO AND REPORTED.

Under Code Civ. Proc. § 638, the court may order referee appointed upon agreement of parties to try any or all issues of law or fact, and report findings and judgment thereon, thus definitely disposing of the issues and action subject to rejection or confirmation, and under section 639 the court may appoint a referee on its own motion for the limited purpose of an examination of a long account, and where the order of reference was based partly on each section, a finding not strictly involved in the account may be made where the parties agreed that it should be gone into and reported by the referee.

2. APPEAL AND ERROR ⊂=924—REFERENCE ⊂= 26—INTERLOCUTORY DECREE NOT ESSENTIAL TO JURISDICTION TO ORDER REFERENCE.

A court is not without jurisdiction to order a reference because it had not previously found interveners entitled to an accounting and entered an interlocutory decree adjudicating that fact, and the decision to make reference under Code Civ. Proc. § 639, is practically sufficient as an adjudication that an accounting is justified, and, where the record shows that evidence thereon had been heard prior to the order, it will be presumed that such testimony justifies the court's conclusion that an accounting is necessary.

3. APPEAL AND ERROR ⊂=1170(1)—FAILURE TO DECREE RIGHT TO ACCOUNTING BEFORE ORDERING REFERENCE NOT PREJUDICIAL.

If it was error for the trial court to order a reference of an account before expressly finding and decreeing that the parties were entitled to an accounting, such error involved a mere irregularity in procedure from which defendants could not have suffered any prejudice, and could not justify the conclusion that a miscarriage of justice resulted from the error so as to warrant reversal (Const. art. 6, § 4½).

4. CORPORATIONS ⊂=182, 189(13) — STOCKHOLDERS FRAUDULENTLY OBTAINING PROPERTY BECAME INVOLUNTARY TRUSTEES.

In a stockholders' action, where defendants, also stockholders, wrongfully took control under a fraudulently obtained contract of oil belonging to the corporation which oil they sold, defendants thereby became involuntary trustees for the other stockholders and were in analogy to the case of conversion chargeable with the market price of the oil at the time sold, and it was not necessary that the referee determine to support the court's finding that defendants actually received the money.

5. APPEAL AND ERROR ⊂=173(11) — PARTIES FAILING TO PRESENT OFFSETS MAY NOT COMPLAIN OF FAILURE TO FIND THEREON.

In an action between stockholders of a corporation, where defendants had full and complete information of any offsets or credits to which they were entitled before the reference, and did not appear and claim such offsets, they cannot later complain that the evidence is insufficient to support the judgment because the referee made no finding with respect to offsets.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by T. B. Fredenhall and others against John Shrader and others, in which S. A. Burrell and others intervened, and prior to trial the action was dismissed as far as plaintiffs were concerned, and from a judgment in favor of the interveners, the defendants other than the El Dora Oil Company and E. S. Good appeal. Judgment affirmed.

E. L. Foster, of Bakersfield, and Davis, Kemp & Post, of Los Angeles, for appellants.

George E. Whitaker, of Bakersfield, and John A. Powell and Hunsaker & Britt, all of Los Angeles, for plaintiffs respondents.

George L. Greer, Frank F. Oster, and Alfred H. McAdoo, of Los Angeles, for other respondents.

HART, J. Plaintiffs, stockholders in the defendant corporation, El Dora Oil Company brought the action for the purpose of having canceled certain deeds of trust and chattel mortgages given by said corporation to secure the payment of certain promissory notes, aggregating $85,000, in favor of defendants John Shrader and the Ohio Valley Construction Company, a copartnership, con-

sisting of John Shrader, Henry M. Jackson, and J. L. Campbell, for the purpose of having delivered up and canceled 75,000 shares of the capital stock of said El Dora Oil Company issued to the defendants Campbell, Jackson, and Shrader, for the purpose of having declared null and void a certain contract of sale of oil by the oil company to said last-named defendants, for an accounting by defendants of the money received by them for the sale of oil, and for certain other relief.

After the filing of the amended and supplemental complaint, S. A. Burrell, C. A. Bailey, W. H. Ballard, P. E. Stodley, Thomas Nestor, D. K. Cheever, John Glendening, Ida Otey, and Harry Clark, other stockholders of said oil company, by leave of court filed complaints in intervention, in which they adopted the amended and supplemental complaint of plaintiffs as their complaint in intervention.

The trial occupied five days, ending on May 22, 1915. Prior to the commencement of the trial upon the issues involved in the case an order was made, on motion by plaintiffs, dismissing the action so far as they were concerned, and the issues were tried between the interveners and the defendants. On June 8, 1915, an order of reference was made to Leo Longley, Esq., referee, to ascertain and report on certain things enumerated in said order of reference. On May 23, 1916, the referee filed a report, which was confirmed on May 24, 1916. On January 2, 1917, the court made findings, and judgment was entered in favor of interveners, granting them the relief asked for in the amended complaint, the allegations as to which are above set forth, and giving them a judgment against the defendants Shrader, Campbell, and Jackson, individually and as copartners under the firm name of Ohio Construction Company, in the sum of $105,406.25.

The court found that the trust deeds and the chattel mortgage referred to in the complaint were given without a consideration, and that the contract, by the terms of which the El Dora Oil Company sold to the appellants all the oil produced by it on property under lease by it, was fraudulently obtained by the appellants, with the design to cheat and defraud the other stockholders of said company.

The appeal is by the defendants, other than El Dora Oil Company and E. S. Good, from said judgment. It is supported by a transcript containing the judgment roll and a bill of exceptions. The only evidence brought up by means of the bill of exceptions is the order appointing the referee and the referee's report. The objections made by defendants to said order and report, together with a few recitals of proceedings at the trial, are also contained in the bill of exceptions.

[1] The first contention of appellants is that the court had no jurisdiction to appoint a referee to make an accounting without making findings showing that the interveners were entitled to an accounting and making an interlocutory judgment.

The order of reference reads as follows:

"This cause coming on to be tried, and it appearing that the taking of an account is necessary for the information of the court before judgment thereupon, on hearing counsel for the respective parties, it is ordered that it be referred to Leo Longley, Esq., as sole referee, to ascertain and report:

"(a) The amount of money or credits received by defendants John Shrader, Henry M. Jackson, J. L. Campbell, Ohio Valley Construction Company, a copartnership, and Ohio Valley Construction Company, a corporation, or either of them, from the sale or disposition of oil produced from the property of defendant El Dora Oil Company.

"(b) The amount of money expended and paid out and to whom by defendant John Shrader in payment of just claims against and legal liabilities of defendant El Dora Oil Company.

"(c) The amount of the just debts and liabilities of defendant El Dora Oil Company guaranteed by, but not yet paid by, defendant John Shrader.

"(d) The amount of the just debts and liabilities of defendant El Dora Oil Company guaranteed by, but not yet paid by, defendant John Shrader, wherein creditors have released and discharged from liability said defendant El Dora Oil Company.

"Pursuant to the stipulation entered into in open court during the trial of this cause by and between the interveners and defendants it is further ordered that the referee herein named ascertain and report:

"(e) What shares of stock of El Dora Oil Company have been issued since February 12, 1912.

"(f) To whom said shares were issued and by what certificates evidenced.

"(g) For what consideration such shares were issued.

"(h) By what authority and pursuant to what resolution or resolutions of the board of directors such shares issued.

"And, upon such report being confirmed according to the practice of this court, either party may bring on the cause for final judgment."

1. Section 638 of the Code of Civil Procedure provides:

"A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

"1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon;

"2. * * *"

Section 639 of the same Code provides:

"When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: 1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be

directed to hear and decide the whole issue, or report upon any specific question of fact involved therein; 2. * * *; 3. * * *; 4. * * *."

It will be observed that under the section first above referred to the court is authorized thereby to order the referee to try any and all issues, whether of law or of fact, in the action or proceeding in which the order of reference is made, and to report findings and judgment thereon. Thus the referee is practically vested with power to make a definitive disposition of the issues and the action, subject, of course, to the power of the court to reject or confirm his report, and this plenary power vested in the referee proceeds, of course, from the proposition, enunciated in the section, that the order of reference is made upon the agreement of the parties to the action or proceeding.

By section 639 the power of the referee under the order of reference, in cases arising under the first subdivision of said section, is limited to the examination of a "long account," as to which the referee may, according as he may be by the court directed to do, either hear and decide (make findings on) the whole matter or issue, or report upon any specific question of fact involved therein. The whole matter or "issue" refers to or means the account, and does not include other issues in the case or issues having no direct or immediate connection with the account. Williams v. Benton, 24 Cal. 424.

There is, then, an important distinction between the power which may be exercised by a referee to whom a reference is made by agreement of the parties (section 638) and the power of the referee to whom a reference is made under section 639, in this, that, while under the first-mentioned section the referee may be directed and so authorized to report findings and judgment upon all the issues in the case, in the last-named section his power is restricted to the hearing and decision (or the finding) of the facts as to the account ordered by him to be examined.

The order of reference in this case appears to have been based partly on section 638 and partly on section 639. Those portions of the order embraced within paragraphs (a), (b), (c), and (d) of the order refer, it will be noted, to the account, and authorizes an examination by the referee of the account, while those embraced within paragraphs (e), (f), (g), and (h) were incorporated into the order by agreement or stipulation of the parties, so that, if it might be said that the matters referred to in said last-mentioned paragraphs are not strictly involved in the account which the court upon its own motion ordered to be examined and reported on by the referee, the authority in the referee to examine those matters and make a report thereon nevertheless existed by virtue of the agreement between the parties that they might be gone into and reported on by that officer.

[2] Referring now, however, to the point urged by the appellants that the court was without jurisdiction to order a reference because it had not previously to the making of said order found that the interveners were entitled to an accounting and entered an interlocutory decree adjudicating that fact, the answer thereto is that the statute provides for no such preliminary formality. Moreover, the procedure adopted in this case with respect to the order of reference appears to be in accord with the customary practice which has in that particular prevailed in California for many years, and which has received the approval of the Supreme Court. We need not examine specifically herein the cases which seem to confirm this statement. It will suffice merely to name some of them here, viz.: Gunter v. Sanchez, 1 Cal. 45, 48; Smith v. Rowe, 4 Cal. 6; Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206; Williams v. Benton, 24 Cal. 425; Jones v. Gardner, 57 Cal. 641; More v. Calkins, 85 Cal. 177, 190, 24 Pac. 729.

Counsel for appellants cite Fox v. Hall, 164 Cal. 287, 128 Pac. 749, as an authority sustaining their position that it is an essential prerequisite to the proper exercise of the jurisdiction of the superior court to order a reference for the purpose of examining a long account and obtaining a report of the referee thereon to make and enter a preliminary or interlocutory adjudication that the plaintiff is entitled to an accounting. In that case the court said:

"The facts alleged and proved showed the existence of a fiduciary relation sufficient to invoke the jurisdiction of a court of equity to compel an accounting, which, as the evidence shows, had been demanded of the defendant L. J. Hall. [Citing cases.] Upon such accounting, the burden would probably be upon the said defendant to establish any expenditures or credits upon which he might rely as offsets to the gross income shown to have been received by him. [Citing cases.] But be that as it may, the plaintiffs were entitled to an accounting, and if the case had been submitted without further evidence, *an interlocutory judgment directing such accounting would have been proper.* [Italics ours.] * * * The accounting might have been ordered through a reference, or the court might, *with or without a preliminary interlocutory order* [italics ours] have proceeded to take and state the account itself [citing cases], rendering such final judgment thereon as might appear to be proper."

Those portions of the above language italicized constitute the entire predicate of the contention of the appellants that the case from which the language is taken supports the view that an interlocutory judgment adjudicating the right of plaintiff to an accounting is an essential prerequisite to an order of reference. But, while it is true that

the court there says that upon the evidence therein an interlocutory judgment to that effect would have been proper, it does not say, nor is it necessarily to be implied from the language of the court, that an order of reference without a previous express adjudication that the plaintiff is entitled to an accounting will render the act of ordering the reference void. The opinion does say, it will be noted, that the court might, in the absence of such an interlocutory order, itself have proceeded to take and state the account, and it seems to us that, where an order of reference is made either on the court's own motion or upon the application of the plaintiff in the absence of the consent of the other party, the order of reference itself must necessarily be construed as involving nothing less than an adjudication that the plaintiff is entitled to an accounting. If, in other words, when the court itself proceeds to take the account, that act, under the decision in the case above named and quoted from, is itself deemed tantamount to or practically sufficient as an adjudication that the plaintiff is entitled to an accounting, then a fortiori an order of reference, made after some testimony addressed to the issues has been taken, as the record shows was the case here, either by the court sua sponte or upon motion of the plaintiffs should be deemed such an adjudication or one to all intents and purposes. None of the evidence, save that involved in the report of the referee, has been certified up to this court—that is, the record here contains no other evidence than that of the report of the referee—and we are therefore authorized to assume, and indeed presume, that the testimony taken before and heard by the court prior to the making of the order of reference was sufficient to justify the court in concluding that an accounting was necessary to a just adjudication of the rights of the parties, and that therefore it was proper and necessary to order the account to be referred to a referee for examination and a report by that officer of the result of such examination.

[3] But, after all, if it be conceded that error was committed by the trial court in ordering a reference of the account before expressly finding and decreeing that the interveners were entitled to an accounting, such error involved a mere irregularity in procedure from which the appellants could not have suffered any prejudice. As above stated, the order of reference amounted substantially to a finding that justly to decide and determine the rights of the parties an accounting and for that purpose an examination of the account would be necessary; so it follows that in any event an examination of the account and a decision thereon would be required. Under these circumstances, the appellants cannot show or justly claim that they were in any way prejudiced by the action of the court in prematurely ordering a reference, assuming, for present purposes only, that such order was, according to the fair import of the statute, prematurely made. As to the report of the referee itself, it was subject to objection by appellants when the matter of its confirmation came up before the court. Considering, therefore, the error, if error it be, involved in the act of making the order here attacked with reference to and in view of the whole record before us, we thus find that there is no ground justifying the conclusion that a miscarriage of justice resulted from the error, and there is, therefore, no authority in this court to order a reversal for such error. Const. art. 6, § 4½.

[4] 2. It is next contended that there is no evidence to support a judgment against the appellants for any sum of money. This contention is based upon the fact that, while the referee found and reported the quantity of oil coming from the defendant El Dora Oil Company which had gone into the hands of appellants Shrader and those associated with him, and the times at which they received the oil, and also the market value of the oil at the time it was received by said appellants, the referee did not find and report upon the proposition whether said Shrader and his associates received in money the market price for said oil at the place of production. The reply to this proposition is that the court found upon what we are required to presume, under the state of the record here, was sufficient evidence, that the contract whereby the El Dora Oil Company sold to Shrader, Campbell, and Jackson all the oil produced from the property leased by said company at the rate of 25 cents per barrel was fraudulently obtained by said Shrader and others and with the purpose and intent of cheating and defrauding the stockholders of said company. It is further found that Shrader and his associates, subsequently to the execution of said contract, sold a large quantity of the oil so purchased from the El Dora Company. It is thus clear that, having wrongfully taken control of and sold the oil of the company, the appellants thereby became, as to said oil, involuntary trustees of the other stockholders, and were, in analogy to the case of a conversion, chargeable with the market price of the oil at the time they sold the same.

[5] But it is further contended that the evidence is insufficient to support a judgment for any money against the appellants for the reason that there is no finding by the referee with respect to any offsets which they might have had against the money so received by them. The answer to this contention is that, if the appellants had any expenditures or claims which they could have legitimately set up in abatement of the amount for which the referee found that they had sold the oil,

the burden, upon the accounting, was upon them to prove such expenditures or credits. Fox v. Hall, 164 Cal. 287, 291, 128 Pac. 749. This rule follows from the proposition that a party claiming offsets to a claim against him is supposed to have full and complete information as to any offsets or credits he may be entitled to upon such an accounting, while, perhaps, the adversary party is without any knowledge whatever of such offsets. In this case it is manifest, from the situation as it is disclosed by the record, that the matter of offsets, if any existed, was one wholly within the knowledge of the appellants, and that the interveners were entirely ignorant thereof. The report of the referee shows that, although the appellants were duly notified on all occasions of the place and times of the hearing of the account, they at no time made an appearance before the referee or at the hearings, and in no way aided the referee in his work of investigating and making a report on the account. Thus it is obvious that, if they could have shown offsets, and desired to avail themselves of the benefit thereof, it was their duty to have appeared at the investigations by the referee and presented such offsets. Not having done so, it does not now lie in their mouths to complain of a failure of the referee to find as to that matter, or of any disadvantage they may have suffered from such failure.

3. It is lastly contended that the judgment, in so far as it decrees null and void for want of a consideration the trust deeds and the chattel mortgage mentioned in the complaint in intervention, is not supported by the findings. An examination of the findings as a whole will show, as thus we have been convinced, that the point is without merit.

The court found (finding 3) that the trust deed executed and delivered to one M. S. Platz by the El Dora Oil Company, in pursuance of a resolution passed on the 29th day of February, 1912, by the said company's board of directors, of which board the defendant Shrader was then a member, was so executed and delivered for the purpose only of securing said Shrader for any indebtedness then due or that might become due and owing to him from said company; that, contemporaneously with the execution and delivery of said deed, promissory notes amounting in the aggregate to the sum of $35,000 were executed by the El Dora Company to and in favor of said Shrader, and that said deed of trust purported on its face to be security for the payment of said notes; that said notes did not at that time represent an existing indebtedness due from said company to said Shrader in the aggregate sum thereof; and that said notes and said deed of trust were intended as security for the repayment to said Shrader "of what indebtedness there might then be due said defendant John Shrader, or that might in the future become so due and owing." The court also found that, after the above-mentioned transaction, in pursuance of a resolution adopted by its board of directors, the El Dora Company, through its president, one E. S. Good, and its secretary, the defendant Shrader, executed a trust deed to one McGrath to secure repayment of a "pretended indebtedness of $50,000" due from said company to the defendants Campbell, Jackson, and Shrader, and at the same time the said company, under the authority of the resolution referred to, and through said Good and said Shrader, president and secretary, respectively, of its board of directors, executed to and in favor of said Campbell, Jackson, and Shrader its promissory notes aggregating the sum of $50,000, to repay which the said deed of trust was given. The court found that there was no consideration whatever for said last-mentioned deed of trust or for the promissory notes the payment of which said deed was given to secure. The court then found, by finding 23, as follows:

"That the defendants John Shrader, Henry M. Jackson, and J. L. Campbell, and Ohio Construction Company have received from the sale or disposition of oil produced from the property of defendant El Dora Oil Company up to December 31, 1913, money or credits to the extent and sum of $94,188.85, for which said defendants have made no accounting and against which said defendants have no claim, credit, or offset, except in the sum of $7,076.24."

Thus this situation is presented by the findings above considered: (1) That, as to the trust deed and the promissory notes representing the purported $35,000 indebtedness, the court finds that that transaction or the notes did not represent an existing indebtedness, but any indebtedness to accrue only in the future. As to this finding we may here pause to observe that there is no express finding that a "future indebtedness" did not accrue before the commencement of this action against the company in favor of Shrader, and that, if taken alone, or without reference to finding 23, said finding 3 would not be sufficient to support the judgment as to that particular transaction. (2) That the court finds that there was no consideration whatever to support the transaction involving the giving of the notes for the aggregate sum of $50,000 and the trust deed executed for the purpose of securing payment of said notes. (3) That, instead of the El Dora Company being indebted to John Shrader in any sum whatever, John Shrader and his associates, Campbell, Jackson, and the Ohio Construction Company, under which name the said three appellants, as copartners, conducted and carried on business, were indebted to the El Dora Oil Company in the sum of $94,188.85, less a credit of $7,076.24, and the

interest on said indebtedness up to December 31, 1913, bringing the total indebtedness at the time of judgment up to the sum of $105,406.25.

We must assume that, if there was evidence showing that anything was due John Shrader and his associates, or either of them, from the El Dora Company by reason of any of the transactions referred to in the findings above considered, the court would have made a finding thereon and due and proper allowance of the amount as a credit or offset against the amount of money found to have come into their hands from the sale of the company's oil. Indeed, on the record before us, the presumption is that all the findings derive sufficient support from the evidence adduced at the trial, and, considering the findings by the light of each other, or as a whole, they amply support the conclusion of law by the court that the $35,000 transaction, involving the execution of the promissory notes aggregating that sum by the El Dora Company to Shrader, and the deed of trust and the chattel mortgage given as security for said notes, "should be decreed to be null and void and of no effect."

It follows, of course, that the judgment, in so far as it decrees said notes, trust deed, and mortgage null and void, is buttressed by sufficiently supported findings and conclusions of law.

There are no other points presented here for our consideration.

The judgment appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 37

MITCHELL v. MITCHELL. (Civ. 2700.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. EXECUTORS AND ADMINISTRATORS ⟸221(6)—EVIDENCE HELD TO SUSTAIN FINDING THAT LOAN FROM DECEDENT HAD BEEN PAID.

In an action to recover money loaned by a decedent to her son, evidence by the son, his wife, and another that he had repaid the amount *held* sufficient to sustain a judgment for defendant.

2. APPEAL AND ERROR ⟸1048(6)—LIMITING CROSS-EXAMINATION TO AFFECT CREDIBILITY NOT REVERSIBLE.

Though the court in an action to collect money loaned by decedent to her son should allow broad scope in cross-examination of defendant's witnesses, who testified to payment to better determine their credibility, his limiting such cross-examination is not sufficient to warrant a reversal of judgment for defendant.

3. EXECUTORS AND ADMINISTRATORS ⟸221(3)—EVIDENCE OF DECEDENT'S ATTEMPT TO BORROW INCOMPETENT TO CONTRADICT PAYMENT TO HER.

In an action to recover money loaned by decedent to her son, evidence that at the time the son claimed to have repaid the money decedent had to borrow money from another is incompetent to contradict the payment.

4. EXECUTORS AND ADMINISTRATORS ⟸221(3)—EVIDENCE OF SOURCE OF DECEDENT'S FUND INCOMPETENT TO CONTRADICT PAYMENT TO HER.

In an action to recover amount loaned by decedent to her son, evidence that at the time the son claimed to have repaid the amount the only funds in decedent's bank account were the proceeds of the sale of real estate was incompetent to contradict testimony of payment.

5. APPEAL AND ERROR ⟸1071(5)—STATEMENT IN FINDINGS THAT ACTION WAS WITHOUT JUST CAUSE IMMATERIAL.

In an action to recover money loaned by decedent to her son, a statement by the trial court at the end of its findings that the action was prosecuted without just cause was surplusage and immaterial.

6. EXECUTORS AND ADMINISTRATORS ⟸84—DUTY TO BEGIN SUITS.

The administrator's duty to collect all the assets of the estate requires him to bring suit where he has reason to believe that there is money owing to the estate which has not been paid.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by William Mitchell, as administrator of the estate of Elizabeth S. Mitchell, deceased, against Robert Mitchell. Judgment for defendant, and plaintiff appeals. Affirmed.

Jensen & Jensen, of Los Angeles, for appellant.

George H. Moore and Raymond E. Hoyt, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of defendant. The action was brought to recover the principal sum of $750, which was alleged in the complaint to have been loaned by decedent, Elizabeth S. Mitchell, to the defendant. The answer admitted the making of the loan, and affirmatively alleged the repayment thereof.

[1] At the trial defendant testified that at the time of receiving the money from decedent, who was his mother, he gave her his promissory note for $750, payable two years after date, and payable in installments of $20 per month; that in September, 1915, there then being due about the sum of $300 of the principal, his mother, stating that she then needed the money, requested him to discharge the debt, offering to waive certain interest amounts if payment was made;

that not having the money at hand he (defendant) borrowed from Lena R. Brackett the $300, which was delivered to his wife for the purpose of paying the debt. The wife testified that she delivered the money to decedent, and that decedent returned to her the promissory note, and directed her to burn it. Lena Brackett testified that she made the loan to defendant as narrated by him, and that she was present when the money was delivered to the mother, and saw the note handed by the mother to defendant's wife, and heard the direction by decedent to destroy the same, and saw the note destroyed. The testimony offered by the plaintiff was not directly contradictory of the fact of repayment, as asserted by the defendant. There was some testimony to the effect that at about the time defendant, claimed to have repaid the loan his mother had stated to others that she was in need of money, and that near the time of her death she stated to another witness that the interest had not been paid on her note, apparently referring to the note given by the defendant. It must appear from this statement of the testimony that there was ample evidence to sustain the judgment of the court.

[2] Counsel for appellant complain that the court erred in limiting the cross-examination of the witness Brackett; also the cross-examination of the wife of defendant. Conceding that the court should have adopted a very liberal policy toward the plaintiff in allowing broader scope to the cross-examination in order to better determine the credibility of the witnesses, we are not prepared to hold that the error in that regard would be sufficient to warrant a reversal of the judgment.

[3] We do not think the court erred in its ruling refusing to allow another witness to answer a question as to whether decedent had borrowed any money from him within six months prior to her decease. It would have been, no doubt, competent for the plaintiff to have shown, if he could, that at the time it was claimed the payment of $300 was made to decedent by the defendant she in fact had no money; but we do not believe that the offered testimony of her desire to borrow money from others at the same time would be sufficient or competent proof in support of such a claim. We do find that one of these witnesses was allowed to testify that decedent was at about that time without funds, and that she had on many occasions stated that she was without money. The fact that she had requested a loan from the witness could add nothing to the weight of those statements.

[4] Neither do we think that the court erred in refusing to allow to be shown by another witness that the bank deposit which the decedent had late in September was composed only of funds received from the sale of certain real property.

[5, 6] Counsel for appellant complain because the court concluded its findings with the statement "that this action was commenced and prosecuted without just cause." Of course, this statement had no relevancy to the issues presented, and was in no particular a determination of any of the rights of the parties. The chief cause of complaint as to this matter seems to be that appellant resents the imputation that he prosecuted his action without ground therefor. It is the duty of an administrator of an estate to collect all of the assets thereof, and if such administrator has reason to believe that there is money owing which has not been paid, it is his duty to sue therefor. As we have noted, however, the phrase objected to in the findings is surplusage and immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 679

SOUTHERN CALIFORNIA HOME BUILDERS v. YOUNG et al. (Civ. 3133.)

(District Court of Appeal, First District, California, Division 2. Jan. 30 and Feb. 24, 1920.)

1. CORPORATIONS ⟸319(5)—COMPANY CAN SUE DIRECTORS TO RECOVER DIVIDENDS IMPROPERLY PAID.

Under Civ. Code, § 309, prohibiting dividends except from surplus profits, and rendering directors personally liable for improper dividends, a corporation can maintain an action against directors to enforce their liabilty though suing on its own behalf and not for creditors.

2. CORPORATIONS ⟸319(½) —DAMAGE TO COMPANY FROM DIRECTORS' IMPROPER DECLARATION OF DIVIDENDS IS AMOUNT THEREOF.

The actual damage to a corporation from its directors' improper declaration of dividends other than from surplus profits in violation of Civ. Code, § 309, is the amount by which its capital is depleted by the unlawful dividends, the liability of the directors to the company being direct, not secondary only because of inability to pay creditors.

3. CORPORATIONS ⟸310(4)—RIGHT OF COMPANY TO RECOVER ILLEGAL DIVIDENDS HELD NOT TO AFFECT STATUTORY LIABILITY OF DIRECTORS.

Right of corporation to recover from those to whom corporate assets may have been unlawfully transferred by way of dividends not declared from surplus profits does not affect liability, under Civ. Code, § 309, of directors who made unlawful distribution, unless corporation causes replacement in whole or part of what was taken from it, in which event liability of directors is diminished proportionately or expunged.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. CORPORATIONS ⟸310(4)—RIGHT OF COMPANY TO RECOUP FOR ILLEGAL DIVIDENDS BY ASSESSMENT DOES NOT AFFECT LIABILITY OF DIRECTORS.

If a corporation may lawfully recoup itself for loss through dividends improperly declared other than from surplus profits, by assessment on the stock while remaining in the hands of those who received the unlawful distribution, such right does not affect the liability, under Civ. Code, § 309, of the directors who made the distributions, unless thereby the company causes replacement of what has been taken from it.

5. APPEAL AND ERROR ⟸931(1)—EVERY REASONABLE INFERENCE MUST BE DRAWN IN SUPPORT OF TRIAL COURT.

Every reasonable inference must be drawn on appeal in support of the action of the trial court.

6. CORPORATIONS ⟸310(4)—DIRECTORS RIGHT OF RECOURSE AGAINST STOCKHOLDERS RECEIVING IMPROPER DIVIDENDS IMMATERIAL TO DIRECTORS' LIABILITY TO CORPORATION.

If plaintiff corporation is entitled to judgment in its suit against directors to enforce their liability, under Civ. Code, § 309, for having paid dividends other than from surplus profits, neither corporation nor court is concerned with question of any subsequent rights which defendant directors may assert against stockholders who received illegal dividends, persons who are neither necessary nor proper parties.

7. CORPORATIONS ⟸310(4)—SILENCE OF STOCKHOLDERS WHEN IMPROPER DIVIDENDS DECLARED IS NOT RATIFICATION OR ESTOPPEL IN COMPANY'S ACTION AGAINST DIRECTORS.

Mere consent or silence on the part of corporate stockholders, unaccompanied by any other fact which might entail equitable considerations, will neither operate as a ratification of illegal acts of directors, as in declaring dividends other than from surplus profits, nor as an estoppel of the company, as to assert the liability of the directors under Civ. Code, § 309.

8. APPEAL AND ERROR ⟸1170(7)—EXCLUSION OF EVIDENCE TENDING TO PROVE DEFENSE A "MISCARRIAGE OF JUSTICE" CALLING FOR REVERSAL.

The refusal of the trial court to permit defendants to present evidence which, if true, would exonerate them constitutes a "miscarriage of justice" of such a character as to be outside the operation of Const. art. 6, § 4½.

9. CORPORATIONS ⟸151—DEFINITION OF "SURPLUS PROFITS" FROM WHICH DIVIDENDS PROPERLY MAY BE PAID.

"Surplus profits," as used in Civ. Code, § 309, prohibiting the declaration of corporate dividends other than from such profits, means the excess of receipts over expenditures, or net earnings or receipts, or gross receipts, less expenses of operation; mere advance in value of property prior to sale, or estimated profits, not constituting surplus profits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surplus Profits.]

10. CORPORATIONS ⟸310(4)—DIRECTORS DECLARING IMPROPER DIVIDENDS LIABLE, THOUGH ACCEPTING BALANCE SHEET PREPARED BY EMPLOYÉS.

Corporate directors who improperly declared dividends other than from surplus profits, in violation of Civ. Code, § 309, the first of which left the corporation with a deficit of $50,000, the second with one of $117,000, and the third with one of $142,000, at time of declaration of which the company had realty known to be of the value of $327,000, so that there must have been liabilities of about $470,000, *held* liable to the company, though they were led to believe there were surplus profits available for dividends by accepting the figures of a balance sheet prepared by corporate employés, and though they relied on appraisals by competent persons, and had legal advice.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Southern California Home Builders against R. O. Young and others. From judgment for plaintiff, defendants appeal. Affirmed.

Henry K. Norton, Wilbur Bassett, and Roy V. Rhodes, all of Los Angeles, for appellants.

Hickcox & Crenshaw, of Los Angeles, for respondent.

BRITTAIN, J. Five former directors of the plaintiff, a going corporation, appeal from a judgment for something over $30,000, the aggregate of three dividends paid during their administration, the trial court having found that none of the dividends was paid from surplus profits.

Under two broad contentions, that section 309 of the Civil Code does not permit the maintenance of such an action as this by a corporation except for the benefit of creditors, and that good faith on the part of the directors is a complete defense to such an action, numerous questions are presented. Except in one particular, to which further reference is made, counsel for respondent assumes, and, after serious consideration, the court is of the opinion the questions are properly before it upon a sufficient record.

The facts necessary to be considered are undisputed, and, without following the details of the trial procedure, may be summarized as follows: On the demand of the defendants a jury was called to establish the value of the corporation's realty at the dates of the respective dividends. By stipulation these figures were modified, and, as so changed, were adopted by the court as a part of its findings. The court also found that at the date of each dividend the liabilities of the corporation exceeded its assets. For the sake of brevity the figures are tabulated, each dividend having been for 2½ per cent. of the par value of outstanding stock, declared and paid respectively at the dates indicated, as follows:

	Apr. 15, 1913.	Oct. 15, 1913.	Jan. 15, 1914.
Realty value	$311,091.00	$334,394.00	$327,222.00
Deficit	50,099.19	117,534.35	142,312.40
Dividend	8,958.99	9,635.14	11,492.61

The court further found that the defendants, at the date when each dividend was declared, had before them as directors a statement, inventory, and balance sheet, furnished by the employés of the corporation in charge of its books in the ordinary course of its business, purporting to show undistributed in the treasury and accumulated between the dates of the organization of the corporation and the particular dividend surplus profits sufficient to pay the dividend, but that the statement, balance sheet, and inventory were not true, full, or correct statements of the financial condition of the corporation, for the reason that the property was shown at a fictitious value largely in excess of its actual value, and also because many items carried as assets should have been carried as losses, and many carried as profits should have been carried as liabilities, and that if the statement, balance sheet, and inventory had been true and correct, they would have shown the corporation had not made surplus profits, but that there was a deficit. These findings were based on evidence taken during 58 days of trial, 10 of which were devoted to the determination of the value of the real property. The evidence introduced is not before the court, it being recited in the bill of exceptions that sufficient evidence was introduced to support the findings, except those not heretofore mentioned, that the corporation was damaged to the amount of the respective dividends, upon which no evidence was introduced other than the fact of their payment.

[1] Eliminating those clauses not involved in this appeal, section 309 of the Civil Code is as follows:

"The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; * * * nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock. * * * For a violation of the provisions of this section, the directors under whose administration the same may have happened * * * are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced. * * *"

The appellants contend that an action cannot be maintained by the corporation to recover upon the liability defined in the section, except on behalf of creditors. The language of the statute at first glance would appear to be too clear to permit an interpretation limiting the right of the corporation to recover property taken from it. A forceful argument is presented to show that such a first impression cannot be supported upon sound reason.

A similar statute was adopted in New York in 1825, in New Jersey in 1846, and in this state in 1850. It is unnecessary to consider the changes in these statutes by amendments affecting either their language or punctuation. It is contended they are but codifications of a common-law rule that the capital of a corporation is a trust fund, first for the creditors and then for the stockholders, for the misapplication of which the directors were liable as trustees. This view seems to have been held, in 1902, by Vice Chancellor Pitney, of the Court of Chancery of New Jersey. In a very learned and illuminating opinion he reviewed a great number of English and American cases, and reached a conclusion upon which he sustained a demurrer to bills in consolidated suits by certain stockholders against directors of two corporations, saying, among other things:

"It would be unjust and inequitable for the stockholders directly or indirectly to recover from the directors the very moneys which they have already received." Siegman v. Maloney, 63 N. J. Eq. 422, 51 Atl. 1003.

An appeal having been taken under another name from the order made on demurrer, the Court of Errors and Appeals reversed the ruling. In the course of the opinion, written by Mr. Chief Justice Gummere, he said:

"The apparent object of the provision is to afford protection equally to the corporation and to its creditors against loss by reason of the illegal act. But the creditors can suffer no injury from it unless the capital is so impaired as to render the company insolvent. Not so with the corporation. Any impairment of its capital is harmful to it in some degree; the seriousness of the injury depending upon the extent of the impairment. For the full protection of the company, the liability of the directors must be absolute. * * * In our judgment, the Legislature intended by this provision to afford the full measure of protection which the words provide."

Concerning the statement that it would be inequitable to permit stockholders to recover from directors money they had themselves received as dividends, it was said:

"The argument assumes there will be no transfer of the stock of the company during the period of the liability of the directors. The assumption is unwarranted. The very declaration of the dividend, evidencing, as it does, the apparent prosperity of the company, creates a desire on the part of outsiders to become holders of the stock. It at the same time decreases the actual, while increasing the apparent, value of the stock. The result is to afford unscrupulous directors, and stockholders who are cognizant of the illegal action of the board, an opportunity to unload their holdings upon innocent purchasers at fraudulently inflated prices. * * * Nor is it inequitable that stockholders who have innocently participated in the distribution of the illegal dividends should have their stock restored to its normal value by contribution from the directors who have impaired the capital without being first required to pay back

the dividend so paid to them. The ordinary purchaser of corporate stock holds it as an investment. He rightly considers and treats the dividends paid upon it as income. In many instances the income is required to meet the expenses of living, and is entirely expended for that purpose. To say that a person who has been unwittingly induced to exhaust his principal by the mistaken or fraudulent representation of those to whom he has intrusted it, that what has been paid to him as income suffers no injury, is absurd. To refuse him redress except upon the condition that he return the moneys which he has expended in the belief that his capital was intact, notwithstanding that by such expenditure he is rendered penniless, is to put a premium upon fraud in corporate management." Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454.

The same question coming before the court after Mr. Justice Pitney became a member of it, he wrote the opinion expressly adopting the reasoning and conclusions of the decision in Appleton v. American Malting Co. Siegman v. Electric Vehicle Co., 72 N. J. Eq. 403, 65 Atl. 910. The rule has been adopted by the United States Circuit Court in New Jersey, and by the courts of New York. Siegman v. Electric Vehicle Co. (C. C.) 140 Fed. 117; Hutchinson v. Stadler, 85 App. Div. 424, 83 N. Y. Supp. 509; Hutchinson v. Curtis, 45 Misc. Rep. 484, 92 N. Y. Supp. 70; De Raismes v. U. S. Lithograph Co., 161 App. Div. 781, 146 N. Y. Supp. 813. While, in all the cases cited except the latest, the suit was brought by the stockholder instead of the corporation, neither the reason nor the rule is different when the suit is by the corporation. In this state, at least, when such a suit is brought by the stockholder it is entertained only on behalf of a corporation the officers of which fail or refuse to act, and then the corporation must be made a party. Cogswell v. Bull, 39 Cal. 320; Waymire v. San Francisco, etc., Co., 112 Cal. 646, 44 Pac. 1086; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

Under numerous subheadings it is argued, in effect, either that the overruled decision first written by Mr. Justice Pitney when he was Vice Chancellor was correct or that the rule finally adopted by him does not apply in this case. These contentions do not appear to be well founded. They have received careful consideration, but do not require lengthy comment here. Although one of the purposes of the statute was to protect creditors, that was not its sole purpose. There is nothing in People v. Savings Union, 72 Cal. 199, 13 Pac. 498, Moore v. Lent, 81 Cal. 502, 22 Pac. 875, or Baldwin v. Miller & Lux, 152 Cal. 454, 92 Pac. 1030, which in the least degree militates against the rule, nor are the cases from other states, cited by appellants upon this subject, at variance with the rule. The statute affords protection in proper cases to the corporation, regardless of whether or not there are creditors. It would be nothing short of absurd, therefore, to hold that no suit could be maintained to enforce the liability, except one on behalf of stockholders. Kohl v. Lilienthal, 81 Cal. 387, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520. The cases of Winchester v. Mabury, 122 Cal. 522, 55 Pac. 393, and Moss v. Smith, 171 Cal. 777, 155 Pac. 90, when read in connection with the facts upon which they were based, lend no support to the contentions of the appellants.

[2] The appellants argue that, while the statute is highly penal in its effect upon directors, and is therefore to be strictly construed, its purpose is not punitive, but remedial, and that in such cases as this actual damage must be shown. For the present purpose both of these propositions may be accepted, but unless the seemingly unanswerable logic of Mr. Chief Justice Gummere, in Appleton v. American Malting Co., supra, is set at naught, the actual damage to the corporation is the amount by which its capital is depleted by the unlawful dividends. The liability to the corporation is direct, not secondary only because of its inability to pay creditors. The decision of Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153, does not support any other view of the meaning of the unambiguous language of the statute.

[3, 4] The right of the corporation to recover from those to whom corporate assets may have been unlawfully transferred does not affect the statutory liability of the directors who made the unlawful distribution, unless the corporation, in the exercise of the first right, causes the replacement, in whole or in part, of what was taken from the corporation. In that event the liability of the directors would be diminished proportionately or expunged, since the corporation would be entitled to what was taken and no more. The same reasoning would apply to recoupment by assessment upon the stock while it remained in the hands of those who had received the unlawful distribution, and if other equities, suggested in the opinion in Appleton v. American Malting Co., supra, had not intervened, if, indeed, an assessment for such restoration could lawfully be levied. One purpose of section 309 of the Civil Code was to assure existing and incoming stockholders of the corporation that its capital should not be wrongly depleted. If, in violation of the statute, directors should make a dividend from capital instead of from profits, and, before suit, should themselves replace an equivalent sum in the treasury, or should, by an appeal to those who had received the money, cause them to replace it, the corporation, of course, could not, by such a suit as this, exact double payment. If the stockholders or some of them resisted such an appeal, and an assessment, assuming such an assessment to be otherwise legally unobjectionable, were levied and paid, the result

would be the same as if the same stockholders voluntarily had returned the money they had received.

[5] It is stipulated in the present case that after the dividends in question were paid, the corporation received from its stockholders in payment of assessments levied by its board of directors a sum of money greater than the aggregate of the dividends. To say the least, it is extremely doubtful whether an assessment levied for the purpose of replacing assets wrongfully diverted could be upheld under the provisions of the Code prescribing that assessments may be levied for the purposes of paying expenses, conducting business or paying debts. Civ. Code, § 331. If it were levied in terms for any other purpose than recoupment, it would be evasive and fraudulent, if that were its real purpose. In this case the stipulation furnishes no aid to the appellants. It does not show when nor for what purposes the assessments were levied. The trial occupied 58 days, all but 10 of which were devoted to the examination of the financial affairs of the corporation. The evidence adduced is not before the court. Under the rule that every reasonable inference must be drawn in support of the action of the trial court, it may be assumed that the evidence showed the assessments were levied, not for the purpose of recoupment, but for other specific purposes to which the money, when paid, was properly applied.

[6] Argument upon the proposition that such a suit cannot be maintained on behalf of the stockholders is answered by the fact that this suit was brought by the corporation on its own behalf to recover for injury sustained by it. Equally immaterial is the argument concerning the right of the directors to pursue stockholders to whom payments were made in the event of a final judgment in this suit against the directors. If the corporation is entitled to a judgment in this statutory suit, neither the corporation nor the court is concerned with the question of any subsequent rights which the defendants may assert against persons who are neither necessary nor proper parties to the present litigation.

[7] In their fourth special defense the defendants attempted to plead an estoppel against both the corporation and the stockholders who participated in the dividends in question. No special facts were alleged, except that the stockholders had accepted dividends and had not complained. Mere consent or silence on the part of stockholders, unaccompanied by any other fact which might present equitable considerations, will neither operate as a ratification nor as an estoppel. Kohl v. Lilienthal, 81 Cal. 385, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Tapscott v. Mexican Colorado, etc., Co., 153 Cal. 667, 96 Pac. 271; Burne v. Lee, 156 Cal. 228, 104 Pac. 438; Hedges v. Frink, 174 Cal. 553, 163 Pac. 884. The general demurrer was properly sustained to the special defense as pleaded, and the record does not show that the appellants sought to amend, either when the ruling was made or after the evidence was before the court. In the absence of the evidence which was introduced, this court cannot assume that it supported the appellants' claims of estoppel. Neither in the present state of the pleadings would any part of the excluded evidence have been admissible upon an issue of estoppel not before the court.

That there is nothing inherently inequitable in such a suit appears both from the sound reasoning upon which the decision in Appleton v. American Malting Co., supra, is based, and from the express provisions of section 309 of the Civil Code, establishing the directors' liability. If the facts of the particular case showed it would be inequitable to enforce the liability, those facts should have been presented in the record filed in this court. As a matter of law, upon the appellants' first broad contention, it is concluded that the liability of directors for the amount of unlawful dividends distributed by them is a direct one to the corporation, and not dependent upon the existence of corporation creditors.

The appellants' other main contention is that:

"No recovery can be had against directors who after due care and investigation, and in the bona fide belief that the corporation had sufficient surplus for the purpose, paid dividends ratably among the stockholders."

In their second separate defense the appellants alleged that at the time of declaring each dividend as directors they had before them a statement, inventory, and balance sheet, furnished them by employés of the corporation in charge of its books and accounts in the ordinary course of business, showing that between the date of the organization of the corporation and the date of the dividend there had been accumulated and undistributed in the treasury sufficient surplus profits out of which to pay the dividends, respectively, and that the defendants relied upon the entries appearing in the statement, inventory, and balance sheet, and believed the same to be true, and, upon information and belief, they alleged that the same were true and accurate statements of the financial condition of the corporation. General demurrer to this defense was overruled, but a similar demurrer to the third separate defense was sustained, in which defense it was alleged the appellants, in good faith and in the honest belief that the corporation had surplus profits arising from its business from which the dividends respectively could properly and lawfully be made, voted therefor; that each dividend was paid without intent

to delay, hinder, or defraud any creditor; that the defendants exercised due diligence to ascertain the financial situation of the corporation and to determine whether there were sufficient surplus profits arising from the business from which to pay the dividend, and each dividend was paid in the honest belief that the financial situation of the corporation was such that the amount of surplus profits arising from the business then belonging to the corporation was greater than the amount of the dividend. While no direct attack is made by the appellants upon the demurrer ruling, there appears in the respondent's brief a statement made by the trial judge in sustaining the demurrer to this defense, in which, after stating the reasons for the conclusion, the trial judge said:

"All the foregoing considerations lead me to the conclusion that the defense of good faith, attempted to be alleged in the third separate defense, is not a defense; for these reasons the demurrer thereto will be sustained."

While neither the second nor the third defense was pleaded with the particularity of statement which might have been required by special demurrer, it appears from what has been said that the question of good faith was presented by the second defense, although not so strongly as by the third defense. In relation to the second defense the court found that the directors had before them the statement, inventory, and balance sheet, as alleged in the second defense, further finding that the same were false, and that the assets were shown therein to be of a value very largely in excess of their actual value, with items carried as assets which should have been carried as losses, and items carried as profits which should have been carried as liabilities. There was no direct finding on the question of good faith, no doubt because of the demurrer ruling.

In support of the issue of good faith each of the defendants offered to testify that as directors they had relied upon the entries appearing on the statements, inventories, and balance sheets, and believed them to be true, accurate, and correct statements of the financial condition of the corporation, and that when declaring the dividends they acted in good faith and in the honest belief that the corporation had sufficient surplus profits to pay the dividends; that they had exercised reasonable care and diligence to ascertain the financial condition of the corporation. They further offered to prove that they had caused the books of the corporation to be audited by a certified public accountant, that said audit showed a net undivided surplus sufficient to pay at least one of the dividends, and the report of the audit was offered. They further offered to prove by an attorney that they had consulted him in regard to the payment of the dividends, and had been advised by him that they were lawful and proper. They offered to prove that they had caused the real property to be appraised by certain bank officials, bank appraisers, railroad land agents and residents in the neighborhood of the properties; that the defendants believed that the persons named as appraisers were the best-qualified persons then available for the purpose of making appraisement, and that in good faith they had believed in and relied upon the rectitude of the appraisements, which were also offered in evidence. All this evidence was rejected upon the general objection that it was immaterial, as, indeed, it was if the ruling of the trial judge that good faith is not a defense to such an action was correct. The question presented in the first instance, therefore, is one of law as to whether or not under the circumstances the defense of good faith may be interposed to defeat the liability declared by the statute, although that question is brought here upon the rulings of the court in refusing to admit the proffered evidence.

[8] It is apparent this is not a case within the purview of section 4½ of article 6 of the Constitution. That section was adopted to prevent reversal of just judgments for technical errors of procedure. People v. O'Bryan, 165 Cal. 64, 130 Pac. 1042. It did not modify or lessen the substantial guaranties of life, liberty, or property, without which any government must be despotic. Those guaranties depend on what has been said to be the right controlling all rights—the right of every person to be heard in ordinary forms of law in his own defense. The appellants contend that by the action of the trial court they were deprived of their right to present evidence which, if true, would have exonerated them. If the defense was permissible in the particular case, the refusal to receive evidence in its support constituted a miscarriage of justice of such a character as to be outside of the operation of the constitutional provision.

[9, 10] Although the provisions embodied in section 309 of the Civil Code have been in force in this state since 1850, it is remarkable that this exact question does not appear to have been judicially determined by the Supreme Court. It has always been presumed that directors have knowledge of the business of corporations it is their duty to manage and control. Before the adoption of any of the statutes in terms making directors liable, among other things, for declaring dividends out of capital, it was recognized both in the courts of common law and in the courts of equity that directors as trustees were liable for acts of malfeasance or misfeasance by which the capital of the corporation might be improperly depleted. Directors may still be liable under the old rules in cases other than those provided for in section 309 of the Civil Code, if they have been grossly negligent in the employment of the corporation servants, or in their oversight

of them in the management of the corporate business. In such cases the questions of good faith, care, and diligence are the essential ones to be determined.

The appellants argue that section 309 of the Civil Code is only a codification of the old rules. The court has been unable to accept this view. The adoption of the statute was not intended as an idle act. It does not appear reasonable to suppose that if the Legislature merely intended to codify the pre-existing common law, it would have passed the statute apparently limiting the liability of the directors to three particular acts for which they might be held liable as trustees. In the growth of corporate intervention in ordinary business affairs, it is inconceivable that by the adoption of these statutes the Legislatures of a number of states intended to lessen the responsibility of directors by declaring them liable for specific breaches of trust, which by their mention in the statute might have the effect of relieving the directors from civil liability for other breaches not mentioned. In discussing the first general contention of the appellants, decisions of the Supreme Court of this state have been cited from which, generally speaking, it appears that the prohibition of section 309 of the Civil Code against withdrawing capital or declaring dividends from capital has been denounced as contrary to the policy of the law, and ultra vires.

The appellants rely strongly upon a decision in a case arising under a similar statute of Illinois. The opinion was written by Judge Grosscup of the United States Circuit Court of Appeals. The opinion shows that in the particular case the corporation was under the control of a group of men who perpetrated upon it, its directors, stockholders, and creditors, a series of grossly fraudulent and actively dishonest practices. In the course of the opinon Judge Grosscup said:

"The whole question of liability in these respects seems to center around the inquiry, Should the appellees, in the exercise of the diligence required of them by law, have known, at the time of the transactions, the true state of the company's affairs?"

In that case he applied the reasoning and the rules of the common law to the statute. Chick v. Fuller, 114 Fed. 22, 28, 51 C. C. A. 648. This case stands practically alone, and the significant feature of it is the showing of direct fraud practiced, not by, but on, the directors.

Under the first contention of the appellants they relied upon the reasoning of Mr. Justice Pitney in a case in which his decision was reversed by the Court of Errors and Appeals of New Jersey. It has been stated that when Mr. Justice Pitney became a member of that court in a subsequent case he adopted the reasoning of the overruling opinion. Upon the present contention probably no stronger statement can be found than that of Mr. Justice Pitney in the later case. He said:

"Under the statutory scheme it is manifest that while it is a function of the directors of a corporation to determine whether net earnings or surplus exist applicable to the payment of dividends, they cannot, by an erroneous determination of this point, confer either upon themselves or upon the corporation powers that by the corporation act are withheld, nor make lawful that which the act has prohibited. If this were permissible, then by the same logic a court that is called upon to pass on the question of its jurisdiction over a given subject-matter might, by an erroneous determination, enlarge its jurisdiction. Some matters that are ultra vires the directors may be intra vires the corporation; some matters that are ultra vires the corporation may be so, simply because they are unauthorized; other matters may be ultra vires the corporation because prohibited by law. The matter we are dealing with comes within the latter category. Not only is it not within the express or implied powers of a corporation to distribute its capital among the stockholders in the guise of dividends as from profits, but the doing of this is expressly and with emphasis prohibited. In Appleton v. American Malting Co., 65 N. J. Eq. 375, 381, 54 Atl. 454, this court pointed out that the impairment of capital resulting from unlawful payment of dividends not only renders the corporation less able to conduct its business and to meet its obligations, but tends to the injury of innocent investors by decreasing the actual, while increasing the apparent, value of the stock, and likewise to the injury of the very stockholders who innocently participate in the distribution, because they are led to treat dividends as income and expend them as such, while in truth they are unwittingly exhausting their principal." Siegman v. Electric Vehicle Co., 72 N. J. Eq. 408, 65 Atl. 912.

The question of the same dividends came before the United States Circuit Court. In the course of the opinion it was said:

"A board of directors have no legal power to declare dividends and direct their payment when they know, or ought to know, that the payment will result in impairing the capital fund of their corporation." Siegman v. Electric Vehicle Co. (C. C.) 140 Fed. 117, 119.

Under a similar statute considered by the Appellate Division of the New York Supreme Court it said:

"Whether the director knows the exact condition of the corporation is unimportant. It is his duty to ascertain whether the earnings authorize the withdrawal of the corporate assets to pay a dividend. If he can be excused because he did not know the condition of the corporation, the effect of the statute would be nullified. * * * Whenever a dividend was declared, the secretary gave to each director a statement purporting to be taken from the books of the company and showing its financial standing. * * * They had abundant opportunity to examine the statement each time and ascertain whether a dividend was proper. The estimation of values they assented to or did not investigate. They may have relied upon the secretary, but it was their affirmative duty to know whether

a dividend was justified before authorizing its payment." Wesp v. Muckle, 136 App. Div. 241, 244, 245, 120 N. Y. Supp. 976, 979, 980, affirmed in Wesp v. Strasenburgh, 201 N. Y. 527, 94 N. E. 1100.

"Surplus profits" has been defined as:

"The excess of receipts over expenditures; that is, net earnings" (Connolly v. Davidson, 15 Minn. 519 [Gil. 428], 2 Am. Rep. 154); "the receipts of a business, deducting current expenses; it is equivalent to net receipts" (Eyster v. Centennial Board of Finance, 94 U. S. 500, 24 L. Ed. 188). "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. * * * When all liabilities are paid, either out of the gross receipts or * * * net earnings, the remainder is the profit of the shareholders." St. John v. Erie R. R. Co., 10 Blatchf. 271, Fed. Cas. No. 12,226. "Under these definitions, it is not easy to comprehend how profits or surplus profits can consist of earnings never yet received. The term imports an excess of receipts over expenditures, and without receipts there cannot properly be said to be profits. Money earned as interest, however well secured, or certain to be eventually paid, cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits within the meaning of the statute. To hold the contrary would, we think, tend to open the door to a practice under which the assets of corporations would be liable to distribution as dividends, upon no surer basis than the judgment of their directors as to the value of their bills receivable. Such is not, and should not be, the policy of the law." People v. Savings Union, 72 Cal. 203, 13 Pac. 498.

Mere advance in value of property prior to its sale, or estimated profits on partially executed contracts, do not constitute profits, because the fluctuations of the market and the uncertainty of the completion of such contracts may bring about a condition such as was found to exist in the present case, where the estimated profits were in fact liabilities or direct losses. Gray v. Darlington, 15 Wall. 63–65, 21 L. Ed. 45; Jennery v. Olmstead, 36 Hun, 536–538.

The admitted facts shown by the record now before the court that the deficit between the liabilities and the assets of the corporation grew from $50,000 at the time of the first dividend to $117,000 at the time of the second dividend and to over $142,000 at the time of the third dividend, and that at the time of the third dividend the corporation had realty known to have been of the value of $327,000, or, in other words, that at the time of the third dividend there must have been liabilities of about $470,000 at least, render it almost inconceivable that the directors of the corporation could have been deceived by a mere statement and balance sheet. It is equally inconceivable that they could have relied upon any mere appraisement that the realty of the corporation was worth practically half a million dollars over its real value. It will be noted that there was no offer to show there had been any sales of property at values largely in excess of the cost of the property to the corporation; there was no offer to show that the corporation had received from actual business carried on excessively large sums of money from many transactions, the nature of which the directors could not in the exercise of ordinary care have known all about. Mere estimates of increased value of property known do not constitute profits. Upon the record presented to this court none of the exceptional circumstances shown in Chick v. Fuller, supra, appear.

To hold that in every suit to recover the statutory liability, directors may be exonerated by merely testifying they were mistaken and they believed that there were surplus profits, because they had accepted the figures of a balance sheet prepared by the corporate employés, would open the door to the grossest frauds in corporate management. This court can reach no conclusion other than that reached by the highest courts of New York and New Jersey. As a general rule, good faith on the part of the directors in declaring dividends from capital instead of from surplus profits is not a defense in a suit to recover the statutory liability. If the defense could ever be considered, it would only be where the pleadings clearly and in detail show the facts of fraud and dishonesty practiced upon the directors, and further show facts from which the conclusion would follow irresistibly that the directors could not have guarded against such fraud. No such exceptional circumstances appear in the present case. The conceded facts found from the evidence taken during the 58 (trial) days are of such a character that in the absence of the evidence from the record, and on the meager pleadings and offers of evidence, this court is of the opinion that the rejection of the evidence relied on by the appellants was not erroneous.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 780

CAVASSO v. DOWNEY. (Civ. 3228.)

(District Court of Appeal, First District, Division 1, California. Feb. 5, 1920.)

1. PARTNERSHIP ⊂=269—TERMINATED BY INCORPORATION OF PARTNERSHIP BUSINESS.

Where partners incorporated a partnership business, transferred the partnership assets to the corporation, issued additional stock to secure capital and paid the partners' salaries as officers of the corporation, and where there was no evidence of an agreement whereby their relations as copartners should continue in conjunction with their relation as stockholders, the partnership was in fact terminated and merged into the corporation.

2. MONOPOLIES ⊂=12(4)—AGREEMENT NOT TO ENGAGE IN SAME BUSINESS AS CORPORATION, AS A CONDITION OF SALE OF STOCK, VOID.

Where partners incorporated their partnership business, transferred the partnership assets to the new corporation, issued additional stock to secure capital, and voted themselves salaries as officers of the corporation, an agreement by one not to engage in the same business within the city, as a condition of the sale of his interest in the corporation to the other, was void, under Civ. Code, §§ 1673, 1674.

Appeal from Superior Court, Alameda County; Milton T. Farmer, Judge.

Action by I. L. Cavasso against J. C. Downey. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 180 Pac. 950.

M. J. Rutherford of Oakland (Jesse Robinson, of Oakland of counsel), for appellant.

Edward R. Eliassen, of Oakland (Henry G. Tardy, of Oakland, of counsel), for respondent.

WASTE, P. J. Plaintiff brought this action seeking to recover upon three promissory notes for $1,000 each. Judgment was entered for the defendant, and the plaintiff appeals.

The defendant, by failure to deny, admitted the execution of the notes, denied that they have not been paid, and averred a failure of consideration therefor. He further alleged that the notes were procured by plaintiff through fraud and deceit. In this connection defendant averred, and the lower court found, that for some time prior to the making of the notes plaintiff and defendant were engaged in the manufacture, buying, and selling paints, glass, oils, and other merchandise, as copartners, under the firm name and designation, Downey-Cavasso Glass & Paint Company, with a place of business in the city of Oakland, and that they continued to engage in and conduct said business under that name, and as such copartners, until October 31, 1914, the date of the notes sued upon; that on that date the plaintiff sold to defendant all his right, title, and interest in the business, and the good will thereof, to defendant, and that defendant purchased the same from the plaintiff, relying upon the representation and distinct promise of plaintiff, and upon the consideration that plaintiff would not engage in any business in competition with the defendant in the city of Oakland for five years, and that as part consideration for the purchase of the rights of plaintiff in and to the business, as aforesaid, defendant executed a promissory note for $3,000 which was afterward divided into three notes of $1,000 each, the notes sued upon in this action; that after obtaining the said promissory notes from defendant, and in violation of defendant's rights, and of the express agreement on his part, plaintiff did open a store and place of business in the city of Oakland, where plaintiff is now engaged in competition with defendant, under the name of Cavasso Paint Company, in the same line of business as that carried on by defendant

In addition to the foregoing facts, which were alleged and found, the trial court also found: That the copartnership between plaintiff and defendant "continued in name as such until January, 1913, when they (plaintiff and defendant) formed a corporation under the same trade-name as before. That all of the shares of stock in the corporation that were issued were issued to themselves equally, excepting 1 share which was issued and delivered to the bookkeeper in order to qualify him as a director. That thereafter said plaintiff and defendant continued to conduct the said business as before, in all essential and substantial ways. * * * That on or about the 31st day of October, 1914, the plaintiff sold 'all his interest in and to the said business' to the defendant on the following terms: One (1) Mack automobile truck valued at about $2,000, $4,000 in two promissory notes of $1,000 and $3,000 each. Later the $3,000 note was divided into three notes of $1,000 each, which are the notes involved in the above entitled action and on which the present action is brought. That at or about said time, the said plaintiff transferred 380 shares of stock in the said corporation to the defendant, together with all of his interest in and to said business, and covenanted as follows: 'It is further agreed * * * that the said party of the second part (Cavasso) will not engage in any business in competition with the Downey-Cavasso Glass & Paint Company for a period of five (5) years from the date hereof.' That despite the incorporation of the aforesaid business of the Downey-Cavasso Glass & Paint Company, the said plaintiff and defendant were copartners, as between themselves, owning the entire issued capital stock * * * when the plaintiff sold out to the defendant, and that the said sale by Cavasso to Downey of his one-half (or 380)

shares of the capital stock of the corporation was made by said Cavasso as a copartner of said Downey upon, or in anticipation of, the dissolution of the said copartnership." The lower court also found that the defendant continued the business of the Downey-Cavasso Glass & Paint Company after the purchase of plaintiff's alleged interest therein.

From the foregoing facts the court legally concluded that there was an entire want of consideration for the promissory notes, and that plaintiff was not entitled to recover. Judgment for the defendant was entered accordingly; hence this appeal.

This is the third time the parties to the foregoing transaction have been before this court. In the first instance the defendant here, as plaintiff, sought damages, and prayed for injunctive relief against this plaintiff, for alleged violation of the agreement not to again engage in business. In affirming the judgment of the lower court, entered after an order sustaining a demurrer to the amended complaint, the court said:

"If it had unequivocally appeared from the allegations of the complaint that the plaintiff and defendant had, by agreement, express or implied, continued their relations as copartners in conjunction with their relation as stockholders of the corporation, the law would take cognizance of such dual relationship and deal with 'the parties in the light of their agreement, independently of their incorporation' (Shorb v. Beaudry, 56 Cal. 446), and if, in fact, such had been the relationship of the parties, to plead it with perspicuity would, it seems to us, have been a very simple matter." Downey v. Cavasso, 36 Cal. App. 316–318, 171 Pac. 1077.

The next controversy arising out of this transaction to engage the attention of this court was an appeal, by the defendant here, from a judgment in favor of this same plaintiff, for the sum of $1,000 with interest, and costs of suit, in an action to recover on the promissory note for that amount, given by the defendant here as part of the purchase price for the interest of the plaintiff in the Downey-Cavasso Glass & Paint Company, which note is referred to in the findings in this action, before quoted. In that case the trial court decided, upon the whole evidence presented, that the copartnership which had previously existed between the parties had been merged in the corporation formed in the month of January, 1913, and that the relation of copartners in respect to the business then taken over by such corporation did not continue thereafter, and that the transaction between the partners in October, 1914, was one in which the defendant purchased the stock of the plaintiff in said corporation, giving, among other things, the note there sued upon as a part of the consideration therefor. The lower court further found, in that case, that the plaintiff did embark in business in the city of Oakland in competition with the corporation, but not in competition with the defendant, who, after the organization of the corporation, had not engaged in such business on his own account. We were satisfied, from a reading of the record, that the evidence fully justified the findings of the court in that regard, and affirmed the judgment. Cavasso v. Downey, 180 Pac. 950. In doing so, we followed the decisions holding that where one sells his stock in a corporation, and enters into an agreement with the purchaser not to again engage in business, such contract is void under the provisions of sections 1673 and 1674 of the Civil Code, and cannot be enforced. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 386, 78 Pac. 879; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 432, 57 Pac. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94; Chamberlain v. Augustine, 172 Cal. 285, 156 Pac. 479.

It is apparent that the appellant has now attempted, by pleading and proofs, to make his actions conform to the decision on the first appeal, and has sought, in like manner, to escape from the results which must follow, if the facts subject his case to the application of the law followed by us in the second instance.

We will first consider appellant's contention that the evidence is not sufficient to support the finding that the partnership between Cavasso and Downey continued to exist, after the formation of the corporation, and that the sale of Cavasso's interest in the business to Downey was, in reality, a sale of a partnership interest, made in contemplation of a dissolution of the copartnership. The conclusion reached on this point practically amounts to the decision of the whole case.

Respondent relies upon the showing that the copartnership and the corporation bore the same name; that plaintiff and defendant owned all the issued shares of stock, except one; that, after incorporation, according to defendant's testimony, business was conducted in the same manner as before; the plaintiff and the defendant still considering themselves partners in the business. On the part of plaintiff, it appears that immediately after the incorporation of the Downey-Cavasso Glass & Paint Company, a stockholders' meeting was held, directors elected, a code of by-laws adopted and ordered engrossed. The directors thereupon duly organized by the election of Downey as president, Cavasso as vice president, and Schuler (the bookkeeper) as secretary. The by-laws were approved and subscribed. The place of business of the corporation was fixed. A corporate seal was procured. Certificates of stock were prepared. The president, or vice president, and secretary were, by proper resolution, authorized to sign and indorse checks and drafts on behalf of the corporation. The firm of J. C. Downey and I. L. Cavasso, copartners, do-

ing business under the firm name and style of Downey-Cavasso Glass & Paint Company, executed a bill of sale transferring to the corporation everything appertaining to the business, theretofore carried on by it, in consideration for which transfer the corporation issued to Downey and to Cavasso each 380 shares of its capital stock, certificates for which were delivered. At the same time the corporation, by action of the directors, directed the sale of 200 shares of its stock, at the par value of $100, in order to secure "capital to enlarge its capacity and liquidate some of its outstanding indebtedness." This stock Downey attempted to sell. The minutes of a number of directors' meetings appear in the record, from which it appears that the borrowing of money, approval of contracts, election of directors, and secretaries, and other matters were acted upon in corporate capacity. The corporation gave its notes for the payment of money obtained from banks. Downey and Cavasso each received a salary from the corporation after its organization, which was fixed, according to plaintiff's testimony, by Downey and himself, acting "as a majority of the board of directors."

[1] From a careful scrutiny of the entire record, from which the foregoing recital of the evidence is drawn, we are unable to discover the "conflict in the testimony" relied upon by respondent, to support the finding of the court that the partnership between appellant and respondent continued after the formation of the corporation. Respondent's conclusion in the matter as testified to by him, is not sufficient to offset the positive showing to the contrary, and is incompetent to raise an issue, or present a conflict in the testimony. There was no other evidence which has that effect. Neither does the evidence lend weight to the contention of respondent that "as between themselves" appellant and he were partners, nor does it bring the facts within the rule referred to in Downey v. Cavasso, supra, to the effect that if the appellant and respondent had, by agreement, continued their relations as copartners, in conjunction with their relation as stockholders of the corporation, the law would take cognizance of such dual relation, and deal with the parties independently of their incorporation. If such an agreement ever existed it was not alleged or proved.

In the absence of such an agreement, we find nothing in the actions or relations of the parties bringing the case within the rule of the authorities cited by respondent, to the effect that the copartnership should be regarded as continuing. A number of the cases cited deal with the rights of third parties under such circumstances, and have no bearing in the instant case. The other authorities can be differentiated. In Shorb v. Beaudry, 56 Cal. 446, 450, the corporation incurred no liability, did not participate in the profits of the business, no certificates of stock were issued, nor was it contemplated that any ever should be. A similar state of facts existed in Watkins v. Delahanty, 133 App. Div. (N. Y.) 422, 117 N. Y. Supp. 885, where it was held that the previously existing partnership was not terminated by the organization of the corporation, and the transfer to it of the partnership assets, in view of the fact that the stocks and bonds of the corporation were not distributed to the respective parties, as their interests appeared; the corporation being formed merely for the purpose of financing certain partnership affairs.

What we have already said, in our judgment, determines the effect of the contract between the parties. In confirmation of our conclusion in that regard we are of the opinion that the parties themselves, by the language used in the written agreement, made nearly two years after the formation of the corporation, concluded argument concerning the exact nature of that transaction. The consideration passing from the defendant to plaintiff is recited to be "in full payment of all the interest of the said party of the second part (Cavasso) in the said corporation and business known as Downey-Cavasso Glass & Paint Company, a corporation, the said interest being represented by 380 shares of the capital stock of the said corporation, and being represented by one certificate, No. 5." In fact, the conduct of the parties throughout is inconsistent with the continuance of the copartnership, and reconcilable with appellant's claim that it was, in fact, terminated and merged into the corporation. The trial court's finding to the contrary is unsupported by the evidence.

[2] The sale not being one in anticipation of the dissolution of the copartnership, but being merely the sale by one stockholder to another of his interest in the corporation, accomplished by the transfer of his shares of stock, the agreement not again to engage in business was void for the reasons given in the authorities already cited. Cavasso v. Downey, supra; Chamberlain v. Augustine, supra; Dodge Stationery Co. v. Dodge, supra; Merchants Ad-Sign Co. v. Sterling, supra.

In view of these conclusions the other points suggested by the appeal do not require consideration.

The judgment is reversed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

45 Cal. App. 751

HOFFMAN v. PACIFIC ELECTRIC CO.
(Civ. 3187.)

(District Court of Appeal, First District, Division 1, California. Feb. 3, 1920. Hearing Denied by Supreme Court April 1, 1920.)

1. APPEAL AND ERROR ⊂=1064(2)—INSTRUCTION ON FACTS NOT REVERSIBLE UNLESS PREJUDICIAL.

The giving of instruction as to question of fact, forbidden by Const. art. 6, § 19, does not require a reversal, unless from an examination of entire record it appears that appellant has been prejudicially affected thereby, and that the error has resulted in a miscarriage of justice.

2. APPEAL AND ERROR ⊂=1064(2)—INSTRUCTION AS FACT THAT PLAINTIFF WAS PASSENGER HELD BENEFICIAL TO APPELLANT.

Where the only contradiction of plaintiff's evidence that he was a passenger on a certain car was the testimony of defendant's employés, who also testified that the car did not stop where plaintiff alighted, an instruction that there was no question that plaintiff was a passenger on that car was beneficial to the carrier, since if he were not on that car there was no evidence to contradict his testimony that the car he was on stopped, and then started while he was alighting.

3. TRIAL ⊂=243—INSTRUCTION AS TO THE STOPPING OF STREET CAR HELD NOT CONTRADICTORY.

An instruction that, if defendant car stopped to enable plaintiff to get off or for any other reason, and started while he was alighting, he could recover is not contradicted by a later statement in the same instruction, authorizing recovery if the car stopped to enable him to get off and started while he was alighting.

4. CARRIERS ⊂=303(5)—STREET CAR MUST NOT START WHILE PASSENGER IS ALIGHTING, THOUGH NOT STOPPED FOR THAT PURPOSE.

The high degree of care owed by a carrier to its passengers requires that the conductor in charge of a street car which has stopped for a purpose other than to permit a passenger to alight shall not start the car without first ascertaining whether any passenger is attempting to alight.

5. TRIAL ⊂=260(8)—REQUESTED INSTRUCTION ON CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM STREET CAR HELD COVERED.

In an action to recover damages for injuries received by a street car passenger while alighting, it was not error to refuse requested instructions, correctly stating the doctrine of contributory negligence, where the court had stated that plaintiff could not recover if he tried to get off while the car was in motion.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Ben F. Hoffman against the Pacific Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for appellant.

Crail & Crail, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action for damages for personal injuries, alleged to have been suffered by the plaintiff while a passenger on one of the defendant's cars in the city of Long Beach, on the evening of January 16, 1917, the plaintiff averring that the said car had stopped to enable him to alight, but had suddenly started while he was in the act of alighting, whereby he was thrown to the pavement and injured.

The defendant's answer denied that the plaintiff was a passenger on any of its cars, and denied that the car came to a stop for the purpose of allowing plaintiff to alight, and denied that he attempted to alight at the time and place mentioned in the complaint, or that the car started while he was in the act of so alighting, and denied any negligence on the part of the defendant whereby plaintiff was injured; and, as a further and separate defense, pleaded contributory negligence on the part of the plaintiff.

Upon the trial of the cause a verdict was returned for plaintiff in the sum of $2,125, and, after a motion for a new trial had been made and denied, this appeal was taken.

The points raised by the appellant upon this appeal relate entirely to errors of the trial court in the giving or refusing to give certain instructions. In order to deal with the appellant's several points clearly and at the same time concisely, we deem it best to give in full that portion of the instructions of the trial court at which the appellant aims its several objections. After certain preliminary instructions, relative to the credibility or interest of witnesses and the like, the court proceeded as follows:

"Now then, gentlemen, this case is in a very small compass. As I have already stated to you, there is no question but that plaintiff was a passenger on the car that Mr. Wilson and Mr. Shepherd were on. There is no question about that. He was a passenger on that car. He wanted to get off at Atlantic avenue. The burden is upon the plaintiff to prove his acts by a preponderance of the testimony, that is, the burden is upon him to prove that the defendant was negligent, in order to entitle him to recover, and he must prove that by a preponderance of the evidence, that is, such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

"Now, then, all there is to the case is this: If the car stopped, whether it stopped to enable the plaintiff to get off, or whether it stopped for any other reason, if it stopped and the plaintiff started to get off, and while he was getting off it started up again and threw him,

then he is entitled to recover. But, it was his business to know whether the car had stopped or not; he had no right to attempt to get off before it had stopped—he must know that. If, on the other hand, the car did not stop but slowed down, and he attempted to get off while the car was in motion, then he cannot recover. If, however, the car stopped—it does not make any difference whether it was at a street where it was a regular stopping place—if it stopped anywhere else he had a right to get off, and it was the conductor's business before the car started up again to know whether there was anybody getting off, and whether the car was in a situation so that it could start up again.

"Now, that is all there is to the case, gentlemen. I will say it again: If the car stopped to enable him to get off, and started up again while he was getting off, then he is entitled to recover. If, on the other hand, the car did not stop, but simply slowed down, and while it was actually in motion he tried to get off and was injured, he cannot recover. That is all there is to the case."

[1] The appellant objects to the opening clause in the above-quoted instructions, reading:

"Now then, gentlemen, this case is in a very small compass. As I have already stated to you, there is no question but that the plaintiff was a passenger on the car that Mr. Wilson and Mr. Shepherd were on. There is no question about that. He was a passenger on that car. He wanted to get off at Atlantic avenue"

—as constituting an instruction upon a question of fact forbidden by article 6, section 19, of the state Constitution. That the clause in the court's instruction last above quoted is an instruction as to a matter of fact there can be no question; but that is not sufficient of itself to require a reversal of the case, since it must also appear from an examination of the entire record that the defendant has been prejudicially affected thereby, and that the error complained of has resulted in a miscarriage of justice.

[2] A careful scrutiny of this record convinces us that the appellant has suffered no such prejudice from this misdirection of the jury as would justify a reversal of the judgment upon appeal. It is true that the defendant, in its answer, denied that the plaintiff was a passenger upon any of its cars at the time of the accident in question. Upon the trial the plaintiff produced two witnesses besides himself who testified positively that he boarded one of the defendant's cars at the corner of Pine and Broadway streets in Long Beach at about 6:25 or 6:30 o'clock on the evening of his injuries; and also produced two other witnesses besides himself, who were at or near the scene of his injuries, and whose testimony tended strongly to show that he received his said injuries while in the act of alighting from one of the defendant's cars. The defendant introduced the testimony of two of its employés—the conductor and motorman—whose names are those mentioned in the foregoing instructions. These two witnesses testified that the car of which they were in charge left the corner of Pine and Broadway streets, in said city of Long Beach, at 6:23 o'clock on the night in question; the motorman gave no evidence as to whether or not the plaintiff was upon said car, but did testify that his car did not stop at the alley where the plaintiff's injuries were received. The conductor gave similar testimony, and in addition stated that:

"I have no recollection of seeing the plaintiff, Mr. Hoffman, on my car that evening. I don't remember having any one on my car who wanted to get off at Third and Atlantic avenue."

Other than the evidence of these two witnesses the defendant offered no evidence upon the issue as to whether the plaintiff was a passenger upon one of its cars at and immediately prior to the time of his injuries.

In this state of the record we are unable to see how the defendant could have been prejudicially affected by the court's misdirection to the jury as to a question of fact. The plaintiff's evidence that he was a passenger upon some car of the defendant, is uncontradicted. If he was not such passenger upon the car under the control of the motorman and conductor referred to by the court, then their testimony that their car did not stop at the alley in question goes for nothing. Their testimony, therefore, became material to the case only upon the theory adopted by the court in its said instruction that the plaintiff was a passenger upon their car. The court's determination of this question, while an invasion of the right of the jury, was one which operated for the defendant's benefit rather than to its injury, since it rendered important the testimony of its said two witnesses upon the only vital matter to which they testified, viz. whether the car upon which the plaintiff was riding as a passenger did or did not stop at the place where his injuries occurred. We are therefore of the opinion that the misdirection of the trial court as to a question of fact did not amount to such prejudicial error as to entitle the appellant to a reversal of the case.

[3] The appellant's next contention is that the instructions of the trial court above quoted are contradictory to an extent which misled the jury as to the law of the case. The portions of the instructions thus assailed are these: In the earlier part of its instructions the court said:

"If the car stopped, whether it stopped to enable the plaintiff to get off or whether it stopped for any other reason, if it stopped and the plaintiff started to get off and while he was getting off it started up again and threw him, then he is entitled to recover."

In a later portion of the same instruction the court said: "If the car stopped to enable him to get off and started up again

while he was getting off, he is entitled to recover." While this latter statement is not as full as the former one, we can see no contradiction between them by which the defendant could have suffered any injury. There was in fact no evidence whatever that the car, if it stopped at all, at the alley in question, stopped for any other reason or purpose than that of enabling the plaintiff to alight. The truth of the matter is, as disclosed by the entire record, that the only vital issue in the case, aside from the extent of the plaintiff's injuries, was as to whether the car upon which the plaintiff was riding did or did not stop at the point where he sought to alight; and upon this issue the trial court very clearly and succinctly stated what it deemed to be the law of the case stripped of all technical verbiage, and dealing concretely with whichever view the jury might take as to the main fact in issue.

[4] The appellant claims, however, as to its third ground of error, that the trial court in its foregoing brief and concrete instructions has failed to state correctly the law of the case. The contention of the appellant in that regard is this: That the evidence practically without contradiction showed that the alley where defendant's car stopped, it it did stop, was not a regular stopping place for the purpose of taking on or discharging passengers, and that, this being so, the carrier was not bound to look out for passengers intending or attempting to get off at such a place, and hence, in order to establish negligence on the part of the carrier, the attention of its agents in charge of the car must have been called to the intent of the passenger to alight before they can be charged with negligence in starting the car while such passenger was, without their knowledge, in the act of alighting. We are unable to agree with the foregoing statement urged by the appellant as the law applicable to the instant case. It is the law in this state that carriers of passengers upon railways owe to such passengers the highest degree of care, and this degree of care would require of such carriers, especially upon street cars operated in cities, that whenever such cars come to a stop, whether at regular stopping places or not, if such points of stoppage are such that passengers might properly and conveniently alight, it would become the duty of those in charge of the car to advise themselves that such passengers were not attempting to alight from their said car at such point of stoppage before again starting the car, and a neglect of this duty would render their principal liable. The following authorities fully support this view: Carr v. Eel River, etc., R. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; Raub v. Los Angeles, etc., Ry. Co., 103 Cal. 473, 37 Pac. 374; West Chicago St. R. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958.

In the case last cited the court quite clearly stated what we deem to be the law of this case, as follows:

"Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill, and diligence for the safety of the passenger that is consistent with the mode of conveyance employed. The car or train was in control of the conductor, and he was required to know, if by the exercise of due care, caution, and diligence in the discharge of his duties he could know, whether any person was attempting to get on or off his train or car, before permitting the same to start in such manner as would be liable or likely to injure a person so getting on or off the same."

The following cases further support this view: West Chicago St. R. R. v. Luka, 72 Ill. App. 60; Citizens' Ry. Co. v. Hall (Tex. Civ. App.) 138 S. W. 434; Hufford v. Met. St. Ry. Co., 130 Mo. App. 638, 109 S. W. 1062.

The instructions of the trial court herein are in harmony with the foregoing statement of the law, and hence are in our opinion correct.

The appellant finally contends that the trial court was in error in its refusal to give to the jury certain instructions requested by it. As to most of these instructions, they simply present in various forms the appellant's foregoing contention as applied to the instructions which the trial court gave, and hence it is not necessary to further discuss that portion of the appellant's requested instructions.

[5] The appellant, however, also requested certain specific instructions upon its plea of contributory negligence on the plaintiff's part. These requested instructions are general in terms and, it may be conceded, correctly set forth the doctrine of contributory negligence as applicable to cases of this character, and hence might well have been given by the trial court; but upon an inspection of the instructions which the trial court actually gave as above quoted, it will be seen that as to the only state of facts upon which the appellant's claim of contributory negligence on the part of the plaintiff could be predicated the trial court said to the jury:

"If, on the other hand, the car did not stop, but simply slowed down, and while it was actually in motion he tried to get off and was injured, he cannot recover."

Thus, briefly, the trial court gave to the jury the entire meat of the defendant's claim and instruction respecting the plaintiff's alleged contributory negligence, and, having thus done this, it was not incumbent upon it to complicate the situation in the minds of the jury by giving the defendant's expanded generality, even conceding it to correctly state the law.

No other errors being complained of, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 748

PACIFIC HEATER MFG. CO. v. SOUTHERN PAC. CO. (Civ. 2564.)

(District Court of Appeal, Second District, Division 1, California. Feb. 3, 1920.)

1. CARRIERS ⟸124—CONSIGNEE REQUIRED TO ACCEPT DAMAGED GOODS UNLESS ENTIRE VALUE IS DESTROYED.

That goods are injured through causes for which the carrier is responsible does not of itself justify consignee in refusing to receive them, but he must accept the goods and hold carrier responsible for the injury, unless the entire value of the goods is destroyed, in which case the consignee may refuse to receive the goods and sue carrier for their value.

2. CARRIERS ⟸134—EVIDENCE HELD TO PROVE TOTAL DESTRUCTION OF VALUE OF GOODS.

In shipper's action against carrier for damage to goods which consignee had refused to accept because of damaged condition, where defendant claimed that goods should have been received and the damage minimized, evidence *held* to warrant conclusion that the value of the property was totally destroyed.

3. APPEAL AND ERROR ⟸171(1)—THEORY OF CASE NOT TO BE CHANGED ON APPEAL.

Where action against carrier was tried on the theory that carrier was bound by its ordinary liability as a common carrier, and where no special contract relieving carrier from such liability was set forth in answer, judgment for shipper will not be reversed on ground that case should have been tried on theory that the measure of damages was controlled and limited by provisions of bill of lading.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Pacific Heater Manufacturing Company against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondent.

CONREY, P. J. This action was brought by plaintiff to recover the sum of $927.50 for alleged damages to a shipment of 53 gas furnaces or heaters which were transported over the lines of the defendant company from the city of Los Angeles, Cal., to Portland, Or., consigned to the Portland Gas & Coke Company at Portland, and there tendered to the consignee. The consignee refused to accept them, it being claimed by the consignee, and now claimed by the plaintiff, that by reason of damages to the property during transportation its value was totally destroyed. Pursuant to the verdict of a jury, plaintiff recovered judgment for the entire amount of the demand. From that judgment the defendant appeals.

[1] Appellant contends that it was the duty of the consignee, and upon failure of the consignee, then the duty of the plaintiff to have received said furnaces upon tender of delivery by the defendant, in order that the damage to the furnaces might be minimized and not unnecessarily enhanced; and that the damages awarded are excessive. The rule governing the duty of a shipper or consignee, where goods are injured in course of shipment, is stated as follows:

"As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss and sue for their value does not apply to contracts of affreightment. The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury. Where, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them and sue the carrier for their value." Hutchinson on Carriers (3d Ed.) § 1365.

[2] The consignee having refused to receive these goods, defendant tendered them to the plaintiff and also made an effort to induce the plaintiff to repair the furnaces to put them in shape for the market. This the plaintiff declined to do. There is evidence tending to show that repairs might have been made which would have resulted in reducing the amount of the damages incurred. On the other hand, according to the testimony of a competent witness, the furnaces, in their condition as received at Portland, had no market value whatever; the repairs necessary to put them in condition to be sold would not have restored more than 50 per cent. of their market value, and the cost of the repairs would have been more than that 50 per cent. If the jury believed this evidence, as it was entitled to do, the conclusion must have resulted that the value of the property was totally destroyed; and, since the amount of the judgment does not exceed the original market value of the property, appellant's claim that the damages awarded are excessive should not be sustained.

In the brief filed for appellant a general reference is made to various claimed errors of the court, but we will notice only that one concerning which a definite argument has been presented. On the question of measure of damages, the court gave to the jury the following instruction:

"The measure of damages is the difference between the market value of the heaters at Portland, Or., at the time of their arrival in that city in the damaged condition in which they arrived and the market value which they would have had at such time and place if they had arrived uninjured."

Appellant now contends that the measure of damages in this case was controlled and limited by the provisions contained in the bill of lading, which provided for a measurement of loss or damages on the basis of the value of the property tested by the bona fide invoice price, if any, to the consignee, including freight charges, if prepaid, unless, etc. In this connection it should be noted that the court further instructed the jury that—

"The measure of damages for injury to personal property is the difference in value of the property immediately before and after the injury, provided, however, that if the injury be capable of repair, so as to restore the full value of the property at an expense less than the diminution in value of the property as injured, the damage is limited to the cost of making such repair."

[3] It further appears that at the trial the defendant did not request the court to give any instructions referring to a basis of value of the property as controlled or limited by the invoice price or by any special contract or representation; on the contrary, the instructions requested by the defendant stated rules having reference to the market value of the property. The case was tried on the theory that defendant was to be bound by its ordinary liability as a common carrier. No special contract relieving defendant from that liability was set forth in the answer. This should have been done if that defense was to be relied upon. Michalitschke v. Wells Fargo & Co., 118 Cal. 683, 50 Pac. 847. The judgment should not now be reversed upon the ground that the case should have been tried upon a different theory than that which was presented to the trial court.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

45 Cal. App. 776

COLKINS v. DOOLITTLE et al. (Civ. 3024.)

(District Court of Appeal, Second District, Division 2, California. Feb. 4, 1920.)

1. MUNICIPAL CORPORATIONS ⟸582—DEEDS HELD PRIMA FACIE EVIDENCE OF TITLE.

In action to quiet title, plaintiff claiming under deed executed by city tax and license collector under Street Improvement Act April 21, 1909, and under deeds executed by board of public works under Park and Playground Act of 1909, and Street Opening Act of 1903 by introducing such deeds in evidence, made out a prima facie case of title, under sections 17, 25, and 29 of the respective improvement acts.

2. MUNICIPAL CORPORATIONS ⟸581—NOTICE TO REDEEM CLAIMING AMOUNT DUE FOR AFFIDAVIT OF NOTICE INEFFECTUAL.

Notices to redeem from sales for delinquent assessments under Street Improvement Act April 21, 1909, Park and Playground Act of 1909 and Street Paving Act of 1903, including in the amount claimed the $3 due for the making of affidavit of giving of such redemption notice, were ineffective, and rendered the deeds given thereunder void; the $3 being no part of the amount due at the time the notice is given.

3. MUNICIPAL CORPORATIONS ⟸583—OWNERS' TITLE NOT TO BE QUIETED UNTIL REDEMPTION FROM ASSESSMENT.

In action to quiet title by purchasers at delinquent assessment sales under Street Improvement Act April 21, 1909, the Park and Playground Act of 1909 and Street Opening Act of 1903 the court, though it will refuse to quiet purchasers' title because of insufficiency of notice to redeem, will not quiet title in the owners of legal title, in their cross-action therefor, until such owners shall have redeemed the lands from liens created by the street improvement or street paving proceedings.

Appeal from Superior Court, Los Angeles County; J. M. York, Judge.

Action by A. Colkins against Mary E. Doolittle and others. Judgment for defendants, and plaintiff appeals. Reversed.

D. P. Hatch and James Brunken, both of Los Angeles, for appellant.

James R. Jaffray and Chas. J. Conner, both of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff brought this action to quiet title to certain lots in the city of Los Angeles. Defendants recovered judgment in their favor, and plaintiff appeals.

Appellant's claim of title to each lot rests upon a deed thereto, made under a certain street improvement act, and executed by the proper city officer. Each respondent answered and likewise filed a cross-complaint, alleging that he is the owner of some one or more of the lots, or of an undivided part thereof, and prayed that his title thereto be quieted. The court found against plaintiff on the issues of title tendered by his complaint; on the issues tendered by each cross-complaint the findings were in favor of the cross-complainant; and, save as to defendants against whom the action had been dismissed, a decree was entered adjudging each defendant to be the owner of the land as claimed in his cross-complaint. At the trial it was stipulated, in substance, that the title to each lot is in the defendant or defendants claiming the same, save in so far as it may

have been divested by the deeds under which plaintiff claims or affected by the street improvement proceedings pursuant to which those deeds were executed.

The deed under which plaintiff claims title to one of the lots was executed by the city tax and license collector pursuant to proceedings had under the Street Improvement Act of April 21, 1909 (Stats. 1909, p. 1042). Section 17 of that act provides that any deed executed thereunder by the tax collector shall "be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof and of title in the grantee." The deeds under which plaintiff claims title to the remaining lots were executed by the board of public works of the city pursuant to proceedings had, respectively, under the Park and Playground Act of 1909 (Stats. 1909, p. 1066), and the Street Opening Act of 1903 (Stats. 1903, p. 376). Each of these last-mentioned acts contains a provision to the effect that a deed executed pursuant thereto shall "be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee." Section 25 of the Park and Playground Act (Stats. 1909, p. 1073), and section 29 of the Street Opening Act of 1903 (Stats. 1903, p. 384).

[1] Plaintiff rested his case after introducing in evidence the four deeds under which he claims title to the lots. Unless respondents' evidence has successfully impeached these deeds, or some of them, or the regularity of the street opening or street improvement proceedings, pursuant to which the deeds were executed, it must be held that appellant is entitled to a decree in his favor; for the deeds he put in evidence made out a prima facie case of title to the lots. Tilton v. Russek, 171 Cal. 731, 154 Pac. 860.

Respondents' brief, though a model of brevity, is lamentably lacking in comprehensiveness. It does not attempt to point out any irregularity in the proceedings pursuant to which deeds were executed, or call to our attention the omission of any act made necessary to the execution of a valid deed. The evidence, brought up under the alternative method, covers 133 typewritten pages. It certainly is not incumbent upon the members of this court, whose time is occupied continuously with the consideration of questions called to their attention by diligent and assiduous counsel, to perform the labor that properly devolved upon the attorneys in this case. We should not be expected, unaided by counsel, to thread our way laboriously through this long and somewhat complex record on a still hunt for possible defects in the proceedings upon which the validity of these deeds depends. We have done so, nevertheless, but have done it at the loss of much valuable time—time that could have been saved for work on other cases had counsel for the respondents here devoted but half a page to pointing out the defect to which we shall presently refer and the pages in the transcript whereon the evidence thereof appears. As a result of this time-consuming labor, unnecessarily imposed upon us by counsel's neglect, we have discovered at least one defect that is fatal to the deeds upon which plaintiff relies to establish title. How many other defects might be found, were our attention called thereto, we do not pretend to say.

[2] Each of the notices to redeem that was given by plaintiff, or by the person or persons under whom he claims, includes in the sum necessary to effect a redemption at the time of giving the notice the $3 that the statute requires to be paid by the redemptioner for serving the notice and making affidavit thereof. The three street improvement acts under which the deeds that plaintiff relies upon were executed are substantially alike in this, that the applicant for a deed thereunder must serve upon the owner, or the occupant of the property, a 30-day notice to redeem, specifying the amount for which the property was sold "and the amount necessary to redeem at the time of giving notice." The applicant for the deed is also required to file an affidavit showing that such notice was given. If redemption is made after such affidavit is filed, the person making the redemption "must pay, in addition to the other amounts required, three dollars for the service of the notice and the making of such affidavit." This $3 is no part of the amount due at the time when the notice is given; and, if the notice includes it in the amount necessary to effect a redemption at that time, the notice is ineffective, and the deed given thereunder conveys no title. Reed v. Lyon, 96 Cal. 501, 31 Pac. 619.

[3] For this reason, we must hold that the legal title to none of the lots passed to appellant by virtue of any of the deeds under which he claims. It does not follow, however, that the judgment must be affirmed. Though plaintiff did not acquire the legal title to any lot, and cannot therefore, maintain a suit to quiet title against the owner or owners of the legal title, none of the latter is entitled, by cross-action to have his title quieted as against plaintiff's claim until such owner shall have redeemed his lot from the lien created by the street improvement or street opening proceeding. Until then each respondent holds his title subject to the lien created by the street improvement or street opening proceeding—a lien that passed to appellant, or to his grantor or grantors, upon the sale of the lot to satisfy the delinquent assessment thereon. Each of the statutes under which the deeds to plaintiff or to

his predecessor or predecessors, were executed, provides that the lien of the assessment shall vest in the purchaser of the property, "and is only divested by a redemption of the property as in this act provided." To entitle any of these respondents to affirmative equitable relief, he must do equity. Warden v. Bittleston, etc., Agency, 181 Pac. 834; Chapman v. Hicks, 182 Pac. 336. For this reason the case must be sent back for a new trial.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 770

PEOPLE v. GIBSON. (Cr. 851.)

(District Court of Appeal, First District, Division 2, California. Feb. 4, 1920. Hearing Denied by Supreme Court April 1, 1920.)

CRIMINAL LAW ⊂=261(2), 1002; ⊂=193¼, New, vol. 19 Key-No. Series—HABEAS CORPUS ⊂=109—PERSON IMPROPERLY GIVEN INDETERMINATE SENTENCE HELD PROPERLY REMANDED FOR RESENTENCE.

On habeas corpus by a person given an indeterminate sentence for an offense committed before the statute authorizing such sentences had become effective, he was properly remanded for resentence, and the new judgment was not void as putting defendant twice in jeopardy for the same offense, as not passed within a reasonable time after the first sentence, or as illegal because pronounced without proper arraignment proceedings.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Charles E. Gibson was convicted of rape, and from a judgment resentencing him after the first sentence had been set aside on habeas corpus, he appeals. Affirmed.

See, also, 178 Pac. 338.

John W. Stetson and Henry A. Davie, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. In this case the defendant was convicted of the crime of rape. He appealed from this judgment, urging several grounds for reversal, all of which were decided adversely to him by division 1 of this court. A rehearing was thereafter denied by said court, and later a petition for hearing by the Supreme Court of this state was denied. Thereafter the defendant sought a writ of habeas corpus from the court in which the case had been tried. The writ was granted, and upon the hearing thereof it was urged by the attorneys for the petitioner that the sentence theretofore imposed by the trial court under the Indeterminate Sentence Act (St. 1917, p. 665), was void because the crime was committed before the provision of the Code authorizing such a sentence had become effective. This matter had not been urged upon appeal, nor considered by the court upon the determination of the appeal from the judgment. The trial court remanded the petitioner to the custody of the sheriff to be resentenced by the court upon the ground that the former sentence was void. The petitioner was thereupon sentenced to a definite term of 20 years in the penitentiary. The present appeal is from this judgment, and it is urged, among other matters, that the same is void, for the reason that the defendant has been put twice in jeopardy for the same offense, that the sentence is void because not passed within a reasonable time after the first sentence, and that it is illegal because it was pronounced without proper arraignment proceedings.

In view of recent decisions by our Supreme Court, it is not necessary for us to discuss these contentions at length. They have been decided in the cases of Ex parte Fritz (Sup.) 177 Pac. 157, and Ex parte McCready (Sup.) 177 Pac. 459. The procedure followed by the trial court was the exact procedure advised, under such circumstances, by our Supreme Court in the case of In re Lee, 177 Cal. 690, 696, 171 Pac. 958; and this procedure was again expressly approved in the Fritz and McCready Cases, supra.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

45 Cal. App. 772

O'NEILL v. O'NEILL. (Civ. 3170.)

(District Court of Appeal, Second District, Division 2, California. Feb. 4, 1920.)

1. EVIDENCE ⊂=376(8)—SUFFICIENT FOUNDATION FOR INTRODUCTION OF DECEASED'S BOOK TO PROVE CLAIM AGAINST ESTATE.

In a proceeding upon a claim against deceased's estate, testimony introducing a book of entries and memoranda that witness had never seen the inside of the book before and that he had no knowledge of what accounts were kept in it, but he knew the handwriting in the book to be deceased's, and that deceased kept his books correctly, constituted sufficient foundation for its introduction as an exhibit.

2. LIMITATION OF ACTIONS ⊂=54(2)—ACCOUNT HELD NOT TO BE "OPEN, MUTUAL, AND CURRENT BOOK ACCOUNT."

In an action to enforce an account against a deceased's estate, evidence that the items were put down in a memorandum exhibit in order to arrive at how much was due to the deceased, that when they were called off by the deceased

they were put down by plaintiff, and that the deceased signed the memorandum, does not show such entries to be "an open, mutual, and current book account."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Open Account.]

3. LIMITATION OF ACTIONS ⊂=142—ACKNOWLEDGMENT OF DEBT MUST BE ADDRESSED TO CREDITOR.

A memorandum of deceased showing an indebtedness to his brother, even if not a mere memorandum of a debt of honor, would not take the debt out of operation of statute of limitations (Civ. Code § 337, subd. 2), if not addressed to the brother, notwithstanding it might contain a distinct and unconditional recognition of obligation.

4. LIMITATION OF ACTIONS ⊂=54(2)—ONE ITEM DOES NOT CONSTITUTE AN "OPEN, MUTUAL, AND CURRENT BOOK ACCOUNT"; "MUTUAL ACCOUNT."

To constitute an open mutual and current book account, there must be "reciprocal demands" (Code Civ. Proc. § 344), which words are synonymous with or the equivalent of "mutual account" as named in such section, and such accounts are made up of matters of set-off where there is a debt on one side constituting a credit on another or where there is express or implied understanding that mutual debts shall be satisfied or set off between the parties, and one item cannot be said to comply with these requirements.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

5. EXECUTORS AND ADMINISTRATORS ⊂=221(8)—EVIDENCE IN ACTION ON CLAIM HELD TO SHOW PARTNERSHIP SO THAT ACTION SHOULD HAVE BEEN FOR ACCOUNTING.

In an action against the executor of an estate to enforce a claim against deceased on an alleged open book account, evidence *held* to show no relation of debtor and creditor, but that of copartnership, so that the action should have been for an accounting.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edward O'Neill against Josephine O'Neill, executrix of estate of John R. O'Neill, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

Michael F. Shannon, C. M. Mooslin, and Ernest L. Kolb, all of Los Angeles, for appellant.

J. Wiseman Macdonald and W. W. Wallace, both of Los Angeles, for respondent.

THOMAS, J. This is an action brought against the defendant, as executrix of the estate of John R. O'Neill, deceased, upon a claim, which had been rejected, in the sum of $5,222.05.

The complaint is in the usual form, alleging indebtedness "upon and according to a mutual, open, and current book account for money had and received." The formal allegations of the complaint are admitted. By specific denial of the alleged indebtedness in said or any sum, and, by way of separate defense, an allegation that the plaintiff's alleged cause of action was barred by subdivision 2 of section 337 of the Code of Civil Procedure, the issues were joined. The case was tried without a jury. Findings were in favor of the plaintiff on all the issues, and judgment was entered accordingly for the full amount asked. There was a motion for a new trial, which was denied. The appeal is from the judgment so entered.

The record before us consists only of the transcript and appellant's opening brief.

[1] The legal prerequisites for the bringing of an action on account, such as is stated in the complaint in this action, within the saving clause of the statute, are concretely set forth in the case of Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70, to which, without quoting therefrom, we refer. Here the plaintiff has no records of his own that he has offered in evidence. His entire documentary evidence is taken from among the records, if such they may be denominated, found among the effects of the decedent; and it would seem, therefore, that he is trying in this action to prove his claim by his interpretation of what the contents of the purported books are, and what they say.

It is urged that the court erred in permitting the plaintiff, over defendant's objection, to introduce in evidence the document referred to in the record before us as Plaintiff's Exhibit No. 4, and described as "a large book consisting of numerous and divers entries and memoranda, all of which, or at least a large portion, no doubt, being in the handwriting of the deceased." The only foundation laid for the introduction of this exhibit was the testimony of the witness Maier, who testified that he "had never seen inside that [book] before," and that he had no knowledge of what accounts were kept in it, but that he knew the handwriting in the exhibit to be the handwriting of the deceased, and that the deceased kept his books correctly. The objection made is entirely destitute of legal support; the foundation laid was sufficient. 17 Cyc. 395; McLellan v. Crofton, 6 Greenl. (Me.) 307.

[2] It is contended by appellant that the account—the basis of this action—is not in any sense a "mutual, open, and current account." With this contention we are in full accord. Plaintiff's own evidence shows that, so far as the item of $4,600.15, entered under date of May 1, 1905, is concerned, it is, and from the very nature of the case must be, an item that is no part of a "mutual, open, and current book account." This evidence is the stipulation of the parties them-

selves on the trial, by which it was agreed that "from some source" the items were called off by O'Neill and put down on this memorandum of $4,600.15 in order to arrive at how much was due from John O'Neill to Ed, and that, when they were called off by John and put down by Ed O'Neill, then John O'Neill signed the memorandum—Plaintiff's Exhibit No. 1. The entry of the amount set forth in the exhibit referred to, which is the amount so found to be due on May 1, 1905, at Calumet, Mich., would not, we think, by that action alone change its legal aspect so as to make it "an open, mutual, and current book account" in California.

[3] If, however, we are wrong in this conception of the matter, and it being held by this court that "Exhibit No. 4" was legally and properly received in evidence, then we are confronted with the query: Does the entry of one item, assumed to have been entered on January 27, 1913, by deceased, charging himself with $250 as being due from him on that date to plaintiff in addition to the other items already referred to, constitute such an account? We think not. Regardless of this fact, there is nothing in this record inconsistent with an assumption, and indeed we think it may be so inferred, that the deceased kept this "account" simply to keep in his memory the amount owing by him to his brother, if such were in fact the case, as a debt of honor. Still, however, it is also true that, unless this was addressed to the creditor—plaintiff here—notwithstanding it may contain a distinct and unconditional recognition of a certain obligation, it is not sufficient to take it out of the statute of limitations. Roper v. Smith, 187 Pac. 454.

[4] To constitute such an account as contended for here there must be "reciprocal demands" (section 344, Code Civ. Proc.; Fraylor v. Sonora Mining Co., 17 Cal. 594); and the "reciprocal demands" named in the Code section quoted are synonymous with or the equivalent of the "mutual account" named in the first part of that section. Mutual accounts are made up of matters of set-off, where there is debt on one side which constitutes credit on the other, or where there is express or implied understanding that mutual debts shall be satisfied or set off pro tanto between the parties. Millet v. Bradbury, 109 Cal. 170, 41 Pac. 865. Certainly one item cannot be said to comply with these requirements. Nor do we believe the evidence before us shows the account attempted to be the basis of this action to be such an account. There is, we think, nothing to bring it within the purview of the section referred to as "reciprocal demands" or "mutual account," because in every instance it is, if anything, a debit charge by deceased against himself and in favor of the plaintiff. If it is claimed that the shares of stock mentioned in the account were "held" by deceased for plaintiff, then clearly there was no mutual account between them, for the relation of trustee and beneficiary would exist, in which case the deceased would not become the debtor of the beneficiary as to the trust until after a demand by the latter and a refusal by the trustee. No such demand or refusal is here shown. We think that this action presents a case, if at all, on an account stated, rather than upon a "mutual, open, and current book account."

[5] After going through the entire record we are forced to the conviction of the accountant, who testified that he had examined each of these books with the idea of ascertaining, if he could, whether money was due from plaintiff to deceased, or vice versa, and that he could arrive at no conclusion because there was no record other than a memorandum record "here and there," and nothing was completed in any way. There is evidence of the plaintiff himself in this case which shows conclusively, we think, that instead of the relation of debtor and creditor existing between the plaintiff and deceased during the latter's lifetime, if any relation existed at all, it was that of a copartnership. In that event it would seem that the action should have been one for an accounting, before judgment could be entered. This, however, is merely to call attention to the very unsatisfactory condition of the record.

It may also be stated that we have failed utterly to find the, or any, evidence upon which the trial court arrived at the amount of the judgment entered.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 667

SIERRA PAPER CO. v. MESMER.

(Civ. 2708.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. PRINCIPAL AND AGENT ⊂⊃21, 121—AGENT MAY TESTIFY AS TO FACTS ESTABLISHING HIS AGENCY.

While the mere declarations of an agent are not admissible to prove his agency, nevertheless, when the question of his agency is involved, the agent's testimony is competent to establish the fact in issue, together with its extent and nature.

2. FRAUDS, STATUTE OF ⊂⊃158(4)—EVIDENCE HELD TO SHOW CONTRACT FOR PAYMENT OF ANOTHER'S OBLIGATION.

Evidence *held* to show that defendant, for valuable consideration, had contracted by new and original promise for the benefit of plaintiff to pay the debt of another whom defendant

owed, and not to show any rescission of such agreement.

3. FRAUDS, STATUTE OF ⊂⊃18(1)—AGREEMENT HELD ONE EXPRESSLY FOR BENEFIT OF CREDITOR, AND NOT ONE TO ANSWER FOR ANOTHER'S DEBT; "CONTRACT"; "AGREEMENT TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER."

Defendant's agreement with debtor to pay the debt *held* a valid contract within the rule of Civ. Code, § 1559, as being "a contract made expressly for the benefit of a third person" enforceable by creditor before rescission, and not an agreement under section 2794 "to answer for the debt or default of another."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agreement to Answer for Debt of Another; Contract.]

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Sierra Paper Company against Joseph Mesmer. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Visel, of Los Angeles (Arthur G. Fisk, of Los Angeles, of counsel), for appellant.

Hocker & Austin, of Los Angeles, and L. L. Burns, of San Jacinto, for respondent.

SHAW, J. Defendant appeals from a judgment rendered in favor of plaintiff.

[1] The complaint contains two counts. In the first, it is alleged that plaintiff, at the special instance and request of defendant, sold and delivered to him goods and merchandise of the value of $111.08, which allegation the court found true. The finding is attacked for want of sufficient support in the evidence. It appears that the goods were bought through one Bowman, who testified to facts showing that in making the purchase he was acting for and as the agent of defendant, who authorized and instructed him to purchase the goods and have the same charged to defendant, which he accordingly did. Conceding that Mesmer contradicted the witness, it was the province of the trial court to determine the conflicting evidence, and, since it accepted Bowman's statement as true, it was sufficient to establish the fact so found by the court. While the mere declarations of an agent are not admissible to prove his agency, nevertheless, where the question of one's agency is involved, the testimony of the agent, sworn as a witness in the case, is competent to establish the fact in issue, together with its extent and nature. Kast v. Miller & Lux, 159 Cal. 723, 115 Pac. 932; Ford v. Lou Kum Shu, 26 Cal. App. 203, 146 Pac. 199.

[2, 3] In the second count it is alleged that plaintiff sold and delivered to Bowman certain goods and merchandise for which he agreed to pay the sum of $237.19; that thereafter, for a consideration beneficial to defendant, he promised and agreed to pay the said obligation of Bowman to plaintiff, which allegations the court found to be true. This finding is based upon evidence tending to show the existence of business transactions between Bowman and Mesmer, whereby the latter became indebted to Bowman; that thereupon a settlement was had wherein Mesmer agreed to pay certain debts of Bowman, among which was that due plaintiff. A copy of the agreement, which he testified Mesmer signed, was attached to the deposition of Bowman, and Mesmer on cross-examination admitted that he might have signed it, and also testified that, in order to sever his business relations with Bowman, he agreed to pay this bill of $237.19, together with other indebtedness of Bowman's, all of which other bills he paid. This, we think, brings the case within the rule declared in section 1559, Civil Code, that—

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

It is a "principle of law long recognized and clearly established that, where one person for a valuable consideration engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." Washer v. Independent, etc., Co., 142 Cal. 708, 76 Pac. 657. That, for a valuable consideration, a contract was made for the benefit of plaintiff, is admitted by Mesmer, and there is no evidence tending in the slightest degree to show a rescission of the agreement. It was a new and original promise, based upon sufficient consideration, for the benefit of plaintiff, and hence not an agreement within subdivision 1 of section 2794, Civil Code, to answer for the debt or default of another.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 1

PEOPLE v. FRANKLIN. (Cr. 868.)

(District Court of Appeal, First District, Division 2, California. Feb. 5, 1920.)

1. ROBBERY ⊂=24(6)—IDENTIFYING EVIDENCE HELD SUFFICIENT.

In a prosecution for assault to commit robbery, evidence *held* sufficient to identify defendant as the one who had committed the crime.

2. CRIMINAL LAW ⊂=566, 741(2)—IDENTIFICATION OF DEFENDANT AS GUILTY PARTY NEED NOT BE BY SINGLE WITNESS AND IS A JURY QUESTION.

It is not necessary that the identification of defendant as the person who committed the crime be made positively by any one witness, but it is a matter for the jury to determine from all the circumstances and evidence on the subject.

3. CRIMINAL LAW ⊂=1159(5)—QUESTION OF ALIBI FOR JURY.

In a prosecution for assault to commit robbery, whether defendant had not been in the city for two years, etc., *held* for the jury under the evidence; its determination not being open to interference by the appellate court.

4. ROBBERY ⊂=24(6)—EVIDENCE SHOWING ASSAULT WITH INTENT TO COMMIT ROBBERY.

Character and circumstances of assault by defendant on aged grocery store keeper, with other evidence, *held* to justify finding that the assault was with intent to commit a robbery, and was interrupted only by the timely appearance of a third person.

5. CRIMINAL LAW ⊂=568—INTENT WITH WHICH ASSAULT WAS MADE MAY BE ESTABLISHED BY INFERENCES.

A crime having been committed by defendant, the intent with which it was made may be established by proper inferences drawn from the evidence of surrounding circumstances.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

F. H. Franklin was convicted of assault with intent to commit robbery, and he appeals. Affirmed.

Chas. H. Seccombe, of Oakland, and Chas. H. Brennan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of San Francisco, for the People.

BRITTAIN, J. The appellant was convicted on the charge of assault with intent to commit robbery. He contends the evidence was insufficient to identify him with the man who committed the assault, or to show an intent to commit robbery. His chief reliance is upon the contention regarding the question of identity. No evidence was introduced on the part of the defendant. Motion for a new trial was made and denied.

[1, 2] It is conceded that a brutal and unprovoked attack was made on the complaining witness, Vickers, an old man, who at the time of the assault between 8 and 9 o'clock in the morning of November 28, 1918, was alone in his grocery store in Oakland. An entire stranger entered the store and inquired about butter. He walked with Vickers to the back part of the store, where the butter was kept in a refrigerator. While they were talking a second stranger, unnoticed by Vickers, entered, and, approaching Vickers from behind struck him a violent blow with some implement over the top of the head. As Vickers turned to face his assailant, the latter said something about his mother having been insulted, and, as Vickers denied that he had ever insulted any woman, he was struck a second and a third time, when he fell to the floor. He was stunned, but almost immediately regained consciousness and staggered to his feet. A neighbor who had approached the store, Mr. Llewellyn, entered at that moment, and the two strangers passed him going out as he went into the store. Seeing Vickers staggering towards him, Llewellyn first went to his aid, but, on learning something of what had happened, he went with Vickers to the door. No one was in sight except the two men who were identified by both Vickers and Llewellyn, and they were walking rapidly away. Llewellyn followed them at a distance of 100 to 150 feet. He called to them, and one, claimed to be the appellant, turned and looked back at Llewellyn. The two men entered a hotel in the neighborhood, and, instead of walking across the office to the elevator, they turned sharply to the left, walking up a stairway. To Llewellyn they were identified by the woman in charge of the office as those she had brought down from the sixth floor about half an hour before, and who had registered the day before, when she had assigned them a room on the sixth floor. They did not return to their room, from which the police subsequently took their personal effects, including a suit case, clothing, and a dirk, admittedly the property of the appellant, but for the presence of which in the room he attempted to account to the officers after his arrest. From the second floor of the hotel a window gave access to a roof, from which in turn, through another window, a person might enter an adjoining house. At about the time the two men went upstairs in the hotel and disappeared, a woman in the adjoining house saw and talked to a man she had never seen before. He was then in the hall and was seeking a way out. After the arrest of the appellant, Vickers, Llewellyn, the woman from the hotel, and the woman who saw the stranger in her house were taken separately to the prison. While none of them would positively swear that the appellant was the man they had seen on the morning of the assault, each of

them picked him from among other prisoners, and on the trial each was positive in the statement that the appellant resembled the man they had seen at the time of the crime, each expressing the belief that he was the same. Standing alone, this evidence would have been sufficient on the subject of identification. It is not necessary that identification be made positively by any one witness. It is a matter for the jury to determine from all the circumstances in evidence on the subject. People v. Rolfe, 61 Cal. 540; People v. Fowler, 30 Cal. App. 183, 157 Pac. 540. In addition to the evidence already noticed, there was other evidence to which no objection was made, and some of that most damaging to the appellant was brought out on cross-examination of the state's witnesses. The appellant was a paroled prisoner, and, after the time of the assault involved in this case, he was arrested in Solano county on a charge of robbery in that county. When arrested he was wearing a dark-colored mackinaw coat. The man seen by the witnesses who have been mentioned was wearing such a coat at the time of the assault. While in jail in Fairfield the appellant sold the coat for a trifling sum to one of the officers. The coat was introduced in evidence, and, while it was shown that there were other coats of a similar general appearance, other witnesses testified it looked like that worn by the man they had seen on the morning of the assault.

[3] The other of the two men engaged in the crime was one Molin, who had been convicted on the charge of assault in connection with the attack on Vickers. While he was being taken from Fairfield to Oakland, the appellant told the officer who had him in charge that Molin was with him in Stockton on November 24th, that Moline came to Oakland by stage, after having been intrusted with the appellant's suit case and its contents, but that he, the appellant, had gone to Napa, and had not been in Oakland for two years. The appellant did not call any witnesses to establish any of the facts thus stated by him apparently for the purpose of showing his absence from the scene of the crime. The entire evidence was before the jury. The argument made on behalf of the appellant concerns its weight and credibility. These were questions for the jury to determine, and this court on appeal will not interfere with that determination. People v. Emerson, 130 Cal. 563, 62 Pac. 1069.

[4, 5] The two men, who left the store together no doubt entered in pursuance of a common purpose. Both were strangers and had appeared in the neighborhood only the day before. From the evidence the jury might reasonably have inferred that the inquiries of the first man concerning butter were made with the intention of drawing the old man, who was alone in the store, to the rear, out of sight of any one passing along the street. The hour was early and few people were about. The first blow was delivered from the back of the victim. The pretense of a prior insult to the mother of him who struck the blow is too trivial to receive serious consideration. Neither she nor any one else was called to show that any such insult had taken place, or that Vickers had ever seen or heard of her. The assault was of such a character and under such circumstances that a reasonable deduction, if not the only reasonable one, was that drawn by the jury, that the crime committed was with the intent to commit a robbery, which the insensibility of Vickers would have permitted but for the timely entrance of Llewellyn. A crime having been committed, the intent with which the assault was made may be established by proper inferences drawn from the evidence of surrounding circumstances. People v. Hite, 135 Cal. 76, 67 Pac. 57; People v. Woody, 48 Cal. 80. The court did not err in denying the motion for a new trial.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 630

SIERRA PAPER CO. v. GREPPIN et al.

(Civ. 3162.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1920. Hearing Denied by Supreme Court March 29, 1920.)

1. CHATTEL MORTGAGES ⊂⊃271—DENIAL OF FORECLOSURE WHERE TRUSTEE HAD REFUSED TO SUE PROPER IF TRUSTEE HAD DISCRETION.

If, as found by the trial court, a chattel mortgage given by an embarrassed debtor to a trustee for creditors was given with the agreement and understanding that the trustee should have entire discretionary power as to the manner of handling the trust, a judgment, denying foreclosure at the suit of one creditor after the trustee had refused to sue, was proper.

2. CHATTEL MORTGAGES ⊂⊃271 — TRUSTEE HELD TO HAVE DISCRETION TO REFUSE TO FORECLOSE ON APPLICATION OF CREDITOR.

Where the trust agreement under which a debtor gave a chattel mortgage to a trustee for creditors was hazy and nebulous, but it was customary to put such matters in the hands of a representative of the heaviest creditor for discretionary settlement, and plaintiff had been a party to such arrangements, the court *held* justified in finding that the trustee was vested with a discretion to refuse to foreclose on application of one creditor.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Sierra Paper Company against E. H. Greppin, trustee, and others.

From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Hocker and Hocker & Austin, all of Los Angeles, and L. L. Burns, of San Jacinto, for appellant.

George Beebe and Horace S. Wilson, both of Los Angeles, for respondents.

SLOANE, J. The facts in this case, so far as material to the issues on this appeal, are that one H. A. Miller, engaged in the printing business, being indebted to a number of creditors, including the plaintiff, Sierra Paper Company, a corporation, in varying amounts aggregating several thousand dollars, executed a chattel mortgage upon his printing plant, securing his promissory note for the entire indebtedness, to the defendant E. H. Greppin as trustee for the benefit of the creditors. The note, dated July 29, 1915, was made payable, $176.77 on the 15th of September, 1915, and the balance in 51 installments of $150 each, the first to be paid on the 1st of September, 1915, and a like installment on the 15th of each and every month thereafter, with interest at 8 per cent. on each of the deferred payments. The note provided that the whole amount of principal and interest should become immediately due and payable upon the happening of any one of several contingencies, among which was the failure to pay any installment of principal or interest when due, "notwithstanding any other stipulation herein contained." The mortgage provided that on the happening of any of the contingencies named in the note, the whole sum should become due and payable at the option of the legal holder of the note, at once and without notice. The mortgage further empowered the mortgagee, at his option, upon any default on the part of the mortgagor, to foreclose the mortgage as provided by law. It was also made optional with the mortgagee, in case of default in any of the conditions, to take possession of the property without notice to the mortgagor, and to sell the same at public auction or private sale, with or without notice.

There was nothing in the terms of either the note or mortgage indicating the nature or conditions of the trust, or for whose benefit the instruments were executed or the trust created.

Miller defaulted in his payments from the outset, having made only one payment of $75 in over a year, up to the time this suit was commenced. Plaintiff made demand upon the trustee to enforce payment under the note and mortgage, and on his refusal to do so began this suit for a foreclosure of the mortgage in November, 1916, in its own name as one of the beneficiaries of the trust, making Miller, the mortgagor, Greppin, the mortgagee and trustee, and the other creditors and beneficiaries parties defendant. The judgment was for defendants, and plaintiff appeals.

The only question raised is as to the discretion of the trustee regarding the time and manner of enforcing the claims of the creditors under this transaction.

As before stated, there is nothing in the writings indicating the powers or duties of the trustee, and the parol evidence on that point, as shown in the record, is meager, vague, and indefinite. In the absence of any agreement among the creditors giving the trustee discretionary power as to the time and conditions under which he should proceed to enforce payment under the terms of the note and mortgage, it may be conceded that the plaintiff, one of the principal creditors, would have the right to insist upon reasonably prompt action by the trustee. Estate of Heberle, 155 Cal. 723, 102 Pac. 935; Citizens' Bank v. Los Angeles, etc., Co., 131 Cal. 187, 191, 63 Pac. 462, 82 Am. St. Rep. 341; Story's Eq. Jur. § 1275. The trial court, however, found on this point as follows:

"That it is true that at the time of the delivery of the note as alleged in paragraph 4 of plaintiff's complaint and at the time of the execution of the chattel mortgage as alleged in paragraph 5 of plaintiff's complaint, there was an agreement that E. H. Greppin should act as trustee for all of the creditors; that said agreement and understanding was with all of the creditors, and said agreement was oral, and provided that said E. H. Greppin should have entire discretionary power as to the manner of handling said trust, and that said E. H. Greppin was not to enforce the performance of the terms of said mortgage or note unless in his judgment said note should be collected and said mortgage foreclosed."

The evidence shows that the trustee acted in the premises to the best of his judgment, and on a condition of facts which, to all the other creditors, at least, made his indulgence and efforts to nurse this claim along appear wise and reasonable.

[1, 2] It is obvious that if the court's finding as to the discretionary powers given is sustained by the evidence, the judgment must be upheld. It appears by the mortgage itself that an extension of the mortgage debt, by renewal or otherwise, was within the contemplation of the parties. It was shown by parol evidence to have been customary with the business interests engaged in this line of trade to take over claims of this kind, as was done in the instant case, by putting the whole matter in the hands of a representative of the heaviest claimant for discretionary settlement for the mutual benefit of all; that plaintiff had been a party to such arrangements; and that, if there was no express conferring of discretionary power in this instance, it was implied by subsequent conduct and acquiescence. Mr. Greppin, the trustee in this case, was the personal representative

of the defendant Blake, Moffit & Towne, the largest creditor, whose claim was for $3,374.40—nearly one-half the total sum. Plaintiff's claim was $1,879.68. There were 8 or 10 other creditors interested. The evidence disclosed that Blake, Moffit & Towne, who were engaged in selling printer's supplies, and others of the creditors in similar lines of business, continued, during the period covered by this mortgage, to enjoy the patronage of the business of the defendant Miller, with prompt cash payments on account. It may readily be conceived that they submitted to the procrastination in the payment of the original mortgage debt with more complacency than did the plaintiff, which was not enjoying a continuation of the mortgagor's trade on such cash basis. However, it does not seem to be seriously contended that these creditors, or the trustee, were governed by any unworthy motives in granting indulgence on this mortgage claim. It was testified in evidence that the times had been unpropitious for realizing satisfactory results on the security, but that an arrangement was pending which promised a favorable settlement in the course of time. In view of the fact that the plaintiff was party to a rather hazy and nebulous trust agreement, we are of the opinion that the trial court did about as well as could be done in fixing its terms.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

45 Cal. App. 746

BUNDY v. BARNES et al. (Civ. 2064.)

(District Court of Appeal, Third District, California. Feb. 2, 1920.)

APPEAL AND ERROR ⊂=478—QUESTION UNNECESSARY TO DETERMINE IN VIEW OF RETURN FILED BY RESPONDENT COURT.

Where the return filed in the appellate court by a superior court to petitions for supersedeas against it and the guardian of an incompetent shows that certain orders complained of by the incompetent have been vacated and set aside, it is unnecessary for the appellate court to determine whether or not it can issue its supersedeas to such superior court, stranger to an appeal before it.

Application for writ of supersedeas by William L. Bundy against M. P. Barnes, guardian of the person and estate of William L. Bundy, an incompetent, and the Superior Court of the County of Los Angeles. Petitions dismissed.

A. J. Mitchell and Mattison B. Jones, both of Los Angeles, for petitioner.

Benjamin E. Page, Arthur C. Hurt, and Arthur F. Coe, all of Los Angeles, and Thomas B. Leeper, of Sacramento, for respondents.

PREWETT, Judge pro tem. This proceeding, although entitled as a separate matter, is, in fact, ancillary to the matter of Estate of Bundy, Incompetent (Civil No. 2060) 186 Pac. 811, recently decided in this court.

The purpose of the petitioner was to secure a restraining order restraining said guardian and said superior court from proceeding further with an action, pending in said court, entitled "Hellman Commercial Trust & Savings Bank v. Security Trust & Savings Bank," pending the hearing of above estate matter on appeal. The Supreme Court issued the temporary restraining order as prayed for and the matter was subsequently transferred to this court.

On December 13, 1919, the above-named guardian filed his cross-petition asking that said superior court be further restrained, and this court issued its additional restraining order in conformity with the prayer of said cross-petition. This court affirmed the order of the lower court in appointing a guardian for the person and estate of said incompetent (Estate of Bundy, supra), and this rendered unimportant all the questions involved in this auxiliary proceeding.

The return filed by the superior court of the county of Los Angeles shows that the orders complained of have been vacated and set aside; hence it is unnecessary to determine whether or not an appeal court can issue its supersedeas to a lower court that is a stranger to the appeal. Likewise, the action of this court in upholding the power of the guardian to represent the incompetent makes it profitless to determine to what extent, if any, he might have intervened in said Hellman suit.

The petitions herein are dismissed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

45 Cal. App. 618

HART v. C. H. & O. B. FULLER CO.

(Civ. 2686.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

LANDLORD AND TENANT ⊂=80(3)—SUBLESSEES' RIGHT TO PASTURE ENDED ON DATE THAT LEASE EXPIRED.

Where lessee, whose term expired on January 31st, by a written instrument sold and transferred to defendant, on December 9th preceding, all title to cornstalks on land and the right to run stock upon the land for pasture, the instrument providing that "the time of this pasture is not to exceed the day of the expiration of the lease now held by the party of the first part," defendant had no right to pasture his cattle upon the land after January 31st, in view of Civ. Code, §§ 819, 820.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Frank Hart against the C. H. & O. B. Fuller Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Freeman, of Los Angeles, for appellant.

James W. Griffin, of Holtville, and J. S. Larew, of El Centro, for respondent.

SHAW, J. Upon the trial of this action the court found:

"That within one year last past, to wit, in the month of February, 1917, the defendant kept five hundred and eighty (580) head of cattle in a certain pasture belonging to plaintiff for a period of about nine (9) days, and that the pasture so received by defendant from plaintiff was of the reasonable value of four hundred and thirty-two ($432) dollars"

—and accordingly entered judgment for plaintiff, from which defendant appealed, claiming the finding in question is not supported by the evidence.

It appears therefrom that plaintiff, as the owner of certain land in Imperial county, leased the same to Kehar Singh for a term expiring on January 31, 1917; that during the year 1916 Singh, in farming the land, produced a crop of corn or maize, which, about December 9, 1916, was harvested and removed from the land, leaving the cornstalks standing thereon, which, together with wild oats and other growth, possessed some value for the pasturage of stock; that on said last-mentioned date, to wit, December 9th, Singh by a written instrument sold and transferred to defendant all his title to the cornstalks so standing and the right to run stock upon the land for pasture, in which instrument it was expressly provided that "the time of this pasture is not to exceed the day of the expiration of the lease now held by the party of the first part," who was said Kehar Singh. On the morning of January 31, 1917, defendant's foreman, knowing the lease terminated on that day, spoke to plaintiff about placing cattle on the pasture, and in reply to him plaintiff stated the lease expired on that day, following which he was entitled to possession. Notwithstanding this conversation, and the fact that defendant knew of the expiration of the lease on said date, it caused the cattle to be driven upon the land about 12 o'clock on January 31st, at which time the foreman stated to plaintiff that he would see him further about it. A day or two thereafter, and plaintiff not hearing from the foreman, he phoned to him that some agreement must be made as to the pasture. Thereupon the foreman went to see plaintiff, who told him that the cattle must be removed or defendant pay for the pasture, in reply to which the foreman stated he would have to see the manager about it, and kept the stock on the land.

Upon this showing, as to which there is no conflict in the testimony, it is impossible to perceive how the court could, under the law, have made a finding other than the one complained of. Conceding the cornstalks and other growth were valuable for feeding purposes, as claimed by appellant, defendant's right to the pasture and use thereof was in express terms by the sale limited to the expiration of Kehar Singh's lease of the premises, which terminated January 31st, and hence he could not have conveyed to defendant any greater right than he possessed.

Defendant's contention that it was entitled to enter upon the land and feed the same, not only prior to the expiration of the lease, but for a reasonable time thereafter, finds no support in the law. In Ellison v. Dolbey, 3 Pennewill (Del.) 45, 49 Atl. 178, it is said:

"It is a rule of law, applying generally to the case of landlord and tenant, that all the rights of the latter end absolutely with the tenancy."

Not only under the rule at common law did Kehar Singh's right to the pasture terminate with the expiration of the lease (24 Cyc. 1069), but such is the express provision of the Civil Code, where, by section 820, it is declared:

"A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section,"

—which section (819) provides that:

"A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines," etc.

To this rule there is an exception, where it cannot be known when the tenant's estate will terminate, as in case of a tenant for

life, where the estate is terminated by the act of God. Defendant's right to pasture the land was not only ended by the expiration of Kehar Singh's lease, under whom it held, but by the express terms of the conveyance to it such right was so limited.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 654

OFFERDAHL v. BRYDGES. (Civ. 2711.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. EVIDENCE ⊂=423(6)—EFFECT OF DUEBILL MUST BE DETERMINED IN ACCORDANCE WITH IMPORT OF LANGUAGE USED.

The effect of an instrument in the nature of a duebill, in the absence of facts showing it was procured by fraud, mistake, or duress, must, as in case of a promissory note or other writing, be determined in accordance with the plain import of the language used, and evidence to prove the general nature of the business between the parties, etc., is inadmissible in an action on the bill.

2. COSTS ⊂=262—PENALTY CANNOT BE IMPOSED FOR FRIVOLOUS APPEAL IF DOUBT EXISTS.

Where the appellate court cannot say on the record that an appeal apparently without merit and frivolous was not taken in good faith or was for delay, it must decline to impose the penalty on affirmance asked by respondent.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Hildur V. Offerdahl against Minnie L. Brydges. From judgment for plaintiff, defendant appeals. Affirmed.

John M. Bowen, of Los Angeles, for appellant.

Thomas A. Sanson, of Los Angeles, for respondent.

SHAW, J. Plaintiff brought this action to recover upon a written instrument made and executed by defendant to George Mezutani (plaintiff's assignor), whereby she acknowledged that she was indebted to him in the sum of $805.43. Judgment went for plaintiff, from which defendant appeals.

Defendant's answer while admitting the execution and delivery of the writing, alleged that it was made and delivered as evidence of her indebtedness to Mezutani and others employed to assist him in the care and management of her nursery and upon condition that no action be had thereon, and that defendant could have all the time desired by her within which to pay the same, which facts she sought to establish by oral proof. As a second defense and by way of counterclaim, it was alleged that at the time of executing said instrument Mezutani had for months neglected and failed to properly care for and manage the nursery, which fact he concealed from her, and that as a result of such neglect she was damaged in a large sum.

As indicating the errors of which appellant complains, we quote from her brief as follows:

"Two points are raised by appellant in support of her contention that judgment thereon should be reversed: (1) That there was no account stated; (2) that the court erred in refusing permission to appellant to introduce evidence to prove the general nature of the business between the parties and to show the facts and circumstances to aid in deciding what occurred or to explain what occurred when the writing was given by appellant to said Mezutani."

[1] The action does not purport to be upon an account stated, but upon an instrument in the nature of a duebill, the effect of which, in the absence of facts showing that it was procured by fraud, mistake, or duress, must, as in the case of a promissory note or other writing, be construed in accordance with the plain import of the language used therein. The character of the written obligation was such that defendant was not entitled to introduce oral testimony varying its terms. No facts are alleged in either defense set forth in the answer under which evidence was admissible for the purpose of proving the general nature of the transaction had between the parties, or to show the surrounding circumstances under which the document was made and delivered. The action was upon the written instrument, and whether it be deemed an account stated, duebill, or note, it clearly and conclusively appears therefrom that it was an acknowledgment on the part of defendant of a present indebtedness due to plaintiff's assignor.

[2] While the appeal appears to be without merit and frivolous, we cannot upon the record say that it was not taken in good faith or that it was for delay; hence we must decline to impose the penalty asked for by respondent.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

45 Cal. App. 736

WARREN NAT. BANK, WARREN, PA., v. SUERKEN. (Civ. 3156.)

(District Court of Appeal, Second District, Division 2, California. Feb. 2, 1920. Hearing Denied by Supreme Court April 1, 1920.)

1. HUSBAND AND WIFE ⟹87(6) — NOTE OF MARRIED WOMAN TO SECURE INDEBTEDNESS OF ESTATE OF WHICH SHE WAS HEIR NOT AN "ACCOMMODATION NOTE."

Where the heirs of a decedent carrying on a furniture business and indebted to a bank formed a corporation to carry on such business and executed notes as collateral security for the decedent's indebtedness to the bank, and the bank thereupon refrained from presenting any claim against the estate, which was solvent, the notes of the heirs were not without consideration and accommodation notes within the rule in Pennsylvania that a married woman cannot make an accommodation note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodation Bill or Note.]

2. BILLS AND NOTES ⟹493(3)—BURDEN ON ONE DENYING LIABILITY TO ESTABLISH WANT OF CONSIDERATION.

Where notes on their faces imported a consideration, the burden was on one claiming want of consideration to establish that fact.

3. BILLS AND NOTES ⟹49, 96—"ACCOMMODATION MAKER" DEFINED; "WITHOUT CONSIDERATION."

An "accommodation maker" is one who puts his name to a note without any consideration with the intention of lending his credit to the accommodated party, and in this connection "without consideration" means "without consideration to the accommodating party directly."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodation Maker; Consideration.]

4. BILLS AND NOTES ⟹92(3)—SUSPENSION OR FORBEARANCE CONSTITUTE SUFFICIENT CONSIDERATION; "GOOD CONSIDERATION."

Under Civ. Code, § 1605, as to what constitutes a good consideration for a promise, any suspension or forbearance of a legal right constitutes a sufficient consideration for a note or bill.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Consideration.]

5. CONTRACTS ⟹71(2)—RENEWAL OF INDEBTEDNESS OF ESTATE SUFFICIENT CONSIDERATION FOR HEIR'S PROMISE TO PAY.

Where heirs or assignees of the estate of deceased person, in order to protect the estate from claims enforceable against its property, obtain a renewal or extension of time on the original claim by agreeing to pay it, such renewal or extension is sufficient consideration for their promise.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Warren National Bank of Warren, Pa., against Lena M. Suerken. From a judgment for defendant, plaintiff appeals. Reversed.

Bennett, Turnbull & Thompson and Rupert B. Turnbull, all of Los Angeles, for appellant.

Allen & Allen, of Los Angeles, for respondent.

SLOANE, J. The defendant and her stepmother, Annetta R. Johnson, and her brothers, Everett F. Johnson and Charles B. Johnson, were the heirs at law of James P. Johnson, deceased. At the time of his death James P. Johnson was indebted to the plaintiff bank in a sum approximating $15,000, for which the bank held his unsecured promissory notes. The decedent had been in the furniture business in his lifetime, and the heirs, desiring to continue the business organized a corporation known as the Johnson Furniture Company, the sole incorporators of which were the said heirs. This corporation then took over, and thereafter operated, the furniture business. After the organization of such company the four heirs, including this defendant, executed to the Johnson Furniture Company their joint notes for a sum covering the amount of the notes of the decedent held by the bank, and the Johnson Furniture Company indorsed these notes over to the bank. This transaction was had at the request of the plaintiff bank.

The whole controversy in this case is as to whether the defendant, Lena M. Suerken, joined in the execution of these notes without consideration, as an accommodation maker, or was assuming and guaranteeing her father's indebtedness in her own behalf and for the protection of her own interest in his estate.

The notes were executed in the state of Pennsylvania. The defendant was at the time a married woman. It is stipulated that under the laws of that state, as a married woman, she was disqualified from becoming an accommodation indorser, maker, guarantor, or surety on any note or contract. The trial court found that defendant joined in the execution of said notes, "not for any debt of the defendant, but as collateral security to secure the payment of certain notes made by James P. Johnson, deceased, father of the defendant, which notes (the notes of James P. Johnson, deceased) are held by the plaintiff." It is upon the sufficiency of the evidence to support this finding that the appeal is taken.

No point is made as to the sufficiency of the finding to support the judgment. It will be noticed that the court does not expressly find that the defendant was an accommodation maker, or that she executed the notes without consideration, but that the notes were executed, "not for any debt of the de-

fendant, but as collateral security to secure the debt of her father." It might readily be, under the relations and interests of the parties here, that the defendant, in her own interest and to protect her own rights as an heir, executed collateral security for the debts of her father, which debts existed as a claim against his estate, including the business which was taken over by the corporation, the Johnson Furniture Company, to whom the notes here sued on were primarily made payable. Under such circumstances she could hardly be classed as an accommodation maker. However, the point is not raised, and it, perhaps, may be reasonably inferred from the findings as a whole that the court intended to reach and express the conclusion that the defendant signed these notes without consideration. If the evidence is such as to support such an interpretation, we are disposed to so construe it. If the fact that the notes were given as collateral security for the father's indebtedness was conclusive on the point that they were without consideration we think the evidence is ample to uphold such a finding. A number of witnesses testified that such was the avowed and agreed purpose, and the circumstance that the bank continued to hold the original notes of the deceased father is corroborative of this conclusion, notwithstanding the attempted explanation by plaintiff that they were retained merely to show the nature of the transaction.

[1, 2] But was there no consideration for the collateral contract? It is true the evidence sufficiently shows that defendant was under no legal obligation to secure her father's liabilities to the bank. What her interest in the Johnson Furniture Company—the original payee named in the notes, and of which corporation she was a member—was, or whether she owed anything to it, does not appear, so far as we have been able to discover from the record. It was further testified that the defendant did not receive "any money personally, or anything of value, or any consideration of any kind, from the Warren National Bank." The facts, however, that do appear beyond dispute are: That the defendant was an heir at law of her deceased father's estate and a member of the corporation formed by the heirs to carry on his furniture business; that the plaintiff bank held the obligations of the decedent for some $15,000, which were claims against his estate; that the estate appears to have been solvent; that the bank insisted upon some sort of a settlement, and demanded the execution of the collateral notes as security for the father's indebtedness, "so that the records of the bank show up properly to the directors and bank examiners, and also that the notes of the decedent could be kept alive," and "they said that they would carry on the indebtedness if the notes were kept alive." It further appears that the bank refrained from pressing any claim against the estate. Whether the estate was probated and any claim presented or filed on the original notes does not appear. But at least there was an agreement, which was fulfilled by the bank, to extend and carry the estate's indebtedness in consideration for the collateral notes. Under this state of facts, does the testimony of the witnesses for defendant that defendant "received nothing of value or any consideration of any kind from the Warren National Bank"—statements which, in the light of the more specific testimony as to the facts, may be classed as conclusions or opinions, rather than probative facts—justify the finding of want of consideration, particularly in view of the doubtful expression of the court in its finding on that point? These collateral notes on their face import a consideration. The burden is clearly on the defendant to establish the fact of want of consideration. As an heir at law, entitled to succeed to an interest in decedent's property, and one of the organizers of the family corporation that was taking over the furniture business of the deceased, it would seem that she was beneficially interested in securing a settlement or a postponement of these claims, which were enforceable both against her general interests as an heir and against the property being taken over by the corporation of which she was a member.

[3-5] An accommodation maker is defined in Parsons on Notes & Bills, § 131, as "one who puts his name there without any consideration, with the intention of lending his credit to the accommodated party." As stated in Randolph on Commercial Paper (2d Ed.) § 472, the term "without consideration" must be considered as meaning simply "without consideration to the accommodating party directly." Accepting this definition, can it be doubted that when the defendant here became a party to these notes it was for the direct advantage to be gained by herself and her coheirs and associates in protecting their interest in decedent's estate from the immediate enforcement of this liability against it? It was not a liability enforceable against the defendant, but it was enforceable against the property to which she was about to succeed. Any suspension or forbearance of a legal right constitutes a sufficient consideration for a note or bill. Civ. Code, § 1605; Naglee v. Lyman, 14 Cal. 450. And where heirs or assignees of an estate of a deceased person, in order to protect that estate from claims against the decedent which are enforceable against the property of the estate, obtain a renewal or extension of time on the original claim by agreeing to pay it, such renewal or extension is sufficient consideration for their promise. Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054; Whelan v. Swain, 132 Cal. 389, 64 Pac. 560; Humboldt

Sav., etc., Soc. v. Dowd, 137 Cal. 408, 70 Pac. 274. In the last-cited case, where the renewal note and mortgage were given by the heirs to secure extension of time on decedent's debt, the court says:

"The court found 'that the note and mortgage described in the complaint were executed for a valuable consideration,' and we think the evidence fully supported the finding. The old note and mortgage constituted a valid lien upon the lands to which the O'Connell children were heirs. It was created by their father in his lifetime. * * * The original indebtedness was never paid. By the act of the children in making the new note and mortgage they intended to renew the old ones and to get further time. This was the evident intent, and made plainer by the continued payments of interest. The mortgagors, after executing the note and mortgage, in extension of a debt which was a legal charge upon their property, will not now be heard to say that their act was without consideration."

We think the same reasoning applies to the respondent on this appeal. Although the plaintiff bank has no mortgage lien on the decedent's estate, the estate was solvent, and liable for the debt, and the collateral notes sued on were given to protect the interest of the respondent and other heirs from the charge of this debt.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

45 Cal. App. 659

MICHIE GROCERY CO. v. MARTIN et al.

(Civ. 2755.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. EVIDENCE ⊜373(2)—PRIMA FACIE SHOWING OF EXECUTION OF CONTRACT OF SALE BY BUYER CORPORATION THROUGH MANAGER SUFFICIENT TO ADMIT IT.

In action for breach of contract to sell beans, testimony of plaintiff company's general manager that he signed the written contract on behalf of plaintiff and as its act, and that in performance of his duties he had previously signed all contracts for plaintiff in its business, which was that of a wholesale grocer, was sufficient prima facie showing of execution of contract by plaintiff as buyer to admit it in evidence.

2. CORPORATIONS ⊜432(2) — EXECUTION OF CONTRACT BY MANAGER IN NAME OF COMPANY IN USUAL COURSE ITS BUSINESS PRESUMED TO HAVE BEEN AUTHORIZED.

Where the general manager of a corporation, for and on its behalf, in its name and in the usual course of business conducted by it, executes a contract, his authority so to do, in the absence of any contrary showing, will be presumed.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Michie Grocery Company against Albert G. Martin and others. From judgment for defendants, plaintiff appeals. Reversed.

Leonard B. Slosson and George E. Farrand, both of Los Angeles, for appellant.

Ben F. Gray, of Los Angeles, for respondents.

SHAW, J. In this action recovery of damages is sought for defendants' alleged breach of a written contract to sell and deliver to plaintiff 500 bags of beans. Judgment went for defendants, from which plaintiff appeals, claiming the court erred in sustaining defendants' objection to the reception of the contract offered in evidence, upon the ground that, while signed by defendant as seller, it was not shown to have been executed by the plaintiff as buyer.

[1] The contract, without seal attached, was signed as follows:

"Buyer, Michie Grocy. Co.
"P."

In connection therewith, T. E. Powers, in substance, testified that he had been in plaintiff's employ for nine years; that on May 22, 1916, at the time of the execution of the contract in question, he was general manager of plaintiff corporation, in which capacity, and for and on behalf of plaintiff, and as its act, he signed the same; and that in the performance of his duties he had, prior to the execution of this contract, signed all contracts for plaintiff in the conduct of its business, which was that of wholesale grocer. In our opinion, this evidence was sufficient as a prima facie showing to entitle the contract to be admitted in evidence.

[2] The contention of respondents is that, in the absence of a resolution adopted by the board of directors authorizing Powers to execute the contract, his act could not be deemed that of the corporation, in support of which they cite authorities to the effect that the president of a corporation merely by virtue of his position has no power to bind the company by a contract. Conceding this, it is nevertheless true that where the general manager of a corporation, for and on its behalf, in its name and in the usual course of business conducted by it, executes a contract, his authority so to do, in the absence of any showing to the contrary, will be presumed. Powers' admitted relation to the corporation, and the fact that in conducting the business he had theretofore acted for the company in executing all contracts to which it was a party, warrants the inference that his act was in accordance with rules adopted by the

board of directors for guidance in the transaction of its corporate affairs. Bank of Middlebury v. Rutland R. R. Co., 30 Vt. 159; Crowley v. Genesee Min. Co., 55 Cal. 273; Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

If the position of the parties were reversed, and the company attempt to repudiate the contract upon the ground that its execution was not authorized, it should not be heard upon the showing here made. Our view as to the ruling of the court in excluding the contract from evidence renders it unnecessary to discuss the sufficiency of the evidence to support the findings of the court as to damages and defendants' right to an abatement of the action under section 410 of the Civil Code.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 656

CASS v. OCEAN PARK BATH CO.

(Civ. 2729.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. PLEADING ⟸406(8) — RECOVERY UNDER COMPLAINT UNITING TORT AND CONTRACT ALLOWED IN ABSENCE OF ATTACK.

Where a complaint uniting in one count a cause of action for conversion and one under a contract for claim and delivery was not attacked under Code Civ. Proc. §§ 427, 430, plaintiff should be permitted a recovery upon either cause of action that he established by his evidence, as all objections to the complaint must be deemed waived, under section 434.

2. TROVER AND CONVERSION ⟸4 — CONVERSION DEFINED.

To constitute conversion it is necessary that defendant has by some act wrongfully assumed title in himself, or dominion over the property inconsistent with plaintiff's rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

3. TROVER AND CONVERSION ⟸9(4) — PROOF OF DEMAND AND REFUSAL WITHOUT SHOWING ABILITY TO DELIVER INSUFFICIENT.

Proof of mere demand and refusal to deliver property deposited by plaintiff with defendant in itself is insufficient to constitute conversion, for the reason that such refusal may be due to loss or destruction of the property by reason of which defendant is unable to deliver it.

4. JUDGMENT ⟸256(1)—FINDINGS FOR PLAINTIFF ON ONE THEORY REQUIRE JUDGMENT FOR HIM, THOUGH FINDINGS ARE ADVERSE ON OTHER THEORY.

Where a complaint presents two theories upon either of which recovery may be had, and the findings, though adverse as to one, are as to the other in favor of plaintiff, judgment thereon should be entered in his favor.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Harry A. Cass against the Ocean Park Bath Company. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Simms & Fulwider, of Los Angeles, for appellant.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought a judgment for the return and redelivery to him of certain personal property, alleged to have been deposited with the defendant as bailee and by the latter converted to its own use, or the value thereof, alleged to be $320.25, together with $150 for time and money expended in pursuit thereof. Judgment went for defendant, from which plaintiff appeals on the judgment roll.

While the complaint appears to have been based upon the theory of conversion, it, in addition to the allegations constituting such cause of action, set forth in detail facts showing the existence of a contract under which the goods were received by defendant as depository, to be redelivered upon demand, the making of such demand, and defendant's neglect and failure to so deliver them, as to all of which facts, put in issue by the answer and tried, the court found that defendant at the time in question conducted a bathhouse, the privileges of which it let for hire and undertook to safely keep and promptly return on demand valuables and pocket contents intrusted to it by patrons, among whom was plaintiff, from whom, on June 17, 1917, preparatory to his using the swimming pool in the bathhouse, defendant received, upon a promise to safely keep and return to plaintiff on demand, the articles in question, the actual value of which was $320.25; that upon plaintiff's return to defendant's office he demanded the articles, whereupon defendant informed him that they had been lost and could not be found; that, as alleged by defendant, it made every effort to find the articles, but was unable to do so. As to the alleged conversion, the court found that, while defendant refused to pay plaintiff the value of the property, it is not true that it unlawfully converted the same to its own use, "or has refused or does now refuse to redeliver the same or any part thereof to plaintiff"; and upon said findings the court, as a conclusion of law, found that plaintiff was entitled to take nothing.

[1] It is apparent that since, contrary to the provisions of section 427, Code Civil Pro-

cedure, several causes of action, one in the nature of a tort and one upon contract, were united, and further were not separately stated, the complaint was subject to attack by demurrer under the provisions of section 430, Code Civil Procedure. No such attack, however, was made, and in the absence thereof the objection upon such ground, as provided by section 434, Code Civil Procedure, must be deemed waived; and hence the case proceeded to trial upon all the issues joined by the complaint and answer.

[2-4] Conversion implies a tortious act on the part of the defendant. It must be made to appear that he has by some act wrongfully assumed title in himself or dominion over the property inconsistent with plaintiff's right thereto. Steele v. Marsicano, 102 Cal. 666, 36 Pac. 920; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568. Proof of the mere demand and refusal to deliver the property in itself is insufficient to constitute conversion, for the reason that such refusal may be due to loss or destruction of the property by reason of which defendant is unable to deliver it (Hawkins v. Hoffman, 6 Hill [N. Y.] 586, 41 Am. Dec. 767; Hill v. Belasco, 17 Ill. App. 194); and the fact of the loss of the articles, as found by the court, is no doubt the ground upon which it held there was no conversion. Nevertheless other facts were alleged in the complaint and found to be true which, conceding there was no conversion, are sufficient to entitle plaintiff to judgment for the breach of defendant's contract in failing, on demand therefor, to redeliver the goods intrusted to its care. The allegations of the complaint, to which no demurrer was interposed, were such as to present two theories, upon either of which recovery might be had, and while the findings as to one are adverse, they are as to the other in favor of plaintiff, and hence judgment should follow thereon in his favor.

The judgment is reversed, and the trial court instructed to enter judgment in favor of plaintiff for $320.25, together with interest thereon from June 17, 1917.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 669

HARRIS v. CENTRAL UNION HIGH SCHOOL DIST. (Civ. 3145.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1920.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟸80(1)—AGREEMENT TO PAY FOR SCHOOL BUILDING PLANS BINDING ON CONDITIONAL ACCEPTANCE.

Where board of trustees of school district published notice to architects calling for plans and specifications for a building, specified compensation to be paid to the architect whose plans were adopted, a contract to pay a certain architect for his plans was complete and binding on the board, where the plans were accepted with the condition or understanding that such modifications therein as should be directed by the board would be made by the architect; the board not thereafter indicating its desire to have any modifications made.

2. SCHOOLS AND SCHOOL DISTRICTS ⟸121—FINDING THAT BOARD ACCEPTED PLANS OF ARCHITECT SUSTAINED BY EVIDENCE.

In an action by an architect to recover compensation and premium agreed to be awarded by the board of trustees of school district to architect whose plans for a building should be adopted, evidence *held* sufficient to sustain a finding that the board adopted plaintiff's plans subject only to the condition or understanding that plaintiff should make any modifications therein that the board might desire.

3. SCHOOLS AND SCHOOL DISTRICTS ⟸80(1)—TRUSTEES MAY RESERVE RIGHT TO MAKE ALTERATIONS IN ARCHITECT'S PLANS.

The board of trustees of a school district, having authority to contract for the construction of a school building, may in making its contract with the architect or with the contractor reserve the right to make alterations during the progress of the work, so long as the general plan of the building is not changed.

Appeal from Superior Court, Imperial County; W. A. Sloane, Judge.

Action by F. T. Harris against the Central Union High School District. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Simon, of El Centro, for appellant.

Conkling & Brown, of El Centro, for respondent.

CONREY, P. J. On or about the 12th day of February, 1915, the board of trustees of the defendant published a notice to architects, calling for plans and specifications in detail for a proposed addition and extension to the high school building of the district. It was stated in the notice that "the said trustees will award to the architect whose plans and specifications in detail are adopted" a specified premium and compensation. At a meeting of the board held on the 14th day of March, 1915, the board, having considered several plans and specifications submitted under said notice, including those of the plaintiff, took action which was shown by the minutes of the meeting that it was "moved by Hamilton, seconded by Clark, that the plans and specifications of F. T. Harris be accepted. Motion carried." At a meeting of the board held on the 16th day of April, 1915, said minute entry was read, and, on direction of the members of the board, but without formal motion and order of the board, the secretary amended the minute entry by inserting after the word "accepted"

the words "when modified and changed to the satisfaction of the board." After the amendment had been interlined by the secretary, a motion was made and carried "that the board rescind the action of March 14, 1915, with reference to accepting the plans and specifications of architects."

Upon the issue as to whether or not the plans and specifications were accepted as alleged in the complaint, the court found:

"That on the 15th day of March, 1915, the said board of trustees of the defendant, after duly considering all of the plans and specifications submitted under the said notice by resolution and order spread upon the minutes of said board adopted the said plans and specifications as submitted by plaintiff, subject to a condition subsequent, to wit, that the plaintiff should modify and change the plans and specifications to the satisfaction of the board," etc.

The court further found that, after so receiving and accepting the plans and specifications so prepared and submitted by plaintiff, the board of trustees, without requesting the plaintiff to make any modifications or changes in said plans and specifications, and without notifying the plaintiff what, if any, modifications or changes in said plans and specifications were desired by the board, and without affording the plaintiff an opportunity to make any desired modifications or changes in said plans and specifications, failed and refused to proceed further with the construction of said building, and repudiated and by order entered on their minutes on or about the 1st day of April, 1915, attempted to rescind and vacate their former action as to said plans and specifications so prepared by plaintiff, and have ever since refused, and do now refuse, to pay plaintiff the sum agreed to be paid for said plans and specifications or any sum or sums whatever, etc., by reason whereof plaintiff suffered damages in a stated sum for which judgment was awarded.

[1] Appellant contends that said findings are not sustained by the evidence in this, that there was no absolute acceptance of plaintiff's offer with a condition subsequent, but that there was only a conditional acceptance, and that therefore no contract resulted and would not result until there had been a compliance with the conditions of the acceptance by the plaintiff in making modifications and changes in his plans and specifications which would meet the approval of the board. By the use of the phrase, "subject to a condition subsequent," as we interpret the finding, the court decided that the board did in fact accept the "plans and specifications in detail," as presented by plaintiff, but with the condition or understanding that such modifications therein as should be directed by the board would be made by the plaintiff. Upon this finding, if sustained by the evidence, it must be held that the contract was complete; and since the board did not thereafter indicate its desire to have any modification or change made in the plans or specifications, and the plaintiff did not fail to comply with any such indicated desire or instructions, and since it was shown that the plaintiff filed the necessary bond and stood ready to comply with all the conditions of his contract, he became entitled to the compensation agreed to be paid.

[2, 3] We think that the evidence is sufficient to support the finding. The secretary of the board, who also was a member thereof, testified that the minutes as originally made by him correctly stated the motion as he remembered it to have been made; that he had taken notes during the meeting and wrote up the minutes according to those notes. Mr. Hamilton, the member of the board who made the motion, testified as follows:

"Q. Do you remember what the language of your motion was? A. As well as I remember, I moved to accept his plans and specifications. Q. And this matter of his making changes, as desired, was purely a matter of discussion? A. Yes, sir. * * * Q. Didn't you understand from Mr. Harris beforehand that that was satisfactory to him? A. I supposed it would be. We advertised, and I think there were five plans and specifications submitted to the board, and in all of our discussion that none of the plans would go without changing. We would not want to advertise for bids and let a contractor put up a building without some changes."

The testimony seems to show clearly that, as stated by Mr. Hamilton in his testimony, "It was the intention of the motion, we would accept his plans, but there would have to be some alterations made;" and this is the effect of the court's finding. Substantially the plaintiff's plans and specifications were accepted, but the acceptance was subject to the right of the board to have modifications and changes made therein. This was in fact in accordance with a custom based on common experience. The plaintiff testified that at the time he presented his bond to the board he stated to them, in response to a question, that it was possible to make changes, and that "it was always customary with the architect where his plans were adopted, any changes they wanted to incorporate, they could." W. F. Apple, another of the trustees, testified that when he voted on the motion with reference to the Harris plans he understood that he was voting for the absolute acceptance of those plans, "but the board would call for certain little changes in the plans." We do not doubt that the board of trustees of a school district, having authority to contract for the construction of a school building, may, in making its contract with the architect or with the contractor, reserve the right to make alterations during the progress of the work, so long as the general plan of the building is not changed. That

appears to be the kind of reservation intended in the present case, and this was not inconsistent with a complete acceptance of the proposed plans and specifications.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

45 Cal. App. 607

LILLIE v. WEYL, ZUCKERMAN & CO.

(Civ. 2689.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1920.)

1. SALES ⟸377—COMPLAINT HELD TO STATE CAUSE OF ACTION FOR BUYER'S BREACH.

The making of contract whereby defendant agreed to buy entire crop of potatoes grown by plaintiff, plaintiff's compliance with its terms, its breach by defendant, and the damage resulting to plaintiff therefrom, all alleged in the complaint, were sufficient to constitute a cause of action in favor of plaintiff, whose right to recover is, as provided by Civ. Code, § 3300, to be read in connection with section 3049, the amount which will compensate him for "all the detriment proximately caused" by such breach.

2. SALES ⟸377—COMPLAINT NOT DEMURRABLE FOR FAILURE TO ALLEGE DETAILS OF SELLER'S MITIGATION OF DAMAGES.

In action for breach of contract whereby defendant agreed to buy entire crop of potatoes grown by plaintiff, that complaint was uncertain as to what course was pursued by plaintiff in protecting himself from loss did not render it subject to general demurrer, where under the allegations and in the absence of any special objection plaintiff might introduce evidence showing that on defendant's breach he adopted any one of the three courses open to him.

3. SALES ⟸384(7) — MEASURE OF DAMAGES WHERE PROPERTY NOT RESOLD AFTER BUYER'S BREACH STATED.

Under Civ. Code, §§ 3311 and 3353, the measure of damages where title is not vested in the purchaser and the property is not resold in the manner provided by section 3049, is the difference between that which the purchaser agreed to pay and the value of the property to the seller on resale thereof, which value is deemed to be the price obtainable therefor in the nearest market to the place at which it should have been accepted by the buyer.

4. APPEAL AND ERROR ⟸931(1)—FINDINGS CONSTRUED TO SUPPORT JUDGMENT.

Findings should be construed most strongly in support of the judgment.

5. SALES ⟸389—FINDINGS SHOW THAT RESALE AFTER BUYER'S BREACH WAS AT MARKET PRICE.

In action for breach of contract to buy entire crop of potatoes, findings, though inartificially drawn, *held* to show that the potatoes were sold by plaintiff at the market value thereof at the time when it was the duty of defendant to have accepted them.

6. SALES ⟸383—EVIDENCE HELD TO SUPPORT FINDING THAT RESALE WAS IN GOOD FAITH AT MARKET PRICE.

In action for breach of contract to buy plaintiff's entire crop of potatoes, *held*, that there was evidence to justify finding that plaintiff in good faith sold at the market price.

7. SALES ⟸389—FINDING AS TO WEIGHT OF POTATOES AND PRICE ON RESALE AFTER REFUSAL OF BUYER TO ACCEPT HELD WITHIN ISSUES.

In action for breach of contract whereby defendant agreed to buy entire crop of potatoes grown by plaintiff, finding as to total weight of potatoes and price at which plaintiff sold them *held* within the issues.

8. APPEAL AND ERROR ⟸1071(5)—FINDINGS, THOUGH NOT WITHIN ISSUES, HELD WITHOUT PREJUDICE.

Where defendant buyer's refusal to accept and pay for potatoes according to contract price was not on account of the quality or condition of the potatoes, but because the market price had greatly decreased, defendant could not have been prejudiced by finding as to total weight of potatoes and the price at which plaintiff sold them, conceding such finding was not within the issues.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by F. C. Lillie against Weyl, Zuckerman & Co., a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Sidney J. Parsons, of Los Angeles, for appellant.

Purington & Adair and A. Aird Adair, all of Riverside, for respondent.

SHAW, J. In this case defendant appeals from a judgment rendered against it in the sum of $435.38 as damages for the breach of a contract.

The order of the court in overruling defendant's general demurrer to the complaint is assigned as error. The complaint alleged the making of the contract, set out in hæc verba, from which it appears that on June 12, 1917, plaintiff agreed to sell and defendant agreed to buy the entire crop of potatoes grown by the former, the quality of which were specified as being first-class, not less in weight than three ounces each, and to be delivered f. o. b. cars, Elsinore, or as buyer directs, at the price of $2.50 per hundredweight. It is further alleged that about July 10, 1917, plaintiff notified defendant that he was ready to deliver the potatoes in accordance with his contract and that thereupon defendant sent an agent to inspect the same, who, after such inspection, refused to accept the potatoes or any part thereof or pay for the same pursuant to the agreement, as a result of which plaintiff alleged he was damaged in the sum of $439.45, which sum, upon demand, defendant refused to pay.

[1, 2] The making of the contract set out in the complaint, plaintiff's compliance with its terms, its breach by defendant and the damage resulting to plaintiff therefrom, all alleged in the complaint were sufficient to constitute a cause of action in favor of plaintiff (Sutherland, Code Pleading, § 4636), whose right to recover is as provided in section 3300, Civil Code, to be read in connection with section 3049, the amount which will compensate him for "all the detriment proximately caused" by such breach. Appellant insists, however, that, as held in Gay v. Dare, 103 Cal. 454, 37 Pac. 466, and Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926, it was optional with plaintiff in protecting himself from loss, to retain the property for the vendee and sue for the entire purchase price, sell the property for the benefit of the purchaser in which event the damage would be the difference between the price received and that agreed to be paid, or, lastly, keep the property as his own and recover the difference between the market price thereof at the time and place of delivery and the contract price; hence it is contended that, as the complaint was silent as to which method plaintiff adopted, it failed to state a cause of action. Conceding the complaint was uncertain in the respect named, nevertheless it was not obnoxious to the general demurrer for the reason that, under the allegations made and in the absence of any special objection to the complaint, plaintiff might introduce evidence tending to prove that upon defendant's breach he adopted, as he was entitled to do, any one of the three courses open to him. The question as to how or in what manner the damage arose, other than as appears from the general allegations, is the subject of evidence rather than of pleading.

The answer admitted the execution of the contract, and, in addition to denying that plaintiff had been damaged in any sum whatsoever, or that he had demanded payment therefor as stated in his complaint, alleged as a further defense that it was at all times anxious and willing to perform the contract on its part, but that the potatoes which plaintiff offered to deliver to defendant were not first-class, but were sunburnt and defective, as to all of which denials and allegations, and the fact that plaintiff was ready and willing to perform the contract on his part, the court upon ample evidence found in favor of plaintiff. The court further found that the total weight of the potatoes constituting the subject of the controversy was 39,580 pounds, "that the plaintiff sold said potatoes at $1.40 per hundredweight, that said sale was made in good faith, and that the said price was the best price that could then be obtained for said potatoes," and, as a conclusion of law, found that plaintiff, by reason of the breach of the contract on the part of defendant, had sustained damages in the sum of $435.38, for which he was entitled to judgment.

[3] It thus appears that plaintiff, pursuant to his right, as declared in Gay v. Dare, supra, acting as the agent of defendant, which refused to perform its part of the contract, resold the potatoes and brought this action to recover that part of the contract price which was in excess of the price obtained on the resale, which was the difference between $1.40 and $2.50 per hundred on the total weight of the potatoes. Under sections 3311 and 3353, Civil Code, the measure of damages, where title is not vested in the purchaser and the property not resold in the manner provided by section 3049—which is the case here—is the difference between that which the purchaser agreed to pay and the value of the property to the seller on the resale thereof, which value is deemed to be the price obtainable therefor in the nearest market to the place at which it should have been accepted by the buyer.

[4, 5] Applying the rule that findings should be construed most strongly in support of the judgment, we find no difficulty in reaching the conclusion that the finding, though inartificially drawn, shows that the potatoes were sold at the market value thereof at the time when it was the duty of defendant to have accepted them. The sale was made in good faith, and the price was the best that could then be obtained therefor.

[6] It appears from the evidence that between the making of the contract and the date when plaintiff sold the potatoes the price thereof fluctuated greatly, dropping from $3 to $1.40 per hundredweight; that at the time when sold by plaintiff there was no demand for potatoes, and the $1.40 per hundred was all that he could obtain for them. Defendant's buyer testified that from the 12th to the 20th of July the market for potatoes went to pieces and there was absolutely no market for them. Charles O. Morgan, who bought the potatoes, stated that between July 10th and July 21st the price of potatoes varied greatly, going from $3 down to $1.40 per hundred; that he paid $1.40 per hundred for his potatoes, which at the time was the market price therefor. Conceding a conflict in the testimony on the question, nevertheless there was ample evidence to justify the finding that plaintiff in good faith sold at the market price.

[7, 8] Appellant complains that the finding as to the total weight of the potatoes and the price at which plaintiff sold them was not within the issue. As we view the case, there is no merit in this contention. The court also found, which fact is apparent from the testimony, that defendant's refusal to accept and pay for the potatoes according to the contract price was not on account of the quality or condition of the potatoes, but because the market price of potatoes had great-

ly decreased between the date of said contract and the date of such refusal to accept the same. Conceding this finding was not within the issues, since it was immaterial what motive prompted defendant to breach the contract, defendant could not have been prejudiced thereby.

That defendant executed the contract, and, without cause, refused to comply with its terms, to plaintiff's damage in the sum as found by the court, is apparent from the record, and no error complained of by appellant has resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 673

REALTY & REBUILDING CO. v. REA et al.

(Civ. 3231.)

(District Court of Appeal, First District, Division 1, California. Jan. 30, 1920.)

LANDLORD AND TENANT ⇐208(1)—LESSEE LIABLE FOR RENT WHERE ASSIGNEE ELECTED TO EXTEND TERM UNDER LEASE.

Where a lease provided that the lessees might elect to take a three-year extension, and, the lease having been assigned, the assignee gave notice of its election to extend the term, the original lessees' liability as sureties for the assignee for the payment of rent applied to the extended term, as well as the original term.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by the Realty & Rebuilding Company against L. A. Rea and others. From a judgment for plaintiff, the defendant Eugene J. Sullivan appeals. Affirmed.

See, also, 194 Pac. 1024.

J. Early Craig, of San Francisco (A. E. Shaw, of San Francisco, of counsel), for appellant.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Nathan Moran, of San Francisco, and A. A. Heer, of Reno, Nev., for respondent Realty & Rebuilding Co.

John D. Rutledge, of San Francisco, for respondent Weinstein.

A. E. Shaw and Bert Schlesinger, both of San Francisco, for respondent Ruef.

Jacob Meyer, of San Francisco, for respondents Rea and others.

RICHARDS, J. This is an appeal by the defendant Eugene J. Sullivan from that portion of the judgment in this action which runs in favor of the plaintiff and against said defendant, and by which the plaintiff is awarded the sum of $11,215.81. The action was instituted by the plaintiff as the transferee from one Rudolph Spreckels of a lease of certain premises on Fillmore street in the city of San Francisco to the defendants herein, L. A. Rea, E. Kehrlein and Eugene J Sullivan, and by them assigned to the defendant Fillmore Arcade Company, a corporation. Certain stockholders of said corporation are also made parties defendant.

The complaint is in two counts, one to recover rent overdue and unpaid under the terms of said lease and of a later extension thereof; the other to recover damages in a large sum for an alleged breach of certain covenants in said lease relating to the duty of the lessees and their assigns to keep the buildings upon the premises in repair.

Upon a trial of the cause the court made its findings and rendered its judgment in favor of the plaintiff and against the defendants, said Rea, Kehrlein, Sullivan, and Fillmore Arcade Company, upon the first count in said complaint, but as to those defendants who were alleged and shown to be stockholders in the Fillmore Arcade Company the court gave its judgment in their favor upon their plea of the statute of limitations, and also gave its judgment in favor of all of the defendants upon the cause of action embraced in the second count of the complaint. Two appeals were taken from this judgment, this one by the defendant Eugene J. Sullivan from that portion of the judgment running against him as one of the original lessees for unpaid rent; the other by the plaintiff from that portion of the judgment denying it relief against the stockholders of the Fillmore Arcade Company upon the first count, and against all of the defendants upon the second count of its complaint. This appeal is upon the judgment roll alone, the only question presented being as to whether the findings support that portion of the judgment appealed from herein.

The facts out of which the case arose are briefly these: On June 1, 1906, Rudolph Spreckels entered into a written lease with the said defendants Rea, Kehrlein, and Sullivan, by which he leased and demised to them certain property on Fillmore street, of which he was then the owner, for the term of three years from said date and for the entire sum of $126,000 for said term, payable in monthly installments of $3,500 per month, monthly in advance. According to one of the provisions of said lease the said lessees agreed that within six months from and after July 1, 1916, they would erect upon the demised premises a frame building or buildings at a cost of about $150,000; by another provision in said lease it was agreed by the lessor that at the end of the said term of three years he would purchase the said buildings so to be erected by the lessees at one-half of their then to be appraised value, in which event the term of the lease should cease; provided, however, that the said lessees by giving notice at least 30 days before the expiration of said three-year term might elect to take a three-year extension of the lease at a

monthly rental of $2,500, in which event the buildings erected upon the premises by the lessees should thereupon become and be the property of the lessor. The lease also contained clauses respecting the duty of the lessees to keep the buildings and structures upon the demised premises in good order and repair.

After the making of said lease, and on December 14, 1906, the lessees named therein assigned and transferred all of their right, title, and interest in said lease to the defendant herein, Fillmore Arcade Company, which immediately thereupon went into possession of said premises and continued exclusively therein thereafter as the tenant thereof. Thereafter, and on April 28, 1908, the said lessor, Rudolph Spreckels, conveyed the said premises to Realty & Rebuilding Company, the plaintiff herein. On May 28, 1909, the said Fillmore Arcade Company, by written notice to the Realty & Rebuilding Company, elected to take the three-year extension of said lease as provided therein and upon the terms and conditions therein stated, and thereupon continued to occupy the premises in question until some time in September, 1911. On the 29th day of May, 1911, the buildings upon the premises which had been erected by the Fillmore Arcade Company under the terms of said lease and which had replaced the buildings originally thereon, were, according to the averments of the plaintiff's complaint herein "destroyed by fire." For the next two or three months thereafter the Fillmore Arcade Company remained in possession of the premises, but failed to pay the stipulated rental thereof falling due during said period, and further failed to take any steps looking to the repair or rebuilding of the destroyed structures, whereupon the plaintiff, after demanding said rent from the Fillmore Arcade Company, and also from the original lessees of the property, and after demanding of each of these that the destroyed structure be rebuilt, and after noncompliance with both of these demands, commenced this action.

In respect to one of the stockholders of the Fillmore Arcade Company, Abraham Ruef, who was also made a defendant in said action, the following additional facts appear: That said Ruef was a stockholder in said Fillmore Arcade Company on the 14th day of December, 1906, the date when said corporation took the assignment of the lease in question from the orginal lessees, and he remained such stockholder until December, 1908, when he assigned and transferred all of his said stock in said corporation to other persons, delivering to them his only indorsed certificate therefor and demanding of the secretary of the corporation that the said shares of stock so assigned by said Ruef be transferred to the name of his assignee upon the books of the corporation. Said transfer upon the books of the corporation was not, however, made, for the reason apparently that the certificate of said shares of stock were not presented for surrender, and hence the name of said Ruef appeared upon the books of said corporation as the owner and holder of said stock down to the time of the institution of this action.

Upon the foregoing state of facts the contention of the appellant herein is this, that as one of the original lessees of said property going out of possession thereof on December 14, 1906, the date of the assignment of said lease to the Fillmore Arcade Company, and having had nothing to do thereafter with the possession of said property or with the giving of any notice extending the term of said lease, his only obligation was to pay the rent for the original three-year term, either as one of the original lessees or as a surety of the assignee of such lessees, and that his obligation in either capacity ended with said three-year term; that the privity of contract as well as privity of estate of said original lessees terminated with the exercise of their assignee's election to extend the term of the lease, and hence that the appellant cannot be held liable for any rent accruing and unpaid after the original but during the extended term.

We are unable to agree with this contention. When the original lessees obtained the lease in question they secured by its express terms the right to the possession and control of the property covered by it for the express term of three years and for the additional term of three years more at their election. Had they themselves exercised said right of election it would seem to be clearly established by the current of authority both of the courts and text-writers that their holding under the extended term would be by virtue of the original demise, and not by virtue of the notice of extension. The fact that the lessees had assigned their rights under said lease to another, who might exercise the right of extension of its original term, thus becomes immaterial, in the absence of a novation between their assignee and the original lessor, since the lease was for the full term, including the extension, and the original lessees were liable thereunder as principals while they held the lease, and as sureties for their assignee thereafter and during such full term for which they had secured the right to have and enjoy said premises under said lease. This principle was laid down in the case of Wiener v. Graff & Co., 7 Cal. App. 580, 95 Pac. 167, the court in dealing with a lease similar in terms, holding:

"That upon compliance with the condition as to giving notice the lessees would then be entitled to hold for the additional term under the original lease, and not under the notice—the lease would then become a lease for both the original and extended terms."

It will be noticed by reference to the terms of the lease in question here that the right of election granted to the lessees therein was not the right to renew said lease upon notice, but

was an election to take a three-year extension of this lease. This was in effect a stipulation giving them an additional three-year term at their election. In McAdam on Landlord and Tenant (3d Ed.) 160, it is said:

"A lease for one year, or three additional years if the lessee elect, is of itself a lease for four years if the lessee elect to continue it beyond the first year. This is so because, if the lessee makes the election, he still holds under the original demise; there is no further act to be done by the lessor."

In the case of Sheppard v. Rosenkans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886, the court in commenting upon a lease similar to that in the instant case, says:

"It was an unconditional lease for the period expiring April 30, 1896, and a conditional lease for four years thereafter. The condition was the giving of a certain notice by the lessee, but it might just as well have been the happening of an event over which neither party had control, such as the death of a person or the falling of a tree. When such required event happened, the condition was satisfied, and the lease became a lease for the additional period by its own terms. The act of the lessee in giving the notice was not the making of an agreement, but the performance of a condition upon which the previously made agreement depended. * * *"

The following authorities also support the same view: Kimball v. Cross, 136 Mass. 300; House v. Burr, 24 Barb. (N. Y.) 525; Cusack v. Gunning System, 109 Ill. App. 588.

The case of Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830, from which the appellant quotes certain extracts, which he asserts uphold his contention, will be found upon the whole to rather sustain the respondent's position upon this appeal, since the court, in construing the much more doubtful terms of the lease involved in that case, held the lessees liable for the entire term of the lease notwithstanding the assignment thereof.

Upon the foregoing reasoning and authorities we are therefore of the opinion that the trial court was not in error in adjudging the appellant liable for the unpaid rent accruing after termination of the original three-year term of said lease, but during the extended term thereof.

This being the only point involved in this case, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 696

FAY v. COX. (Civ. 2100.)

(District Court of Appeal, Third District, California. Jan. 30, 1920.)

1. NEGLIGENCE ⊂⊃111(3) — ALLEGATION OF PROXIMATE CAUSE OF INJURY ESSENTIAL.

Negligence may be charged in general terms, that is, what was done, without stating the particular omission which rendered the act negligent, but it must appear from the facts averred that the negligence caused or contributed to the injury.

2. NEGLIGENCE ⊂⊃111(3)—PROXIMATE CAUSE OF INJURY BY FIRE FROM ENGINE SUFFICIENTLY ALLEGED.

Where it appeared from the complaint that the fire in question was the result of the negligent construction and operation of defendant's traction engine, and that the fire destroyed plaintiff's grain, causal connection between defendant's negligence and plaintiff's loss was sufficiently shown, and plaintiff was not required to anticipate or negative in his complaint any defense as to an intervening agency.

3. APPEAL AND ERROR ⊂⊃1039(4)—COMPLAINT NOT SHOWING PROXIMATE CAUSE HELD HARMLESS ERROR WHERE ANSWER TENDERED ISSUE.

Mere defect in the complaint through failure to allege or show sufficiently causal connection between defendant's negligence and plaintiff's loss was rendered harmless, where the allegations of the answer tendered the issue of agency intervening between the negligence and the loss, and such issue was fully tried.

4. NEGLIGENCE ⊂⊃134(11)—EVIDENCE SUFFICIENT TO SHOW THAT FIRE CAME FROM ENGINE.

In an action for destruction of a crop by fire set by defendant's traction engine, evidence *held* to warrant a finding that the fire was set by defendant's engine.

5. APPEAL AND ERROR ⊂⊃1002 — VERDICT ON CONFLICTING EVIDENCE CONCLUSIVE.

Where the evidence is in conflict, the appellate court must follow that for the party who secured verdict.

6. APPEAL AND ERROR ⊂⊃1003 — APPELLATE COURT CANNOT INTERFERE WITH VERDICT UNLESS SATISFIED IT IS UNREASONABLE.

Before the appellate court is authorized to interfere with verdict for plaintiff, court must be satisfied that it is entirely unreasonable to attribute the finding to a condition imposing liability on defendant.

7. DAMAGES ⊂⊃112, 174(3) — MEASURE OF DAMAGES FOR DESTRUCTION OF CROP STATED; EVIDENCE OF DAMAGE TO CROP ADMISSIBLE.

In case of destruction of a growing crop, it is proper to admit evidence showing kind of crops land is capable of producing, kind destroyed, average yield per acre on land not destroyed and on similar land, expense of cultivation, harvesting, and marketing, and market value at time of maturity or within a reasonable time; but, while such evidence may be considered in determining damages, the true measure of compensation is the value of the crop in the condition it was when destroyed.

8. APPEAL AND ERROR ⊂⊃1052(5), 1068(4)—ERROR IN RULINGS AS TO DAMAGES HARMLESS WHERE LEGAL DAMAGES EXCEEDED AMOUNT AWARDED.

In action for destruction of barley by fire set by defendant's engine, any error in per-

mitting plaintiff to prove highest market value of barley during month of fire, and in instructing that in measuring damage jury were to determine proper yield and market value of crop and deduct costs, and that in arriving at market value they had right to determine what grain was selling for at the time or within a reasonable time, was harmless to defendant, where even at the lower market price for barley, precisely at the time of the fire, actual damage to plaintiff was in excess of amount awarded him.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by John J. Fay against W. W. Cox. From judgment for plaintiff, defendant appeals. Affirmed.

L. J. Maddux, of Modesto, G. A. Ditz, of Stockton, and Goldman & Altman, for appellant.

Ostrander, Clark & Carey, of Oakland, and J. M. Walthall, of Modesto, for respondent.

BURNETT, J. Plaintiff and defendant owned and occupied adjoining tracts of land in Stanislaus county. On the morning of June 7, 1916, a fire started on the ranch of defendant, subsequently spreading to that of plaintiff on the south, and destroyed about 150 acres of standing ripened barley, which plaintiff alleged was of the value of $4,464. Plaintiff claimed that defendant, by reason of his negligence, was responsible for this destruction of the grain. The theory of the contention is found in the following allegation of the complaint:

"That on the 7th day of June, 1916, the defendant above named was the owner of a certain steam traction engine, which he was at said time operating by and through his agents and employés, acting in the course of their employment, in the harvesting of a certain crop of ripened grain, belonging to defendant, situated upon section 19 of said township and range, and adjacent to the said unharvested crop of barley belonging to plaintiff; that on said date, by reason of the negligent and careless operation of said traction engine by the said agents and employés of said defendant, and by reason of its defective condition and defendant's failure to keep it in proper repair and to equip it with adequate devices to prevent the escape of fire or sparks from the smokestack, ash pan, fire box, and other parts of said engine, and the use by defendant of defective and improper appliances and material in and upon said traction engine, the stubble and dried grass and other inflammable matter in which said engine was then being operated was set on fire by burning material which escaped from said traction engine by reason of the said negligence of defendant and his said agents and employés; that said fire then and there spread to the plaintiff's said crop of unharvested barley and entirely destroyed it."

The jury found a verdict for plaintiff in the sum of $2,066, and the appeal is from the judgment rendered upon said verdict in favor of said plaintiff for that sum.

The points urged for reversal by appellant are:

"(1) That the complaint fails to state a cause of action; (2) that the evidence is insufficient to support the verdict; (3) that the court erred with reference to the admission of testimony and in instructing the jury upon the measure of damages."

[1, 2] The attack upon the complaint is directed to the asserted failure "to allege either directly or inferentially that the destruction of plaintiff's grain proximately resulted from the negligence of defendant as herein alleged." Manifestly, the mere allegation of negligence on the part of defendant and the loss of property by plaintiff would not charge the former with responsibility for the damage. It must appear expressly, or by fair intendment, that said negligence caused or contributed to said loss. This, of course, is fundamental, and the principle is stated in Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, as follows:

"It is well settled that negligence may be charged in general terms; that is, what was done, * * * without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury."

In his closing brief, appellant disclaims any contention "that plaintiff was required to use the words that the injury complained of was the proximate result of the negligence alleged," but he insists that any possible intervening agency, which would excuse the original act of negligence, should have been eliminated. He does not suggest the phraseology by which this might be made to appear, but declares that "the complaint should have in some manner alleged that the negligence of defendant was the proximate cause of the injury complained of."

It may be that in this respect the complaint could have been improved, but we think the criticism of appellant is somewhat hypercritical. It certainly does appear that the fire was the result of the negligent construction and operation of defendant's engine, and that this fire destroyed plaintiff's grain. The causal connection between the negligence and the loss seems thus to be expressly though concisely shown. Plaintiff was not required to anticipate or negative any defense that might be urged as to an intervening agency.

[3] Moreover, any such defect, if existing, was rendered entirely harmless by reason of the allegations of the answer tendering such issue and the fact that the issue was fully tried. In said answer it was denied—

"that on said date, or any other time, by reason of the negligent or careless or any opera-

tion of said traction or any engine, by the said or any agents or agent, or employés or employé, of said defendant, or at all, the grain, or any part thereof, of the plaintiff was destroyed by fire;" or "that by reason of defendant's failure to keep the engine in proper repair, or at all, or its defective or any condition, or to equip it with adequate or any devices, or to prevent the escape of fire or sparks from the smokestacks, ash pan, or fire box, or other or any parts or part of said engine, any grain of the plaintiff was destroyed."

The point is covered by the decisions of the Supreme Court in Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292; Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687.

We quote from the last of these as follows:

"And the matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to its injury."

[4, 5] As to the second point, it is not disputed that the fire started on defendant's premises and spread rapidly to the barley field of plaintiff and soon destroyed his grain; there being a strong north wind at the time. Furthermore, it is a fair inference that this fire was caused by sparks from defendant's engine, and that it was traceable to his negligence as alleged in the complaint. The fire originated in a pile of straw, a short distance from the uncut grain, and was discovered a few moments after the engine had passed the point. The situation was such that any other reasonable inference could hardly be drawn than that the fire came from the engine. This was the only apparent cause, and it may be added that no effort was made to show that it might have originated from any other source. It is true that there is a conflict of evidence as to the distance of said pile of straw from the course of the engine; but, manifestly, we must accept that which harmonizes with the verdict, and, so regarding the case, it seems quite rational to conclude that the fire came from the engine.

As to the element of negligence, it appears that there was no spark arrester on the engine, and from certain testimony, which we cannot say is inherently improbable, the jury was justified in concluding that if said engine had been so equipped the fire would not have occurred, and that the exercise of ordinary care required the use of said arrester on the part of appellant. Here, again, the evidence is strikingly conflicting, the defendant having made an impressive showing, but we must follow the evidence for respondent. In this connection we may remark that immediately after the fire the defendant secured an arrester for his engine—a circumstance of no inconsiderable significance.

Again, when Mr. Fay arrived on the scene, the engine was standing still and whistling for the water wagon, but it soon started to meet the latter and "it strung a string of fire all the way until he met Mr. Cox with the water wagon." It is a fair inference that this fire in the stubble extending for several hundred feet caused, or at least contributed to, the destruction of plaintiff's grain. It was for the jury to say, also, that it was an act of negligence for the defendant's employés in this manner to drive across the field with the fire thus dropping from the engine. It may be added that there was evidence that the fire box was defective. In fact, plaintiff testified that defendant admitted as much and thus accounted for the fire. But whether this was true, or whether the wheels picked up burning straw and thereby scattered the fire as claimed by appellant, we cannot hold the inference to be unfair that such conduct constituted negligence.

Both these theories were set forth in the complaint; they find support in the evidence, and singly or together they warrant the finding in favor of plaintiff. Sampson v. Hughes, supra.

[6] Appellant apparently conceives it to be the duty of this court to reverse the judgment if "the origin of the fire could be reasonably attributed to a condition for which no liability attaches"; but the truth is that before we are authorized to interfere we must be satisfied that it is entirely unreasonable to attribute it to a condition imposing liability. It is not sufficient if a finding in favor of appellant would be rational, but we must be satisfied that the opposite finding is irrational. We cannot say that such is the case.

[7] The third point grows out of the fact that the court permitted respondent, over the objection of the appellant, to prove the highest market value of barley during the month of June, 1916, and that the court instructed the jury as follows:

"In measuring the damage, you will determine from the evidence the proper yield and market value of the crop and deduct therefrom the cost of harvesting and marketing the same, and in arriving at the market value you have the right to determine what grain of the same kind and similar quality was selling for in the market in the vicinity where said crop was grown at the time of its destruction or within a reasonable time thereafter."

In this connection the claim of appellant is that the damage to the innocent party is measured by the actual loss sustained by him at the time of the destruction of his crop, and that the jury had no right to speculate as to any possible increased value that might have accrued to plaintiff had he held his grain throughout the month of June. Appellant claims that the rule is, as stated in Teller v. Bay & River Dredging Co., 151 Cal.

209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779:

"The true measure of damage for the total destruction of a growing or standing crop is the value of the crop in the condition it was at the time and place of destruction."

As to the values, the evidence shows that on June 7th barley was worth $1.20 a bushel, whereas the highest price in June was $1.31¼. It is the claim of appellant, therefore, that the jury may have adopted the latter figure, to the prejudice of appellant. The trial court probably misapplied the language of the Supreme Court in the Teller Case, supra, wherein it said:

"The true rule in arriving at the value at the time of destruction is that laid down by the trial court and abundantly supported by authority. The Supreme Court of Utah well states the proposition (Lester v. Highland Boy Gold Min. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341 [1 Ann. Cas. 761]): 'In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops, at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops. And,' proceeds that court, 'while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction.'"

In other words, it is proper to consider the market value at the time or about the time, but this is for the purpose of determining the value at the time of the destruction.

[8] But it is perfectly apparent that this error was without prejudice, for the reason that all the evidence shows that at the lower rate the damage was in excess of the amount awarded by the jury. The total yield from the 155 acres at 20 sacks per acre would be 3,100 sacks, weighing 108 pounds a sack, and at $1.20 per cwt. the value would be $4,017.60. The entire cost of harvesting and marketing, according to the evidence, would be $942.40 and the net value would be $3,075.20. Or, if we take the lowest estimate of the yield, 18 sacks to the acre, the net value would be $2,674.44. Moreover, it was admitted by the answer that the value of the grain was $3,000, the language being:

"Denies that said crop of barley was at the time of its destruction, as set out in the complaint, or otherwise, of the reasonable value of $4,464, or any other amount over and above the sum of $3,000."

Even if we subtract from this sum the cost of harvesting and marketing, the balance would be in excess of the jury's award.

We think that under well-established principles we are not authorized to disturb the judgment, and it is therefore affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

45 Cal. App. 741

FERRO v. LAGOMARSINO. (Civ. 3173.)

(District Court of Appeal, Second District, Division 2, California. Feb. 2, 1920. On Petition for Rehearing, March 3, 1920. Hearing Denied by Supreme Court April 1, 1920.)

1. APPEAL AND ERROR ⊂⊃981—GRANTING OF NEW TRIAL ON NEWLY DISCOVERED EVIDENCE IS FOR TRIAL COURT.

The matter of granting a new trial for newly discovered evidence is with the trial court, and it is for that court to say whether the proffered evidence is such as to affect the decision of the court if introduced.

2. APPEAL AND ERROR ⊂⊃1010(1)—FINDINGS SUPPORTED BY EVIDENCE NOT DISTURBED.

Findings of the trial court supported by evidence are conclusive on appeal.

On Petition for Rehearing.

3. APPEAL AND ERROR ⊂⊃989—IN CONSIDERING FINDINGS EVIDENCE MUST BE CONSIDERED AS A WHOLE.

The evidence must be considered as a whole, and a finding cannot be successfully attacked on the ground that particular evidence does not support it.

4. EVIDENCE ⊂⊃16—TRIAL ⊂⊃395(1)—JUDICIAL NOTICE OF MEANING OF WORDS.

Under Code Civ. Proc. § 1875, subd. 1, the courts will take judicial notice of the meaning of the words "trial balance" which were indorsed on a statement as to the assets of a corporation whose stock defendant sold to plaintiff; so, in view of Civ. Code, § 3532, it was unnecessary for trial court sitting without jury to define the phrase in its finding.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Giovanni Ferro against John Lagomarsino. From a judgment for defendant, plaintiff appeals. Affirmed.

Earl E. Moss, of Ventura, for appellant.
Robert M. Clarke, of Los Angeles, and Orr & Gardner, of Ventura, for respondent.

THOMAS, J. This is an action brought to recover the sum of $9,100, claimed by plaintiff for alleged misrepresentation as to the value of certain shares of stock in the Theater Improvement Company, a corporation, such misrepresentation being alleged as follows:

"* * * Defendant stated and represented to plaintiff that the capital stock of the Theater Improvement Company * * * was worth the sum of $130 and of the market value of the sum of $125 per share, and that it was then earning and paying dividends at the rate of one-half per cent. per month or 6 per cent. per annum on the par value of $100 per share, and then and there delivered to plaintiff a certain statement which defendant stated and represented to plaintiff was a true and correct statement of the financial affairs of said Theater Improvement Company, which said statement was in words and figures as follows, to wit:

Trial Balance Theater Imp. Co.

To August 1, 1916, from May 1, 1913.

To W. T. Wyatt Co.	$ 3,345 00	
" Central Bank	929 17	
" Dividends	12,572 50	
" Expense	12,531 05	
" Real estate and improvements	70,326 25	
" Loss—Gain	413 29	
By Capital stock		$ 53,500 00
" Surplus		14,105 10
" Rents—Income		32,512 16
	$100,117 26	$100,117 26

"That plaintiff believed that all said statements and representations so made by defendant were true, and, relying wholly on the truth thereof, on or about the 1st day of October, 1916, plaintiff purchased 140 shares of the capital stock of said Theater Improvement Company from defendant for the sum of $17,500, and paid to defendant said sum of $17,500 by accepting the said * * * shares * * * from defendant as part of the purchase price of $67,500 paid by defendant to plaintiff for 587½ shares of the capital stock of the Del Norte Land Company, a corporation, sold to defendant by plaintiff."

Following this, by proper allegation, appears a statement that said Theater Improvement Company stock was not worth the sum of $130 per share, and that it did not have said alleged market value, but that, on the contrary, the shares were not worth and did not have "a market value of more than $60 per share, and that said Theater Improvement Company was not then earning or paying dividends * * * at a rate greater than one-quarter per cent. per month, or 3 per cent. per annum." Plaintiff further alleged that the "statement" referred to was false in certain particulars, and that all these alleged false statements were made with the intent and for the purpose of inducing plaintiff, and that he was so induced, to purchase the stock, with the intent and purpose to deceive and defraud him.

The issue of fraud is made by appropriate denials in the answer. The court found in favor of the defendant on the issues thus presented, and judgment was entered accordingly. There was a motion for a new trial, which was denied. The appeal is from the judgment.

Appellant urges that the findings are not supported by the evidence, and that the court erred in denying plaintiff's motion for a new trial. We shall discuss the latter proposition first.

[1] The affidavits presented by plaintiff on the motion for new trial, and which were based on newly discovered evidence, are set forth in full in the record. As to whether the ruling of the court was error, we are confronted at the outset with two questions: (1) Was due diligence shown? and (2) if so, would the introduction of the testimony revealed by these affidavits produce a different result on another trial? Without any further discussion, we are bound to decide that there is nothing contained in the record which will permit us to disturb the ruling of the learned trial judge. The matter of granting a new trial upon the ground of newly discovered evidence is with the trial court, and it is for that court to say whether or not the proffered evidence is such as would affect the decision of the court if introduced. The court in this instance determined that it would not. Jones v. Lewis, 19 Cal. App. 575, 126 Pac. 853; Mayne v. San Diego, etc., Ry. Co., 175 Pac. 690; Cahill v. Stone Co., 167 Cal. 135, 138 Pac. 712; People v. Selby, etc., Co., 163 Cal. 94, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267; Oberlander v. Fixen & Co., 129 Cal. 690, 62 Pac. 254.

[2] As to whether or not the evidence supports the findings, we are not disposed to indulge in a lengthy discussion, which, even were it conceded that such might be enlightening and interesting, we are convinced would be without profit, save only to law-book publishers. Suffice it to say that there is direct conflict in the evidence as to the material issues involved. In such case, if there be any evidence in support of the findings, this court will not interfere. Levey v. Henderson, 177 Cal. 21, 169 Pac. 673; Kuck v. McConnell, 178 Pac. 533. In the case at bar we find evidence which amply supports the findings of the trial court.

No other point raised need be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

On Petition for Rehearing.

PER CURIAM. This application for a rehearing is nothing more nor less than a further argument on the same points urged by appellant in the main case—that of insufficiency of the evidence to support the findings. No new point is raised nor has any point previously urged been made more clear or presented in a different light.

In the opinion heretofore handed down by this court it was said, in discussing the point as to whether the evidence supports the findings:

"Suffice it to say that there is direct conflict in the evidence as to the material issues involved. In such case, if there be any evidence in support of the findings, this court will not interfere. * * * In the case at bar we find evidence which amply supports the findings of the trial court."

We have not been convinced that such statement was or is erroneous. Indeed, the learned trial court resolved the conflict referred to in respondent's favor, and that decision is binding upon this court. Counsel has not called our attention to any law under which, when confronted with facts such as are found in the instant case, will authorize this court to set aside the findings of the trial court and in effect substitute others favorable to appellant.

[3] As respondent puts it:

"The vice of the appellant's position is that he selects a particular finding for attack, selects some evidence from the record, and then proceeds to argue at some length that this particular evidence does not sustain a particular finding or portion of a finding."

That will not do. The evidence must be viewed as a whole.

[4] One instance of that which we regard as a narrow and perverted conception of the evidence we cite from among the 21 "points" urged, viz.:

"* * * A trial balance might very well be between the dates upon the top of the statement, which was the interpretation that appellant placed upon it, and the only interpretation that a person of the least intelligence could place upon such a remarkable document."

Unfortunately for the author of the foregoing statement, the "trial balance" referred to shows nothing, except certain totals, as of the date August 1, 1916, there being no statement or item of any transaction appearing therein at or under any date from May 1, 1913, to and including August 1, 1916. In the same connection it is urged that "the court's finding that the statement was a 'trial balance,' without defining these words, means nothing." This appears to us rather remarkable, in view of the fact that certain facts of general notoriety may be assumed to be true. Under subdivision 1 of section 1875, Code of Civil Procedure, the court would take judicial notice of the true significance of the words "trial balance," and, if need be, may resort for its aid to appropriate books or documents of reference. This fact is equally binding on all. We know of no law, and none has been called to our attention, which requires the court to define any such phrase. The "statement" referred to was certainly not a report of the corporation's financial condition. Under these conditions, to require the defining of such words by the court would be to exact the performance of an idle and unnecessary act. This the law does not do. Section 3532, Civ. Code.

The petition for rehearing is denied.

(182 Cal. 485)

DEPONS v. ARISS et al. (S. F. 8718.)

(Supreme Court of California. March 19, 1920. Rehearing Denied April 16, 1920.)

1. MUNICIPAL CORPORATIONS ⟸705 (1) — DRIVER OF MOTORTRUCK HELD NOT NEGLIGENT AS TO DECEASED WHO STEPPED INTO PATH OF TRUCK.

Where deceased was cranking a car parked along the curb of a street where travel was restricted because of repairs on the street car tracks, the driver of a motortruck which struck deceased cannot be deemed negligent, where deceased suddenly left his place of safety and stepped in front of the truck, which had been deflected so as to escape a wagon; for the driver of the truck had a right to assume that deceased would not recklessly expose himself.

2. MUNICIPAL CORPORATIONS ⟸706(3)—RES IPSA LOQUITUR DOES NOT APPLY IN CASE OF ONE STRUCK BY AUTOMOBILE.

Where plaintiff's intestate, who was cranking a car parked along the curb, left his place of safety, stepping in front of a motortruck, which killed him, the doctrine of res ipsa loquitur does not apply; for there can be no presumption of negligence from the mere fact of injury.

In Bank.

Appeal from Superior Court, Alameda County; Wm. M. Conley, Judge.

Action by Celestin Depons, administrator of the estate of Jean B. Depons, deceased, against W. B. Ariss and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Ostrander, Clark & Corey, of Oakland, for appellant.

Decoto & Calkins, of Oakland, and Barry J. Colding and Theodore Hale, both of San Francisco (Eugene F. Conlin, of San Francisco, of counsel), for respondents.

KERRIGAN, Judge pro tem. This is an action for damages for the death of one Jean B. Depons. The action was brought by the administrator of the estate of deceased, and the complaint alleges that the death of Depons was caused by the negligent operation of an automobile truck, which was driven at the time of the accident by defendant Clark, an employé of the other defendants, Ariss and Knapp. The case was tried without a jury, and the court rendered judgment in favor of defendants. Findings were waived, but it appears from the record that the trial court's decision was based upon the fact that the plaintiff had failed to establish negligence on the part of defendants. It was stipulated that in the event of a reversal that the trial court should be directed to enter a judgment for plaintiff in the sum of $2,800. To prove her case plaintiff introduced only two witnesses at the trial. The testimony of one of these was confined to the surroundings and the condition of the street where the accident occurred. The other witness testified to the circumstances of the accident. The facts, therefore, are practically without conflict, and, in brief, are as follows: Deceased was employed and interested in a laundry, situated on the east side of San Pablo avenue, between Fifty-Ninth and Sixtieth streets, in the city of Oakland.

San Pablo runs in a general northerly and southerly direction. A street railway company occupies tracks in the center thereof. On the day of the accident these tracks were in the course of repairs, and the westerly portion of the street was, in consequence, obstructed and unsuitable for travel. For this reason, vehicles going in both directions were using the easterly side. The width of the roadway on this portion of the thoroughfare, from the curb to the first car rail, is about 24 feet. Of this, 2 feet adjoining the car tracks was excavated and had been filled with fresh cement and was not suitable for travel, leaving about 22 feet of this easterly portion of the street open for traffic.

On the day of the accident, a Ford machine, facing south, was parked along the curb in front of the laundry. Deceased was bending over in front of this machine, apparently fixing or cranking it, his back being turned to the south. While in this position a heavy truck, some 8 feet wide and loaded with crushed gravel, operated by defendant Clark, was proceeding northerly along the easterly side of the street, approaching the point where the Ford machine was standing. At the same time a coal wagon was moving southerly along the same side of the street, and it also had reached the immediate vicinity of the stationary machine. After the coal wagon had passed defendants' truck, Clark, the driver thereof, moving at from 10 to 12 miles an hour, swung sharply to the left in order to clear the Ford car, which was then from 10 to 12 feet away. At this time, without warning or intimation of his intention so to do, deceased straightened up, stepped to his left with his hand upon the fender of the car, and stood directly in front of the approaching truck. Immediately upon seeing the deceased in this exposed position the driver of the truck, who had then slowed down to about 8 or 10 miles an hour, sounded his horn, shut off his engine, apparently applied his brakes, and turned sharply to the left to avoid striking deceased, but the truck, traveling by gravity of its own momentum, struck deceased, and at the same moment stopped.

The above facts, relating to the accident, were testified to by a witness, who was driving his machine about 15 feet behind the truck, and he was the only witness of the accident produced at the trial. Upon the

conclusion of this testimony, plaintiff announced that these were all the facts to be offered. The trial court thereupon expressed the opinion that plaintiff had proved no negligence on the part of defendants, but that the act of deceased in stepping in front of the moving truck was the proximate cause of his death. Judgment followed for defendants.

[1] Under the facts stated we are asked to reverse the judgment. This we cannot do. It was shown that deceased left a position of safety and put himself directly in the path of the approaching truck. This evidence was sufficient to support the conclusion of the trial court. Under these circumstances no duty was imposed upon the driver of the truck to assume that deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine. Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 44, 76 Pac. 719, 101 Am. St. Rep. 68, and Basham v. Southern Pacific Co., 176 Cal. 320, 168 Pac. 359.

The facts further show that defendant Clark, after seeing deceased in a position of danger, used every proper care and precaution to avoid injuring him.

[2] Appellant invokes the doctrine of res ipsa loquitur and claims that the facts as narrated make out a prima facie case of negligence sufficient to shift the burden of proof. We cannot subscribe to this contention. In this state negligence is not presumed from the mere fact of injury. Here no negligence on the part of defendants was shown, nor can any be implied from the circumstances surrounding the accident. The doctrine invoked has no application in such a case.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

182 Cal. 488

ROBERT SHERER & CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9254.)

(Supreme Court of California. March 20, 1920. Rehearing Denied April 16, 1920.)

1. DIVORCE ⟸324—REQUIREMENT THAT FATHER PAY FIXED SUM DOES NOT TERMINATE LIABILITY TO SUPPORT CHILD.

A divorce decree requiring the father to pay a specified sum at stated intervals for the maintenance of his minor child does not relieve him from liability for the maintenance of the child and substitute therefor an ordinary debt or money obligation.

2. DIVORCE ⟸309—AMOUNT OF PAYMENT FOR SUPPORT OF CHILD MAY BE VARIED.

The court, having in divorce proceedings awarded custody of minor child to the mother and required father to pay a stated monthly sum for its support, may vary the amount so fixed from time to time in the exercise of its sound discretion.

3. MASTER AND SERVANT ⟸388—COMMISSION CAN DETERMINE CHILD'S DEPENDENCY ON DIVORCED FATHER.

Industrial Accident Commission, in proceedings to recover death benefits for the support of employé's minor child, whose custody had been awarded to her divorced mother, can determine whether the amount father was required to pay the mother for the child's support was sufficient for the entire support of the child.

4. MASTER AND SERVANT ⟸388—CHILD HELD "DEPENDENT" ON DIVORCED FATHER.

Where the payments which a father was required to make to his divorced wife for the support of his minor child were sufficient for the entire support of the child, the commission can find that the child was wholly "dependent" on the father within Workmen's Compensation Act, § 14, subd. a (2).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

Shaw, J., dissenting.

In Bank.

Certiorari by Robert Sherer & Co., a corporation, and another against the Industrial Accident Commission and others to review an award by the Industrial Accident Commission of death benefits to Ruth Iris Haskell, the minor daughter of William A. Haskell, who was killed in an industrial accident. Award affirmed.

Griffith R. Williams, and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding death benefits to Ruth Iris Haskell, the minor daughter of William A. Haskell, who was killed in an industrial accident. The issue presented is whether or not the commission was justified in finding that the applicant was wholly dependent for support upon the deceased employé.

It appears that the mother of the applicant, who appears as the guardian ad litem herein, obtained a decree of divorce in an action against Haskell. By this decree the mother was awarded the custody of the child, Haskell being ordered, however, to pay $20 a month for its support. The mother remarried, but the order requiring Haskell to pay $20 a month for the support of the child was in force at the time of his death. It

is conceded that under section 14a (2) of the Workmen's Compensation Act (St. 1917, p. 844) the applicant is to be presumed wholly dependent for support upon the deceased if, under the facts stated, he was legally liable for her maintenance.

[1] Petitioner contends, in effect, that where the court merely requires the payment by the father of a certain specified sum at stated intervals, it does to all intents and purposes relieve the father from liability for the maintenance of the child, creating in the place of such liability an ordinary debt or money obligation. A similar contention was made on behalf of defendant in the case of People v. Schlott, 162 Cal. 347, 122 Pac. 846, and was held to be without merit.

But it is insisted that, even if Haskell's obligation to support the applicant did continue after the divorce, it was an obligation which could be fulfilled by paying $20 a month, and that, inasmuch as the mother would be under a duty to contribute any additional sum needful to make suitable provision for the child, it necessarily followed that the girl was only partially dependent on the deceased. With this contention as a basis it is argued that the deceased was not legally liable for the maintenance of the child within the meaning of section 14a (2) of the statute. We do not undertake to decide whether or not the deceased would have been legally liable for the maintenance of the child within the meaning of the statute had the sum which he was required to pay been unquestionably insufficient for the entire support of the child.

[2] However that may be, it is certain that the court may fix a specified sum for the support of the child as a matter of administrative convenience and may vary its amount from time to time in the exercise of its sound discretion. Harlan v. Harlan, 154 Cal. 341, 346, 98 Pac. 32; Lewis v. Lewis, 174 Cal. 336, 338, 163 Pac. 42.

[3] This being so, it is, we think, in any case competent for the commission to determine as a matter of fact that the father was liable for the maintenance of the child where it finds upon competent evidence that the sum which he was ordered to pay was fully sufficient for its entire support.

[4] In the instant case the commission found:

"That the said monthly sum of $20 was fully sufficient for the entire support of said minor child in the custody and care of the mother."

It follows that the commission was justified in finding that the child was wholly dependent upon the deceased.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

SHAW, J. I cannot agree with the conclusion of Justice LENNON.

A divorced man was by the decree of divorce required to pay $20 a month for the support of his minor child, whose custody was awarded to its mother. A person employed this man, and while he was so employed he was killed by accident arising out of and in the course of the employment. Thereupon the Industrial Accident Commission, although this man was liable for only $20 a month during the child's minority, a period of 10 years only, amounting at most to only $2,400, made an order compelling the employer of the man to pay for the benefit of the child $4,175 to be invested, held in trust, and paid to the child in installments of $25 a month, and continuing, if paid out of principal alone, until the child is 22 years old and as much longer as the accruing interest will carry it. It does not seem reasonable to conclude that the act was intended to produce a result so absurd and unjust. Its terms should receive a strict construction, if necessary, to avoid such injustice.

The father was legally liable for only $20 a month for the child's support. It was not a full liability. It was limited to that sum. The child was not one "for whose maintenance such parent was legally liable," within the meaning of section 14a (2) of the Workmen's Compensation Act (Stats. 1917, p. 844). The quoted language obviously refers exclusively and only to a complete liability, a liability for the expenses or cost of all necessaries required for the support of the child, a parent who could be made to pay for such necessaries, if furnished by a third person, whatever their reasonable cost, not a parent who could not be made to pay beyond a limited sum, nor one who could not be made to pay at all to any person except the mother.

In Continental, etc., Co. v. Pillsbury, decided October 8, 1919, 184 Pac. 658, the husband was declared to be "legally liable" for the support of the wife, although they were living apart and she had secured judgment against him for her maintenance. Some language in that opinion may seem inconsistent with the foregoing when considered without reference to the context. But the real point there decided is that the primary obligation of the husband for the wife's support remains, notwithstanding the maintenance decree. In this case the father is not "legally liable" when deprived of the custody of his child, except as provided in the decree of divorce. The two cases are unlike in fact and in law, and that case is not inconsistent with my position in this case.

For these reasons I am of the opinion that such a child is not conclusively presumed to be "wholly dependent" for support upon the parent who is not legally liable for its entire maintenance, if need be, and that the award is not warranted by the law.

182 Cal. 408

HARRELSON v. MILLER & LUX, Inc.
(Sac. 2839.)

(Supreme Court of California. March 12, 1920.)

1. LANDLORD AND TENANT ⊂=41—CHARACTERIZATION OF LEASE AS SUCH NOT CONTROLLING, BUT EVIDENCE OF INTENTION.

Considered with the general tenor of the instrument, the fact that the parties called it a lease is some evidence that they intended it so to operate, though the characterization is not of controlling importance.

2. LANDLORD AND TENANT ⊂=323—INSTRUMENT CONSTRUED AS "LEASE" AND NOT AS "CROPPING AGREEMENT."

Where an instrument characterized itself as a lease, treated possession as transferred, right of re-entry being reserved to owner, who also reserved a room in the dwelling house on the land, right to enter and inspect premises, etc., required lessee to keep premises in repair, created a definite term of three years, and provided for delivery to the lessor of his share of the crops off the premises, the instrument was a "lease," and not a mere "cropping agreement."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lease.]

3. LANDLORD AND TENANT ⊂=45—RIGHTS OF TENANT FOR YEARS UNDER STATUTE STATED.

Under Civ. Code, §§ 819, 820, a tenant for years is entitled to the rights accorded by section 819, unless their exercise is forbidden by the lease itself; but so far as additional privileges are concerned his rights are measured by the terms of the instrument.

4. LANDLORD AND TENANT ⊂=136—GRANT OF RIGHT TO PASTURE ON PASTURE LANDS NOT IMPLIED PROHIBITION AS TO GRAIN LANDS.

Where a single lease implied two agreements, first, the letting of the grain land which was included in the demised tract, and second, the letting the pasture land included in the tract, the fact that it expressly granted right to pasture the pasture land cannot be construed as implied prohibition to pasture straw and stubble on grain lands.

5. LANDLORD AND TENANT ⊂=138—ONLY CUSTOMS OF GOOD HUSBANDRY IN THE VICINITY CAN OBLIGATE TENANT.

In the absence of such express provision in the lease, an obligation on the tenant's part to use for fertilizer the straw and stubble on grain lands covered by the lease can be based only on the rules and usages of good husbandry prevailing in the vicinity.

6. LANDLORD AND TENANT ⊂=139(1)—LESSEE FOR FARMING NOT OBLIGED TO LEAVE STRAW AND STUBBLE THEREON.

The pasture of grain land being common practice as incidental to farming, there was no obligation on the part of a lessee of land demised solely for the purpose of farming to leave straw and stubble on such land.

7. LANDLORD AND TENANT ⊂=76(2)—SALE OF STUBBLE WITH LICENSE TO BRING SHEEP ON LAND NOT SUBLETTING.

Sale by lessee of straw and stubble on grain land, coupled with mere license to bring sheep up on land to use it, was not violation of covenant against subletting, since, if lessee had a right to sell the feed, he also had the right to use it on the land.

8. TRIAL ⊂=397(1)—FAILURE TO FIND ON SPECIAL ISSUES SUPPORTED BY PROOF ERRONEOUS.

In suit by assignee from lessee of right to use stubble feed on grain land, where damages sustained by plaintiff through injury to his sheep occasioned by their premature removal from land by defendant lessor and by reason of loss sustained by premature dismantling of water troughs were capable of ascertainment to a reasonable certainty, the trial court erred in not finding on such issues.

9. APPEAL AND ERROR ⊂=422—APPEAL WILL NOT BE DISMISSED FOR MISDESCRIPTION OF JUDGMENT IN NOTICE.

Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or that to which it relates, unless it appears respondent has been misled.

10. APPEAL AND ERROR ⊂=419(1)—NOTICE OF APPEAL FROM PART OF JUDGMENT HELD SUFFICIENT.

If notice of appeal from part of a judgment specifies the part with reasonable certainty, so that respondent is not misled, it will suffice even though the terms used in indicating the part appealed from are defective.

11. APPEAL AND ERROR ⊂=419(1)—NOTICE HELD SUFFICIENT IN SPECIFYING PART OF JUDGMENT APPEALED FROM.

Judgment having consisted of two parts, first, that plaintiff recover nothing, and, second, that defendant recover $760 together with costs, notice of appeal from "that part of the final judgment * * * which limits the amount to be recovered by defendant from plaintiff to $760" *held* sufficient as indicating with reasonable certainty part of judgment providing that defendant recover such amount; further specifications relating to part of judgment failing to give judgment for defendant being cumulative and open to disregard as surplusage.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by W. H. Harrelson against Miller & Lux, Incorporated. From judgment for plaintiff, both parties appeal. Reversed and remanded.

Stephens & Stephens, of Los Angeles, and Power & McFadzean, of Visalia, for plaintiff.

Edward F. Treadwell, of San Francisco, (Farnsworth & McClure, of Visalia, and Berkeley B. Blake, of San Francisco, of counsel), for defendant.

LENNON, J. Plaintiff was the owner of about 5,880 acres of land in Tulare county. This land was let by plaintiff to one L. B. Crow in 1910 for a term of three years,

which was afterward extended to the 1st day of October, 1916. In June, 1916, Crow granted to defendant, Miller & Lux, the right to pasture said land with sheep. For this right Miller & Lux paid to Crow the sum of $3,040. After the sheep were taken onto the land, plaintiff received information of the fact and ordered defendant to remove them, which it did. Plaintiff thereupon instituted this suit to recover damages from defendant for various injuries to his property alleged to have been occasioned by the running and bedding of the sheep upon the land. Defendant filed a cross-complaint, wherein it asserted its right to run and bed the sheep upon plaintiff's land and sought to recover the value of the straw and stubble remaining upon the land at the time of the eviction, together with damages for the injury to its sheep occasioned by their removal and for the loss sustained in dismantling watering troughs erected by it upon the land. The trial court decided in effect that Crow had a right to grant to defendant the right to pasture its sheep upon the land; that defendant had had the benefit of one half of the straw and one half of the stubble upon the land; that the other half of the straw belonged to plaintiff; that defendant was entitled to recover $760 for the other half of the stubble, and that the other injuries alleged by defendant were too remote to justify recovery. Judgment was entered accordingly, and from the judgment so entered both parties have appealed.

[1, 2] Plaintiff contends that Crow had no right to allow defendant to pasture its sheep upon the land, basing this contention primarily upon the assumption that the agreement between plaintiff and Crow amounted to a mere cropping agreement and did not constitute a lease of the premises. We think, however, that the instrument executed by the parties to that agreement is to be construed as a lease. In reaching this conclusion we have not attached controlling importance to the fact that the instrument so characterizes itself. But, considered with the general tenor of the instrument, the fact that the parties called it a lease is some evidence that they intended it to operate as such. While retention of possession by the owner is one indication of a cropping agreement, the so-called lease repeatedly treated possession as transferred to Crow; right of re-entry being reserved to the owner for certain limited purposes only. Thus plaintiff reserved to himself the use of a certain room in the dwelling house upon the place, the right to enter and inspect the premises, and also the right to pasture four animals upon the land. If the arrangement was intended to make Crow a mere cropper, there would have been no necessity for the reservation by the plaintiff of such rights, for under a mere cropping agreement plaintiff would have had the right at any time to enter and occupy the land subject only to the rights of Crow with respect to the crops. It further appears that Crow was required to keep the premises in repair at his own expense. Moreover, a definite term of three years was created. Both the term and its length indicate that this was not a mere cropping agreement. Finally, delivery to the plaintiff of his share of the crops was to be made off the premises, strong evidence that the instrument constituted a lease. 16 R. C. L. 587. These provisions of the agreement, taken together with the description of the instrument as a lease by the parties themselves, indicate, we think, an intention to execute a lease.

Plaintiff next contends that Crow was not entitled to pasture the straw and stubble even if the instrument embodying their agreement did constitute a lease. This contention is based upon several grounds.

[3] The first of these grounds is that the right to pasture the straw and stubble was outside of Crow's rights as measured by section 820 of the Civil Code. Conceding in this behalf that the right in question is given to a tenant for years by section 819 of the Civil Code, since section 820 provides that "A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, *or* by the last section," plaintiff argues that wherever express rights are granted to a tenant by the lease itself he cannot claim any of the rights accorded by section 819. This argument is based upon the use of the word "or" which we have italicized in quoting the Code section. It is evident, however, from a consideration of sections 819 and 820, taken together, that it was intended by the Legislature that a tenant for years should be entitled to the rights accorded by the former section unless their exercise was forbidden by the lease itself, but that, so far as additional privileges were concerned, his rights should be measured by the terms of the instrument itself.

[4] It is contended, however, that the lease itself forbids the pasturing of the stubble and straw for the reason that since express provision is made for pasturing certain of the lands demised the failure to expressly authorize the pasturing of the stubble and straw must be held to amount to an implied prohibition by an application of the rule of construction expressio unius est exclusio alterius. We have examined the lease which defines the rights of Crow and find that it dealt with two separate and distinct subjects: First, the letting of the grain land which was included in the demised tract, the right to pasture which is involved herein; and, second, the letting of the pasture lands which were included in the tract, the latter demise being for an independent purpose, to

enable Crow to raise stock on shares and to receive stock on the land to pasture for profit. We thus find two virtually independent agreements included within one lease. Under these circumstances, the fact that the lease expressly granted the right to pasture the pasture lands cannot be construed as an implied prohibition of the pasturing of the straw and stubble on the grain lands.

[5, 6] Apparently receding from the position taken in the court below that the lease should be construed as requiring a division of the straw between the lessor and lessee, plaintiff still contends that, if no division was to be made, at all events the straw and stubble should have been left upon the land as a fertilizer. There being no express provision to this effect in the lease, an obligation on Crow's part to so use the straw and stubble can be based, if at all, only upon the rules and usages of good husbandry prevailing in the vicinity. The evidence in the case shows without dispute, however, that pasturing grain land was a common practice as incidental to farming. This evidence it may be noted is also fatal to plaintiff's contention that Crow had no right to pasture the grain land since it was demised solely for the purpose of "farming." The pasturing of grain land being a common practice as incidental to farming, there was no obligation on the part of Crow to leave the straw and stubble upon the land. It follows that, if defendant was entitled to recover at all, it was entitled to recover for all of the straw of which it was deprived.

[7] Plaintiff insists, however, that whatever may have been Crow's rights to pasture the grain land himself, the granting of the right to the defendant amounted to a violation of the covenant in the lease against subletting. The contract between Crow and defendant amounted essentially to a sale of the feed coupled with a mere license to come upon the land to use it. If Crow had a right to sell the feed at all, he certainly had a right to grant the right to use it on the land, for obviously the stubble at least could not be otherwise utilized. That the granting of such a right is not a violation of a covenant against subletting has been directly held in Baldwin v. Jacobs, 182 Iowa, 789, 166 N. W. 271, 273. This view not only accords with the rule that such covenants should be strictly construed, but it also accords with a fair and reasonable construction of the covenant as forbidding the letting of the premises to a third person for the purpose of using them as it was provided that the lessee should use them, viz., for the purpose of raising grain and the development of such other interests as are usually incidental to farming.

[8] Although defendant introduced evidence in support of its allegation of damage sustained by reason of injury to the sheep occasioned by their premature removal from the land and by reason of the loss occasioned by the premature dismantling of its watering troughs, the court failed to find upon these issues. This was error. The special damages so set up by defendant are capable of ascertainment by proof to a reasonable certainty, and, so far as damage was suffered at all in the respects named, it was certainly the direct or proximate result of the act of plaintiff in forcing the removal of the sheep before the pasturage contracted for by defendant had been used. Under these circumstances, there is no apparent justification for the failure of the trial court to find upon the issues tendered.

[9-11] Defendant cannot, it is claimed, under its attempted appeal, avail itself of the record furnished in this case on the alternative plan, for the reason that the appeal is taken from that which does not appear in the judgment instead of from what does appear, and therefore is ineffectual in that there is a failure to appeal from any part of the judgment rendered. The notice of appeal specifies that the appeal is "from that part of the final judgment * * * which limits the amount to be recovered by defendant from plaintiff to $760, and from that part of said judgment which fails to give judgment in favor of the defendant for the balance of the damage prayed for in the answer and cross-complaint herein, and particularly from the part of the said judgment that fails to give judgment for the value of the straw upon the said property, and for the special damage alleged in the answer and counterclaim herein, and from the whole of the said judgment with the exception of the part thereof which adjudges that plaintiff take nothing by the said action, and that the defendant recover $760 from the plaintiff, together with costs of suit." The point raised is that this notice of appeal does not state that the appeal is "from the judgment, order or decree, or some specific part thereof," within the meaning of section 941b of the Code of Civil Procedure. Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears that the respondent has been misled by such misdescription. Meley v. Boulon, 104 Cal. 262, 37 Pac. 931; Estate of Stone, 173 Cal. 675, 161 Pac. 258. If a notice of appeal from part of a judgment specifies the part appealed from with reasonable certainty so that respondent is not misled, such notice will suffice even though the terms used in indicating the part of the judgment appealed from are defective. Anderson v. Phegley, 54 Or. 102, 102 Pac. 603; State v. Bleth, 21 N. D. 27, 127 N. W. 1043. The judgment in the present case consists of two parts, namely: (1) That plaintiff recover nothing by the action; and (2) that defendant recover $760 together with costs.

By the use of the words "that part of the final judgment * * * which limits the amount to be recovered by defendant from plaintiff to $760," the notice indicates with reasonable certainty that part of the judgment which provides that defendant recover $760. The further specifications relating to the part of the judgment which fails to give judgment for the defendant, while they do not relate to a part of the judgment as rendered, are merely cumulative and may be disregarded as surplusage which does no injury. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187. The notice of appeal must therefore be held sufficient.

The judgment is reversed, with costs to defendant, and the cause remanded for a new trial.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; SHAW, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

182 Cal. 437

SUDDEN & CHRISTENSON v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8882.)

(Supreme Court of California. March 13, 1920. Rehearing Denied, April 12, 1920.)

1. ADMIRALTY ⟸1 — PURPOSE OF FEDERAL CONSTITUTION WAS TO ESTABLISH EXISTING MARITIME LAW.

The purpose of Const. U. S. art. 3, § 2, extending a federal judicial power to all cases of admiralty and maritime jurisdiction, was to designate the existing law of the sea as that by which rights of litigants in maritime cases were to be determined.

2. ADMIRALTY ⟸20—POWER TO SAVE STATE REMEDIES DOES NOT INCLUDE POWER TO SAVE RIGHTS.

The validity of Judicial Code, §§ 24, 256 (U. S. Comp. St. §§ 991[3], 1233), conferring exclusive admiralty jurisdiction on federal courts, but saving the right of a common-law remedy where the common law is competent to give it, does not establish the validity of the amendment by Act Oct. 6, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 991[3], 1233), which extended the saving clause to secure to claimants the rights as well as the remedies under state Workmen's Compensation Laws.

3. COURTS ⟸90(2) — MAJORITY OPINION STATES LAW NOTWITHSTANDING DISSENT.

The opinion concurred in by the majority of the Justices of the United States Supreme Court establishes the law, though four of the Justices dissent therefrom.

4. COMMERCE ⟸12—POWER TO SUBJECT LIQUOR TRAFFIC TO STATE PROHIBITION DOES NOT EXTEND TO ADMIRALTY RIGHTS.

Decision upholding the validity of the statutes subjecting interstate commerce in intoxicating liquors to state prohibition does not establish the power to subject admiralty rights to the several state Workmen's Compensation Laws, since the former power was based upon the nature of intoxicating liquor.

5. ADMIRALTY ⟸20 — AMENDMENT SAVING STATE COMPENSATION FOR MARITIME INJURIES IS UNCONSTITUTIONAL.

The amendment of Judicial Code, § 256, by Act Oct. 6, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 1233), saving to claimants for maritime injuries the rights and remedies under the Workmen's Compensation Law of any state, destroys the uniformity which Const. art. 3, § 2, was intended to secure in admiralty cases, since the Compensation Laws are not strictly confined to local matters, and therefore that amendment is unconstitutional.

In Bank.

Certiorari by Sudden & Christenson against the Industrial Accident Commission and others, to review the action of the Commission in awarding death benefits to Maria Soarez and another. Award annulled.

McCutchen, Willard, Mannon & Greene and McCutchen, Olney & Willard, all of San Francisco, for petitioner.

Henry Heidelberg, of San Francisco (A. E. Graupner and Warren H. Pillsbury, both of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding death benefits to respondents Maria and Carmina Soarez. The deceased, Joe Soarez, died as the result of an accidental injury sustained by him while employed as a stevedore on the deck of petitioner's vessel, which was at the time discharging a cargo of lumber at a San Francisco dock. The rights and liabilities of the parties in connection with the injury and death of Soarez were matters clearly within admiralty jurisdiction, and, prior to the amendment of the Judicial Code in 1917, the application of the California Workmen's Compensation Act (St. 1917, p. 831) would have been an unwarranted invasion of the admiralty jurisdiction of the federal courts. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

At the time the decision in the Jensen Case was rendered, sections 24 and 256 of the Judicial Code gave to the District Courts of the United States exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." 36 Stat. 1091, 1160, c. 231 (U. S. Comp. Stat. §§ 991, 1233). By Act Oct. 6, 1917, hereinafter referred to as "the amendment," Congress amended the Judicial Code to ex-

tend the saving clause to secure "to claimants the rights and remedies under the Workmen's Compensation Law of any state." Act Oct. 6, 1917, c. 97, 40 Stat. 395, § 2, Fed. Stat. Ann. Supp. 1918, pp. 401, 414 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 991 [3], 1233). Petitioner resists the application of the amendment in support of the award in the instant case upon the ground that the said amendment is in conflict with article 3, section 2, of the United States Constitution and therefore wholly void.

[1] Article 3, § 2, of the Constitution, provides that the judicial power of the federal courts shall extend to all cases of admiralty and maritime jurisdiction. It is the theory of petitioner that the existing law of the sea was impliedly designated by this provision to furnish the rules by which the rights of litigants in maritime cases were to be determined. The correctness of this theory is not open to question. Benedict's Admiralty (4th Ed.) § 139; Willoughby on the Constitution, c. LV; The Genesee Chief, 12 How. 443, 13 L. Ed. 1058; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; Southern Pacific Co. v. Jensen, supra. Nor is it open to serious question that the reason for this implied adoption of the existing law of the sea as the basis and groundwork of the maritime system of the nation was to withdraw the rules and limits of maritime law from the disposal and regulation of the several states, thereby securing that uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other and with foreign nations. The Lottawanna, supra; Southern Pacific Co. v. Jensen, supra. Whether or not the amendment to the Judicial Code assumes to authorize under federal sanction the exercise of a power of disposal and regulation over the rules and limits of maritime law which would be fatal to that uniformity and consistency which it was one of the primary objects of the Constitution to secure is the question now presented for our determination.

[2] On behalf of respondents, the suggestion is made that the numerous decisions upholding the constitutionality of the old "saving to suitors" clause of the Judicial Code foreclose all discussion in the instant case for the reason that the present amendment is merely an expansion of that clause. The difficulty with this reasoning lies in the fact that the original "saving clause" saved remedies only, whereas the amended clause saves, not only remedies, but rights as well. Under the original clause, the substantive law, wherever administered, was for maritime cases the law of the sea. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. The old "saving clause" did not, therefore, interfere with the uniform and harmonious operation of the maritime law, and, consequently, it did not violate the Constitution. It by no means follows, however, that the same may be said of the clause as expanded to save to claimants the rights and remedies under the Workmen's Compensation Law of any state. By the statute as so amended, Congress has adopted as part of the substantive maritime law of the nation the rules governing liability in the case of industrial accidents contained in the Workmen's Compensation Acts of the several maritime states. In general, these acts, like that in force in this state, are exclusive in character; that is to say, where applicable at all, they furnish the sole basis for recovery in the case of industrial accidents. It follows that in states having this type of statute Congress has wholly abolished all liabilities under the general maritime law arising out of industrial accidents. The Howell (D. C.) 257 Fed. 578. The Workmen's Compensation Acts in the various states are widely divergent in their terms. Moreover, if it be true, as it undoubtedly is, that the amendment must be interpreted prospectively, there is no visible limit to the possible future divergence between the terms of these laws. Finally, when it is considered that the courts have upheld clauses in the Workmen's Compensation Acts giving to those statutes an extraterritorial effect, it is at once apparent that the rules adopted by Congress to govern the liabilities of the parties in the case of maritime accidents cannot fail to present an aspect of "confusion worse confounded." The question in the instant case, therefore, is whether or not the divergence and confusion so created in the substantive law of the sea interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations which it was the aim of the Constitution to secure.

The constitutionality of the amendment to the Judicial Code has been upheld in Stewart v. Knickerbocker Ice Co., 226 N. Y. 305, 123 N. E. 383. The reasoning upon which the decision in that case was based is stated as follows by the Court of Appeals of New York:

"In view of the close division of opinion amongst the learned Justices of the Supreme Court, involved in the decision of the Jensen Case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the Constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of mari-

time employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional."

[3] This reasoning appears to us to be based upon a misconception of the Jensen Case. It is true that in that case four Justices dissented, but it is in the prevailing opinion that we must seek for a statement of the law as established by the decision of the court. It is also true that that opinion concedes the difficulty of determining the exact extent to which state legislation may limit or affect maritime rights and states that, considering the former opinions of the court:

"It must now be accepted as settled doctrine that * * * Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

The court did not mean to imply, however, that Congress in the exercise of this "paramount power" or that the state Legislatures in the exercise of their somewhat indeterminate authority could destroy the uniformity of the maritime law which it was the aim of the Constitution to secure. That the uniformity of the maritime law is guaranteed by the Constitution itself is unequivocally stated and restated in the opinion of the court. That such, indeed, was the fundamental basis of the prevailing opinion is clearly recognized in the opinions of the dissenting Justices. Since, therefore, it has been determined that, whatever may be the power of Congress or of the state legislatures in maritime matters, the Constitution itself guarantees the uniformity of the maritime law, we can see no escape from the necessity of considering whether or not the amendment to the Judicial Code destroys the uniformity so guaranteed.

[4] Respondents contend that by granting to Congress the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, the framers of the Constitution evinced a purpose to secure consistency and uniformity of regulation identical with that evinced by extending the judicial power of the federal courts to all cases of admiralty and maritime jurisdiction. With this contention as a basis, respondents argue that the case of Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, which upholds the constitutionality of the Webb-Kenyon Act (U. S. Comp. St. § 8739), is a conclusive authority in favor of the constitutionality of the enactment which we are now considering. The position of respondents in this behalf is squarely sustained by the opinion of Judge Hand in The Howell, supra. The learned judge held, in effect, that the Clark Distilling Co. Case established the proposition that as to any matters over which Congress has jurisdiction, it may allow state legislation untrammeled until such time as in its own pleasure it may choose to assume explicit legislative control. While we have the utmost respect for the learning and ability of the author of that opinion, after mature deliberation we are constrained to disagree with his conclusion.

In Clark Distilling Co. v. Western Maryland R. Co., supra, the United States Supreme Court held that Congress had power to forbid "the interstate shipment or transportation of intoxicating liquor which was intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported." It was claimed "that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things, was wanting in uniformity." It is not, we think, open to serious question but that this claim would be sound as applied to any ordinary article of commerce or but that it would have prevailed with the court had liquor been regarded, as it once was, as an ordinary article of commerce. Bowman v. C. & N. W. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Vance v. Vandercook Co. (dissenting opinion) 170 U. S. 438, 457, 18 Sup. Ct. 674, 42 L. Ed. 1100. The United States Supreme Court has shown an unmistakable inclination to uphold restrictions upon traffic in liquor without openly declaring that liquor was not an ordinary article of commerce. In so doing, the court has resorted to applications of constitutional principles which would not have been applied in like manner to uphold restrictions upon traffic in lumber or cotton which were similar in their scope and effect. See Willoughby on the Constitution, §§ 317–321, inclusive. This fact is recognized by the Chief Justice in the closing paragraph of the opinion in the Clark Distilling Co. Case:

"Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. *The fact that regulations of liquor have been upheld in numerous instances, which would have been repugnant to the great guaranties of the Constitution, but for the enlarged right possessed by government to regulate liquor has never, that*

we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is that basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." (The italics are ours.)

The difference between the character of the Webb-Kenyon Act and the amendment to the Judicial Code now under consideration, as well as the difference between the subjects of which these two laws treat is manifest. The one deals with certain property, the abuse of which is a menace to society. The other deals with ships (of whose vital importance to the welfare and even to the life of the nation the recent war furnishes a vivid reminder) and subjects them at one and the same time to the varying, and even conflicting, laws of the many states at whose ports they must call in the course of their necessary wanderings. As stated in The Lottawanna, supra:

"The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."

There was no general system of liquor laws designed to be preserved by the Constitution. Indeed, the subject-matters of the two enactments which respondents seek to link together are so vitally and patently different in nature, purpose, history, and circumstance that we find it impossible to conceive that the question of the constitutionality of one is conclusively determined by the ruling on the constitutionality of the other. We therefore consider ourselves not only free but also under a manifest and unescapable duty to consider on its own merits the question as to whether or not the Judicial Code as amended in effect destroys the uniformity of the admiralty and maritime law, which, like the law merchant, is always national, even international, in character, and necessarily so to fulfill its mission.

[5] It is only in case the state Workmen's Compensation Acts merely assume to regulate matters of a local nature admitting of diversity of treatment according to local necessities that their adoption by Congress as part of the maritime law would not be destructive of that uniformity which it was the aim of the Constitution to secure. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Port Richmond Ferry v. Hudson County, 234 U. S. 317, 34 Sup. Ct. 821, 58 L. Ed. 1330; Wilmington Transportation Co. v. Cal. R. R. Com'n, 236 U. S. 151, 35 Sup. Ct. 276, 59 L. Ed. 508; Wabash, etc., R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. That such, however, is not the nature and effect of the Workmen's Compensation Acts has been conclusively determined by the United States Supreme Court in Southern Pacific Co. v. Jensen, supra. In this behalf the court said:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destructive to the very uniformity in respect to maritime matters which the *Constitution* was designed to establish, and the freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in The Roanoke." 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770. "The Legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. *So applied, it conflicts with the Constitution and to that extent is invalid.*" (The italics are ours.)

After admitting that state legislation may to some extent change or modify the general maritime law, and after refusing to attempt to define with exactness just how far such changes and modifications are valid, the court continued:

"And plainly, we think, no such legislation is valid, if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. *This limitation, at least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.*" (The italics are ours.)

The decision in the Jensen Case was based, therefore, upon the conclusion that the Workmen's Compensation Act of New York (Consol. Laws, c. 67), as applied to maritime accidents, did work material prejudice to the characteristic features of the general maritime law and did interfere with the proper harmony and uniformity of that law in its relation to international and interstate relations.

It is true that this language was used of the Workmen's Compensation Act of New York as applied to maritime accidents ex proprio vigore. But by no possible process of reasoning can it be asserted that that act, or any of the other varying and conflicting Workmen's Compensation Acts of the several maritime states, can have the effect of de-

stroying the uniformity of the general maritime law when their force is derived from the respective state Legislatures, but that these identical acts have precisely the opposite effect when their force is derived from the act of Congress. If the Workmen's Compensation Act of New York, or of California, operating in the field of maritime accidents by the act of the state Legislature, would have the effect of inflicting upon commerce a far more serious injury than that which would have resulted from the Washington statute authorizing a materialman's lien which was condemned in The Roanoke, supra, its effect in the same field can be no less injurious and no more consonant with the uniformity of regulation which it was the aim of the Constitution to secure if its operation is extended to that field by the act of Congress. If the effect of the statute as enacted by the state Legislature was to make its application to maritime accidents a violation of the Constitution of the United States by reason of the fact that it destroyed the uniformity of the law of the sea, such must of necessity be its effect when enacted by Congress, for the identical conflicts and inconsistencies are adopted and perpetuated.

We therefore conclude that the amendment to the Judicial Code is unconstitutional in that it violates article 3, section 2, of the Constitution of the United States.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

46 Cal. App. 55

In re GUILBERT'S ESTATE.

GUILBERT v. KOESTER et al.

(Civ. 2061.)

(District Court of Appeal, Third District, California. Feb. 7, 1920. Hearing Denied by Supreme Court April 5, 1920.)

1. APPEAL AND ERROR ⊂=762—POINTS ABANDONED IN CLOSING BRIEF NOT CONSIDERED.

Where appellant in his closing brief abandoned points made in opening brief, and advanced reasons for reversal not discussed in opening brief, appellate court will take it for granted that the matters discussed in closing brief were the only matters considered by appellant as possessing merit.

2. EVIDENCE ⊂=596(1)—PARTY HAVING BURDEN NOT REQUIRED TO PRODUCE CONVICTION IN JURORS' MINDS.

A party having the burden of proof is not required, in order to prevail, to produce conviction in the minds of the jurors, but it is sufficient if his evidence outweighs that of the opposite party, and the jury considers from the evidence his contention as more probably true than otherwise.

3. TRIAL ⊂=296(8)—INSTRUCTION ON PREPONDERANCE OF EVIDENCE HELD CURED BY OTHER INSTRUCTIONS.

Inaccuracy of instruction that "testimony which produces conviction in the unprejudiced minds of the jurors represents the preponderance of proof" *held* cured by other instructions.

4. TRIAL ⊂=296(2)—INSTRUCTION ON SOUNDNESS OF MIND HELD NOT MISLEADING.

In will contest instruction on soundness of mind *held* not misleading in view of other instructions.

5. TRIAL ⊂=256(6) — CONTESTANT DESIRING MORE ACCURATE DEFINITION SHOULD REQUEST SAME.

In will contest, where instruction on soundness of mind was somewhat obscure, but not misleading, contestant, if he desired any fuller or more accurate definition or instruction, should have requested it.

6. APPEAL AND ERROR ⊂=1170(9)—ERROR IN INSTRUCTIONS AS TO PREPONDERANCE OF EVIDENCE HELD IMMATERIAL IN VIEW OF OVERWHELMING EVIDENCE.

In will contest, on ground of unsoundness of mind, evidence of sanity *held* so thorough and overwhelming as to render any errors in instructions on preponderance of evidence and unsoundness of mind harmless under Const. art. 6, § 4½.

7. WILLS ⊂=31 — WHEN "UNSOUNDNESS OF MIND" OR "INSANITY" WILL INVALIDATE WILL.

Anything short of a normal and healthy mind free from any defective co-ordination arising from disease or decay, in a medical sense, may constitute insanity or unsoundness of mind, but the law does not demand such perfection to give capacity to manage one's affairs and make valid disposition of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insane; Unsound Mind.]

8. WILLS ⊂=38(2)—DELUSION MUST HAVE ENTERED INTO SCHEME OF DISTRIBUTION; "INSANITY."

The insanity which will render a will invalid is general mental incompetency or some narrower form under which the testator is the victim of some hallucination or delusion, in which case the act to be avoided must have been produced in whole or in part by some delusion.

9. EVIDENCE ⊂=574—EXPERT TESTIMONY OF PHYSICIANS WILL NOT PREVAIL AGAINST MASS OF EVIDENCE SHOWING COMPETENCY.

Expert testimony of physicians as to insanity of testator, where physicians had medical, and not legal, standard in view, will not be allowed to prevail against the mass of evidence showing competency to make will.

10. WILLS ⊂=55(1)—EVIDENCE HELD TO SHOW MENTAL COMPETENCY.

Evidence *held* to show mental competency.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

In the matter of the estate of Lucien E. Guilbert, deceased. Proceedings to probate

will by Katherine Koester and others, contested by August Lucien Guilbert. Judgment admitting will to probate, and contestant appeals. Affirmed.

James D. Fairchild, of Yreka (A. Walter Allen, of Los Angeles, of counsel), for appellant.

Taylor & Tebbe and Herbert R. Raynes, all of Yreka, for respondents.

BURNETT, J. This was a contest of the will of Lucien E. Guilbert, deceased, brought by his nephew and devisee under his will. The sole ground of contest was that at the time of the making of his will said deceased was of unsound mind and not capable of making a testamentary disposition of his property. The issue was properly framed by the pleadings and was submitted to the jury in the form of this question:

"Was Lucien E. Guilbert, on January 16, 1919, at the time he executed the document claimed to be the last will and testament, of sound mind?"

The jury answered the question in the affirmative, and thereupon findings of fact and conclusions of law were made and filed by the judge of the superior court, and said will was admitted to probate, and respondents were appointed executrices thereof. The appeal is from said judgment and order admitting said will to probate. In the opening brief of appellant several reasons are urged for a reversal of the judgment, but in his closing brief he seems to have abandoned all these points, and for the first time urges that the court committed prejudicial error in giving certain instructions to the jury. As this was a new point, advanced for the first time in the closing brief for appellant, respondents were permitted to file a brief in reply thereto.

[1] Under the circumstances we take it for granted that this matter of the instructions is the only consideration which appellant considers as possessing merit, and we therefore devote our attention to it, stating, however, that the other points urged in the opening brief are clearly and satisfactorily met and answered in the reply brief of respondents. One instruction which appellant assails is as follows:

"The burden of proof is upon the plaintiff, August Lucien Guilbert, to establish by a preponderance of the evidence all the allegations of the opposition denied by the petitioners. The burden of proof lies on the party who would be defeated if no evidence were given on either side, and if after a consideration of all the evidence in the case you should find the evidence upon any question is equally balanced, you should answer such question against the party who has the burden of such issue, for in such a case there would be no preponderance of the evidence in favor of such proposition. The preponderance of evidence in a case like this is not determinable by the number of witnesses introduced to support the affirmative of the issue, *but that testimony which produces conviction in the unprejudiced minds of the jurors represents the preponderance of proof*, regardless of the number of witnesses from whom it proceeds."

[2] It is fair to state that appellant does not challenge the accuracy of the first part of the above instruction, but his criticism is directed to that portion which we have underscored. Undoubtedly this was not an accurate or correct definition of the preponderance of evidence which the law contemplates. The one having the burden of proof is not required, in order to prevail, to produce conviction in the minds of the jurors, but it is sufficient if his evidence outweighs that of the opposite party, and the jury considers from the evidence his contention as more probably true than otherwise. A similar instruction was condemned in People v. Miller, 171 Cal. 649, 154 Pac. 468, and more recently in the case of In re Ross Estate, 178 Pac. 510, and by reason thereof each cause was reversed. The corresponding language in the Miller Case was:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds."

In the Ross Case the objectionable portion was:

"By a preponderance of evidence is meant that amount of evidence which produces conviction in an unprejudiced mind."

It is apparent that by reason of the expression "to a moral certainty" the instruction in People v. Miller was more objectionable than the one involved in this case. The Ross instruction, though, contains the identical language of the instruction herein, and it was given in a similar case.

[3] We must hold, therefore, that said instruction contained an inaccurate statement of the rule as to "preponderance of evidence." However, for the reasons stated in Lawrence v. Goodwill, 186 Pac. 781, and Boa v. San Francisco-Oakland Terminal Railways, 187 Pac. 2, the inaccuracy was virtually cured, and it was rendered innocuous by a consideration of the entire charge. In the former the court instructed the jury that—

"If the plaintiff has proven the material allegations of his complaint by such evidence as satisfies and produces conviction in the minds of the jury, then he may be said to have proven his case by a preponderance of evidence. When you are satisfied that the truth lies with a single witness or with any number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds."

The foregoing is probably more objectionable than the one before us, but after a thorough consideration of the question in the light of other instructions, especially this one, "In civil cases the affirmative of the issue must be proven; the affirmative being upon the plaintiff, upon him therefore rests the burden of proof, and he must establish his case by a preponderance of the evidence; that is to say by the greater weight of the evidence," this court, through Justice Hart, reached the conclusion that the jury was not misled by the inaccurate portion of the charge.

In the Boa Case, supra, the jury was instructed:

"The defense of contributory negligence on the part of the plaintiff is an affirmative defense, and, unless it appears from the evidence on the part of the plaintiff, must be established by the defendant to your satisfaction by a preponderance of the evidence, and, if in your minds the evidence is evenly balanced, the defense fails in that particular."

The Supreme Court condemned the use of the phrase "to your satisfaction," but held that it was rendered harmless by other instructions and followed certain decisions from other jurisdictions to the effect that—

Such instruction "is not reversible error, where the other instructions in the case clearly define what is meant by a preponderance of the evidence and distinctly advise them that a preponderance of the evidence will be sufficient to justify a finding in favor of the party having the burden. In such cases it is held that the words 'to the satisfaction of the jury' are equivalent to 'find' or 'believe.'"

Herein, in the first part of the instruction complained of, it is implied that the preponderance of evidence means the greater weight of evidence; for the court stated that, if the evidence were equally balanced, there would be no preponderance.

From this expression the jury would naturally infer that, if it "preponderated" in favor of the party having the burden, the requirement of the rule would be satisfied. But scarcely any doubt could remain as to what the court meant by "produces conviction" when the jury considered this instruction:

"The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration [reciting certain recognized tests of credibility], and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

"You are not to be governed by the number of witnesses, but by the weight or preponderance of the evidence. The plaintiff must prove the case by the preponderance of the testimony or by the greater weight of the evidence. This does not necessarily mean a greater number of witnesses who testify on any side of the issue or issues involved in any case, but according to the weight you give to the testimony of each witness."

If, in the consideration of all these instructions, the jurors were misled by said objectionable expression, they must have been stupid, indeed.

Appellant also criticizes the following portion of another instruction:

"What we mean by soundness in this connection is not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relation to each other."

[4, 5] The instruction is somewhat obscure, but we do not consider it misleading. The jurors might find some difficulty in comprehending it, but in another part of the charge they were instructed that to be of sound and disposing mind the deceased "must have understood what he was doing." We are satisfied that, taken together, the instructions on this subject could not have created any prejudicial impression. If appellant desired any fuller or more accurate definition or instruction, he should have requested it.

Indeed, we find nothing in the record to show that these instructions were not given on request of appellant. The incompleteness of the record in that respect is probably due to the fact that no attack was made upon the instructions on the motion for a new trial, or, indeed, until the final brief was filed.

[6] However, if we concede that error was committed as claimed, and that it was not the fault of appellant, then the cause should not be reversed for the sufficient reason that, under the evidence submitted, it is not at all probable that, if a new trial were had, any fair jury would reach a different result. We may go further and say that the proof of the sanity of the testator, in the legal sense, seems to have been so thorough and overwhelming as to make it almost inconceivable that there was any miscarriage of justice. In other words, if we were to grant all the errors charged in both briefs of appellant, we should have a clear case for the application of the recent amendment to the Constitution (section 4½, art. 6).

It is probably seldom, in a serious contest of this character, that the contrast is so great in favor of the proponent of the will as against the contestant. Considering the immediate circumstances attending the execution of the will, we may remark that three persons were present besides the testator: Fred Martin, his confidential clerk; George A. Tebbe, the man who drafted the will under the direction of decedent; and R. S.

Taylor, a leading attorney of Yreka. These witnesses had known Mr. Guilbert intimately for many years. They testified minutely to what occurred at the time he executed his will, and, if credit is to be given to their statements, there can be no doubt that the testator had a clear conception of every essential element of the transaction; he comprehended what property he owned; he knew the objects of his bounty; he understood what disposition he was making of his possessions; and he had no difficulty in giving expression to his testamentary purpose. We may add that these witnesses also affirmed, as intimate acquaintances, the complete sanity of the testator. They were joined by other intimate acquaintances, his bankers, his regular physician, his friends and business associates, many of whom had known him for a lifetime, and they unqualifiedly declared that he was at all times during their acquaintance of sound mind. We may state also that there seems to be nothing unnatural or extraordinary in the terms of the will. The testator was a bachelor, and his collateral kindred apparently had no particular claims upon his bounty. He did, however, remember them in his will, leaving to one brother the sum of $5,000. To contestant, who was the son of a half-brother, he devised the sum of $500, and he had a life-insurance policy of $3,000 in favor of contestant's mother. There were gifts to other relatives, and the residue of his estate, amounting to a considerable sum, was left to respondents, who were strangers to his blood. But he had an affection for them; they had been kind to him and had been attentive to his invalid sister while she resided with him, and it is not surprising that he thus manifested his appreciation of what they had done.

On the other hand, no intimate acquaintance expressed the opinion that he was insane, although some of them related instances of peculiar and eccentric conduct on the part of the deceased. These, however, were all consistent with entire sanity. The most serious circumstance, it may be said, occurred on January 15th, when he was undoubtedly stricken with a serious malady. He seemed to be unable to control his movements; he "was staggering around and mumbling to himself; didn't seem to comprehend what he was doing." One of the physicians described it as the condition of a man suffering from overindulgence in alcoholic drink or some powerful drug. This may have been the case, as the deceased was in mortal dread of influenza then prevailing, and to fortify himself had laid in a large supply of whisky. At any rate, he recovered from the attack that day, and there is no evidence that the incident affected his mind in the slightest at the time he executed his will.

It is true that two physicians, who were called in to prescribe for him, expressed the positive opinion that he was insane. They both were trained and experienced men in their profession, and their views are entitled to respectful consideration. But they were applying a different test from what the law requires in order to determine a person's competency to make a will.

[7, 8] Anything short of a normal and healthy mind "free from any defective co-ordination arising from disease or decay," in a medical sense, may constitute insanity or unsoundness of mind, "but the law does not demand such perfection to give capacity to manage one's affairs and make valid dispositions of property." Estate of Collins, 174 Cal. 670, 164 Pac. 1110. The insanity which will render a will invalid is general mental incompetency, or some narrower form under which the testator is the victim of some hallucination or delusion, and in the latter instance the act to be avoided must have been produced in whole or in part by said delusion. Estate of Chevallier, 159 Cal. 161, 113 Pac. 130.

[9] That said physicians had in view the medical, and not the legal, standard, and that their opinions could not be allowed justly to prevail against the mass of evidence showing the competency of Mr. Guilbert to make his will, appears clearly from the record.

Indeed, one of them said that, if the testator was capable of transacting business, he would still pronounce him insane, while the other, strange to say, declared that under such circumstances he would consider him sane, thus virtually lending support to the cause of respondents, since there can be no doubt that the testator understood and was capable of transacting business affairs. It may be added that the first of these did not see the testator until one week after the execution of the will, and there can be no question that there had been a marked deterioration, mentally and physically, in the condition of the patient.

[10] Without going further into the incidents of the case, we conclude, having read the transcript carefully, that the jury's conclusion was legal and just, and that, in the light of the principles enunciated in the Estate of Carithers, 156 Cal. 422, 105 Pac. 127, Estate of Chevallier, supra, and Estate of Collins, supra, a finding in favor of contestant could not be upheld.

The judgment is affirmed.

We concur: ELLISON, Judge pro tem.; HART, J.

46 Cal. App. 47

SMITH v. PETERS. (Civ. 2741.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. APPEAL AND ERROR ⟸907(2)—ISSUE RAISED BY PLEADINGS PRESUMED TO HAVE BEEN TRIED.

Where answer denied an allegation of ownership in complaint, which allegation was a conclusion of the pleader, appellate court, in absence of the evidence, would presume that issue was tried.

2. APPEAL AND ERROR ⟸193(4)—IN ABSENCE OF DEMURRER, CONCLUSION OF PLEADER RAISING COLORABLE ISSUE WAS SUFFICIENT ON APPEAL.

Allegation "that plaintiff is now the owner and holder of said note," which was denied in the answer, was a colorable tender of an issue, even though only a conclusion of law, and, in the absence of a demurrer, no objection on appeal can be urged.

3. APPEAL AND ERROR ⟸883—ESTOPPEL TO DENY ASSUMED ISSUE.

Where an issue is assumed by the parties to exist, and the trial is had on the assumption that such an issue is before the court, the parties will be estopped from thereafter asserting that such issue was improperly made the subject of a finding.

4. BILLS AND NOTES ⟸315—NONNEGOTIABLE INSTRUMENT SUBJECT TO DEFENSE OF LACK OF CONSIDERATION.

A nonnegotiable instrument in the hands of an assignee or indorsee is subject to equitable defense that it lacked consideration.

5. BILLS AND NOTES ⟸155—NOTE WITH ACCELERATION OF MATURITY CLAUSE NOT NEGOTIABLE.

A note containing a clause, "Should the interest not be paid monthly, then the whole sum of principal and interest shall immediately become due and payable, and interest shall be compounded monthly thereafter at the same rate," making its due or maturity date uncertain, was nonnegotiable, where executed prior to the going into effect of the Negotiable Instrument Law on April 27, 1917.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by B. K. Smith against J. T. Peters. Judgment for defendant, and plaintiff appeals. Judgment vacated and set aside, and trial court directed to amend conclusions of law and to enter judgment in favor of defendant.

Winslow P. Hyatt, of Los Angeles, for appellant.

Bowen & Bailie and Norman A. Bailie, all of Los Angeles, for respondent.

JAMES, J. Appeal by defendant from a judgment entered in favor of plaintiff.

This action was brought to recover upon a promissory note dated January 8, 1916, and signed by the defendant Peters. The payee in the note was A. Vitagliano. The note provided that interest should be paid at the rate of 7 per cent. per annum, and further contains the following clause:

"Should the interest not be paid monthly, then the whole sum of principal and interest shall immediately become due and payable, and interest shall be compounded monthly thereafter at the same rate."

The defendant in his answer asserted that the note was given without consideration, and in conformity with the defense pleaded the court made the following finding:

"The court finds: That on the 25th day of February, 1916, A. Vitagliano, the payee of the promissory note involved in this action, and the defendant occupied an office together at 619 H. W. Hellman Building, Los Angeles, Cal. That on said date the defendant, at the instance and request of said A. Vitagliano, executed and delivered to him the certain promissory note involved in this action, in words and figures as set forth in paragraph I of plaintiff's complaint. That said promissory note was so executed and delivered for the purpose of enabling said A. Vitagliano to exhibit the same as evidence of his financial worth, and that no consideration passed to the defendant in connection therewith. That said note was expressly dated as of January 8, 1916, in order that the same should appear as past due at the time of its execution and delivery."

The court further found that on February 29, 1916, for a valuable consideration, the payee indorsed the promissory note and deposited it with a bank as collateral security for the payment of an indebtedness due to the bank from him, and that the said bank had no notice of the equities existing between the parties to the note; that no demand was made upon the defendant for the payment of the principal or interest until July 2, 1917, which such demand was made by the indorsee bank. There was a further finding that, upon Vitagliano failing to discharge his indebtedness to the bank, a pledgee sale was had and the note in question was sold to the plaintiff. Among the conclusions of law, the following recitation occurs:

"That the promissory note involved in this action was past due, according to its terms, at the time of the delivery thereof, and was therefore a note payable upon demand;" that the bank "became an innocent holder of said note before the apparent maturity thereof, and, no prior demand having been made, took the same free from the defenses and equities existing between the parties thereto."

[1-3] The appellant makes question as to the sufficiency of the allegation of ownership of the note in the complaint, because of the fact that the only allegation appearing to

show a transfer from the payee was "that plaintiff is now the owner and holder of said note." In the answer, however, issue was made by a denial of this allegation, and we will assume that that issue was tried, as the evidence is not before us and the findings determine the fact. Conceding, also, that the allegation would have been considered insufficient in the face of a demurrer, it must be held, under the authority of Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, that a colorable issue was tendered, even though the allegation amounted to only a conclusion of law, and that in the absence of a demurrer the objection here made cannot be urged. The further answer is that where an issue is assumed by the parties to exist, and the trial is had upon the assumption that such an issue is before the court, the parties will be estopped from thereafter asserting that such issue was improperly made the subject of a finding.

[4, 5] The principal argument of appellant is that as the note, considering the date shown upon its face, was transferred after maturity, it was subject, as against the claims of the indorsees, to the equitable defenses pleaded. The respondent answers this contention by authorities to the effect that, as the fact was determined to be that the note was not delivered until its apparent maturity date, it became in the hands of the holder a demand note, and therefore would not mature until the demand for payment was made, which the court finds to have been done at a later time, and after the indorsee bank received the note in pledge. The following cases, which seem to support respondent's contention in this regard, are cited: Bank of Sonoma County v. Gove, 63 Cal. 355, 49 Am. Rep. 92; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873.

The difficulty we find in applying these authorities, however, is that to us the note appears to be on its face nonnegotiable rather than negotiable. If nonnegotiable, it would, of course, be subject to the equitable defenses made, and under the findings of fact as settled by the trial court the defendant, rather than the plaintiff, would be entitled to judgment. The note contains the accelerating clause which we have quoted, which makes its due or maturity date uncertain. That such a note is nonnegotiable was decided in Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367. This decision is supported by the reasoning in Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Mathews et al. v. Wilson et al., 175 Pac. 647; Spotton v. Dyer, 184 Pac. 23. The late case of Utah State Bank v. Smith et al. (Sup.) 179 Pac. 160, contains language which might indicate a contrary view; but the court does not therein overrule its former decisions, but expressly declares that a different state of the law was being considered by reason of a stipulation made by counsel. Under the uniform Negotiable Instrument Law now in force in this state (St. 1917, p. 1531), the note here sued upon would be negotiable; but that law did not become effective until April 27, 1917, more than a year after the note in this suit was made, delivered, and indorsed. It follows from these conclusions that the judgment appealed from must be set aside.

The judgment is vacated and set aside, and the superior court is directed to amend its conclusions of law to conform to the views expressed in this opinion, and, upon the findings of fact as made and such amended conclusions, enter judgment in favor of defendant.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 63

ONG et al. v. COLE. (Civ. 2082.)

(District Court of Appeal, Third District, California. Feb. 9, 1920. Hearing Denied by Supreme Court April 7, 1920.)

1. DEEDS ⊂⊃208(7)—EVIDENCE HELD TO SHOW DELIVERY WITH INTENT THAT DEED SHOULD BE OPERATIVE AT ONCE.

In a suit to avoid a deed executed by a person since deceased, evidence *held* to support a finding that the deed was delivered with intent that it should be operative, though at the grantor's request the grantee deposited it with a bank and withheld it from record until the grantor's death.

2. EVIDENCE ⊂⊃588—DUTY OF COURT AS TRIER OF FACTS WHERE EVIDENCE IS CONFLICTING STATED.

In a suit tried without a jury, it is the province of the court to harmonize, if it can, the testimony of different witnesses, and, if this cannot be done, to decide whose testimony to accept, and, when the same witness has given conflicting accounts of the same transactions, to determine which statement it will accept as being in accord with the fact.

3. DEEDS ⊂⊃61—MEMORANDUM STATING THAT DEED WOULD BE "DELIVERED" TO GRANTEE ON GRANTOR'S DEATH CONSTRUED.

The word "delivered," is used both in a popular and in a technical sense; and, when a deed had been delivered to the grantee, who at the grantor's request deposited it in a bank and signed a memorandum stating that it was to be delivered to her on the grantor's death, the word was evidently used as meaning that she would call for the deed and the bank would let her have it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver.]

4. DEEDS ⊂=56(2)—INTENT THAT DEED SHALL BE OPERATIVE TO BE DETERMINED FROM ALL FACTS AND CIRCUMSTANCES.

Whether a change of possession of a deed from grantor to grantee is with the intent that the deed shall become operative as such must be ascertained by a consideration of all the attendant facts and circumstances.

5. WITNESSES ⊂=202—ATTORNEY MAY TESTIFY TO CLIENT'S DIRECTION TO DRAW DEED.

Under Code Civ. Proc. § 1881, subd. 2, as to the disclosure by an attorney of communications made by the client to him or his advice given thereon in the course of professional employment, an attorney employed to draw a deed may testify to what the client said she wanted done, where she stated no facts and received no advice.

6. DEEDS ⊂=48—NOT RENDERED VOID BY DELAY IN AFFIXING REVENUE STAMP.

Where, at the grantor's request, a grantee withheld a deed from record until the grantor's death, and the failure to place revenue stamps on the deed until just before it was offered for record was not with intent to defraud the government, the delay in placing the stamps on the deed did not render it void.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. C. Ong and others against Jennie L. Cole. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. C. Ong and Tanner, Odell & Taft, all of Pasadena, for appellants.

Hahn & Hahn, of Pasadena, and Adams, Adams & Binford, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. The complaint alleges that the plaintiff, D. B. Ong, is the executor of the last will of Minnie R. Ong, deceased, and that the other named plaintiffs are devisees under the will of said deceased. Continuing, it states that said Minnie R. Ong, in her lifetime and at the time of her death, was the owner of a certain described piece of real estate situate in Los Angeles, Cal.; that the defendant, Jennie L. Cole, now claims title to said real property by reason of a certain deed, which she claims was executed and delivered to her by said Minnie R. Ong in her lifetime. Plaintiffs allege that this deed was never executed as a deed, was without consideration, and was never delivered by Minnie R. Ong to Jennie L. Cole. The prayer of the complaint is that said deed be declared null and void, and plaintiffs decreed to be the owners of said property.

The court found that the deed was executed by Minnie R. Ong for a valuable consideration, and by her delivered to Jennie L. Cole, and entered judgment for the defendant. Plaintiffs assert that the finding of the court as to the delivery of the deed is not sustained by the evidence.

[1] The only witnesses examined on the trial were the defendant, Jennie L. Cole, and Mr. George W. Adams, the attorney who drafted the deed. Concerning the execution and delivery of the deed, the defendant testified that she was a trained nurse, and had acted as such, and as housekeeper and companion for Minnie R. Ong, deceased, for 20 years; that the husband of the deceased was an invalid for several years prior to his death, and that she nursed him for several years until 1914, when he died; that thereafter she looked after his widow until her death, which occurred in 1916. Continuing, she testified:

"I had a conversation with Mrs. Ong with regard to the property after that, just prior to the execution of the deed, possibly a week or two—I can't just remember the exact date. This conversation took place in the home, and just the two of us were present. She simply said that she was anxious to deed the home to me, or she wanted me to have the home, because she appreciated all that I had done and the faithfulness and the care that I had taken of everything, and that she wanted to feel that I would have it, and she felt that she was not going to live long, and she wanted everything arranged so that I would have a home and the furniture, and always have a place to stay. She felt that she wanted to do that, and that she and Mr. Ong had talked that matter over during his lifetime, and he had made the remark, 'If I go before you, Minnie, I want you to look after Jennie.' Q. Did Mrs. Ong ever hand you the deed to that property? A. She did. Q. When and where was that deed handed to you? A. In Mrs. Ong's room at 161 North Mentor avenue, in her den on October 15th, I think. The deed came that morning by the post. The postman left the deed, and I brought in the envelope and gave it to her in her room. I gave her the deed, or the paper, a business envelope, you know, of Adams, Adams & Binford, which was on the outside, and handed her the deed, and she took it from me, and I think she remarked, possibly, 'It has come at last.' She took the deed and I went on out in the kitchen; I was preparing lunch, and she called me in her room and says, 'Jennie, here is your deed; you had better take it down to the bank. * * * It is my wish that you should not have the deed recorded during my lifetime, as I don't want any fuss with the relations.' I said: 'Minnie, your wishes shall be granted.'"

Mr. George W. Adams testified, in substance:

That he had been attorney for Mrs. Ong in settling her husband's estate. "Shortly before her death she sent for me to come to her house in Pasadena. She stated to me that now the controversy over the estate of L. B. Ong had been settled and the property distributed, she wanted to make a deed to the home property to Jennie L. Cole. * * * She further stated to

me that she wanted Miss Cole to have the property, meaning the home where she then lived, and that it was her purpose to deed the property to Miss Cole at that time rather than give it to her by any codicil to her will. She then instructed me to draw such a deed, which I did, and she then signed it. I took it to my office in order to put my notarial seal on it, and I then mailed the deed back to Mrs. Ong."

The foregoing testimony is ample to sustain the finding that the deed was delivered to take effect as a present conveyance of the title to the property. It shows a putting of the deed by the grantor into the possession of the grantee, accompanied by the words:

"Here is your deed. You better take it down to the bank."

The testimony of the defendant shows that the handing to her of the deed was the carrying out of a preconceived intention on the part of Mrs. Ong to make her the owner of the property at that time. The testimony of Mr. Adams is to the same effect. He said Mrs. Ong did not want to give her the property by codicil to her will, and it was her purpose to deed the property to Miss Cole at that time. "She then instructed me to draw such a deed, which I did, and she then signed it."

If it had been the desire and intention of Mrs. Ong to so deal with the title that it would vest in the defendant only upon her death, it seems reasonable to assume that something along those lines would have been said to her attorney.

Appellants claim that the testimony of the defendant above referred to was in conflict with testimony given by her on other occasions concerning the same transaction. It appears she was examined as a witness in the matter of the estate of the deceased, Mrs. Ong, and also that her deposition was taken before trial in this action.

Plaintiffs introduced the testimony of defendant given on these two previous occasions, and in their brief point out what are claimed to be different and contradictory versions of what occurred concerning the execution of the deed, and it is now their claim that these contradictions are so material as to destroy the effect, largely of defendant's testimony given at the trial, and, also, that these former statements are evidence favorable to plaintiffs' case. To illustrate counsel's position, and without referring to all the claimed contradictions, it will be sufficient to advert to one or two. In probate proceedings these questions were asked her:

"Q. Well, you stated you were requested by her to hand it (the deed) to Mr. Hall. What did she say when she requested you to do that? A. It had been understood before—she had talked—as I remember it she says, 'Jennie, here is the deed.' Q. And what then? A. And she said, 'Take it to Mr. Hall.' Q. Take it to Mr. Hall and then do what? A. He was to keep it in his possession until her death."

When her deposition was taken in this case she testified:

"The postman brought a letter and a deed in a long envelope. I gave it to Mrs. Ong, and she opened it. She was in her den, and I was out in the other room busy. She called me and said, 'Come here.' I responded, and she took the deed and said: 'Jennie, this is your deed. Now you had better take it down to the bank and take care of it.' I think she said, 'Take it to Mr. Hall' because that was where we did our business there at the bank, and I was personally acquainted with Mr. Hall, and I think she did say Mr. Hall. Q. What did she tell you to say to Mr. Hall? A. Not a word."

[2] It is to be noticed that in her first testimony she said she was to take the deed to Mr. Hall, and he was to keep it in his possession until Mrs. Ong died. In her second deposition she testified that Mrs. Ong told her to take the deed to Mr. Hall, but did not tell her anything to say to him. It is the province of a court to harmonize, if it can, the testimony of different witnesses, and if this cannot be done, to decide whose testimony to accept. Similarly, when there appears to be conflicting accounts of the same transactions given by the same person, it is the duty of the court to determine which statement it will accept as being in accord with the fact. The court could accept the version of the transaction given by the witness at this trial, notwithstanding it might appear to be in conflict, to some extent, with statements made by her on other occasions.

Counsel for appellants rely much upon a written memorandum that appeared upon the envelope, in which the deed was inclosed when left with the bank. It was as follows:

"Union Trust & Savings Bank of Pasadena, California, Trust Department. Contents. The within deed is deposited by Jennie L. Cole, and is to be delivered to Jennie L. Cole upon the presentation of satisfactory evidence of the death of Minnie R. Ong the grantor and not otherwise. Jennie L. Cole."

It is claimed by appellants that this memorandum shows that it was the understanding, both of the grantor and grantee, that the deed was not to be delivered until the death of the former, and that in taking the deed to the bank, defendant was simply acting as the agent or servant of the grantor. The defendant testified on the taking of her deposition concerning this indorsement on the envelope:

"Why I had the deed, and I simply took it down there and asked Mr. Hall if he would keep the deed for me. And he first said he did not know whether he could or not. And then asked me to explain. I told him that Mrs. Ong had deeded the property to me, and had delivered the deed to me, requesting me to bring it down there for safe-keeping and would he

take care of it for me, as near as I can remember, and he asked the question: 'Miss Cole, did Mrs. Ong deliver this deed to you?' and I said: 'Yes, sir,' and he said: 'Well, under the circumstances I can take the deed and keep it for you.' Mr. Hall wrote this down after talking with me. He put the deed in the envelope and sealed it, and then wrote this on the outside, and I read it over and signed it. Q. Did that statement which you signed contain the substance of what you and Mrs. Ong talked about what was to be done? A. Practically as far as I can remember. Q. Then the deed was not to be delivered to you until after Mrs. Ong's death? A. That was the understanding."

It will be observed from this that the defendant took the deed to the bank; told Mr. Hall that Mrs. Ong had deeded the property to her and delivered the deed to her and had requested her to bring it to the bank for safe-keeping, and asked him to take care of it for her. The writing was all done by Mr. Hall and defendant signed it. The writing begins with stating that the deed is deposited by Jennie L. Cole. If she had taken it there as the servant of Mrs. Ong, it is reasonable to assume that the memorandum would have stated it was deposited by Mrs. Ong. Mr. Hall, in making out the memorandum, used the expression "to be delivered to Jennie L. Cole."

[3] The word "delivered" is used both in a popular and in a technical sense. It was evidently not used by Mr. Hall, nor understood by Miss Cole, in its technical sense. She had already told him that Mrs. Ong had deeded her the property and delivered the deed to her. The word was evidently used by him and understood by her that when Mrs. Ong died she would call at the bank for the deed, and he would let her have it. She had agreed with Mrs. Ong that she would not place the deed on record until Mrs. Ong died. She had no occasion then to get the deed from the bank and have it in her personal possession until the time came to have it recorded.

Similarly, in the last question and answer:

"Q. The deed then was not to be delivered to you until after Mrs. Ong's death? A. That was the understanding."

It is not to be thought that the defendant, not a lawyer, and not familiar with the significance attached to the word "deliver," had in mind, in answering the question, all that the word conveys to one using legal terms with legal accuracy, in saying that was the understanding. It is fair to believe she meant what she had said on several occasions, that it was the understanding that she was to place the deed with the bank for safe-keeping, and when Mrs. Ong died get it and place it on record.

In Smith v. Smith, 173 Cal. 725, 161 Pac. 495, it appears the grantor in a deed had delivered it to R. Grant Taylor with written instructions, as follows:

"I herewith deliver to you two deeds, one to each of my sons, N. D. Smith and G. C. Smith, and direct that you keep and hold the same in escrow during my lifetime, and upon my death deliver them to N. D. Smith and G. C. Smith, so that they may then take effect."

It was claimed in that case that the use of the word "deliver," where it occurs the second time in the paper, showed an intent not to pass the title at that time. Upon this feature of the case, the court said:

"Appellant places great stress upon the words contained in the written directions to Mr. Taylor: 'Upon my death *deliver* them' (the deeds), and 'so that they may then take effect.' There is nothing in this language to prevent the present passing of title at the time of the giving of the deeds to Mr. Taylor, if the intention of the grantor was that it should then pass. Earlier in the letter of instruction Mr. Smith had used the technical language, 'I herewith deliver to you two deeds.' In view of all the evidence the court was justified in deciding that the word 'deliver,' used in the latter part of the writing, was employed in its general sense, meaning 'transmit,' and that the expression, 'then take effect,' referred, not to the vesting of title, but to the time of enjoyment. Haug v. Schumacher, 50 App. Div. 562, 64 N. Y. Supp. 310–313; Middleton's Heirs v. Middleton's Devisees (Ky.) 43 S. W. 677; Newberry v. Hinman, 49 Conn. 130–132; Chambers v. Chambers, 139 Ind. 111–119, 38 N. E. 334; Dove v. Torr, 128 Mass. 38–40."

[4] Counsels for appellants have cited several decisions bearing upon the question of a delivery sufficient to pass title, and from them conclude that the delivery in this case did not measure up to the rule therein announced, but these cases go no further than to decide that to be effective it must appear that the change of possession of the deed from grantor to grantee was accompanied with the intent that the deed should become operative as such. This intent must be ascertained by a consideration of all the attendant facts and circumstances, and we think such intent appears in this case.

[5] Appellants claim it was error to permit Mr. Adams to testify to what Mrs. Ong said to him when he was called in and asked to draw the deed; that such statements were protected from disclosure by virtue of subdivision 2 of section 1881 of the Code of Civil Procedure. This section has been considered by our higher courts in a number of cases, but the exact point now under consideration seems never to have been directly passed upon. Thus, in Re Bauer, 79 Cal. 312, 21 Pac. 762, it is said:

"When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on

the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations."

In this case defendant did not employ Mr. Adams, and he was not acting as her attorney. In Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365, it is said:

"Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present."

The defendant testified that she was not present at the interview between Mrs. Ong and Mr. Adams, so the case does not entirely meet the situation.

In Wigmore on Evidence, § 2292, the rule as to privileges of an attorney is stated as follows:

"(1) Where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relevant to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected from disclosure by himself or by the legal adviser; (8) except the client waives the protection."

And again, at section 2297, the same learned author says:

"In the United States, the drafting of a will has almost always been assumed (and naturally) to bring the testator's communications within the privilege. But for deeds and other instruments the privilege has been strictly construed, and where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of the instrument have been commonly admitted."

The author quotes from Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415, as follows:

"There are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case, the fact that the agent sustains the character of an attorney does not render the communications attending it privileged; and they may be testified to by him, as by any other agent. We cannot perceive that the communications were made to the attorney by Winch, were with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none given."

Another case cited by Mr. Wigmore is Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92:

"Again, for the purpose of showing deceased knew and understood the contents of the written contract at the time it was executed by her, the witness W. H. Burbage, who prepared the contract, was asked, 'Will you state what conversation, if any, occurred between yourself and Mrs. Elizabeth C. Grimshaw leading up to the execution of this contract?' The answer of the witness to this question was also excluded. It is contended, as witness was a lawyer, that the conversation requested was privileged. We think not. Here no relation of attorney and client existed. Any person at all familiar with business transactions could have performed the labor of drafting the contract in question as readily as the witness. As the purpose of the question was to place before the jury the mental capacity of deceased to know and understand the contract she was entering into with defendants, and as the question propounded was not for the purpose of varying or contradicting the terms of a written contract, the witness should have been allowed to answer the question."

The testimony of Mr. Adams shows that Mrs. Ong communicated to him no fact for the purpose of getting any legal advice, and he gave her none. She stated to him that she had decided to deed the property at that time to the defendant, and asked him to prepare the deed. She could have had the same work done by any real estate agent or notary public. As said in Hatton v. Robinson, supra:

"Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law and none was given."

It does not appear that any statement was made by Mrs. Ong to Mr. Adams for the purpose of getting any legal advice from him, and under the circumstances we hold that his testimony, as it appears in the transcript, does not come within the rule of privilege. It was not a case: "(1) Where legal advice of any kind is sought; (2) from a professional legal adviser as such" (Wigmore on Evidence, sec. 2292)—and it was not error to permit him to give the evidence.

[6] The record shows that at the time the deed was executed no United States revenue stamps were placed upon the deed by defendant. Upon getting it from the bank and before offering it for record she placed, or caused to be placed, upon it the proper stamps. Appellants claim that the delay in stamping the deed rendered it void. We are unable to agree with him. In Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339, it is said:

"The only reasonable construction of all these provisions, taken together, is that an instrument not duly stamped at first is not by reason thereof absolutely void, but only voidable by proof that the stamp was omitted with intent to defraud the government."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 79

PEOPLE v. AIROLA. (Cr. 488.)

(District Court of Appeal, Third District, California. Feb. 9, 1920.)

1. CRIMINAL LAW ⊂⊃1160—VERDICT SUPPORTED BY EVIDENCE NOT DISTURBED AFTER NEW TRIAL DENIED.

Where testimony warrants a rational inference that defendant committed the crimes charged, and where the trial judge, on motion for new trial, was satisfied that defendant was properly convicted, appellate court will not interfere with the verdict; it being sufficient for appellate court to know that there is nothing inherently improbable in testimony pointing to defendant's guilt and that in a legal sense it supports the verdict.

2. CRIMINAL LAW ⊂⊃1159(3)—INCONSISTENCIES IN TESTIMONY NOT GROUND FOR SETTING ASIDE VERDICT.

Inconsistencies and contradictions in testimony do not warrant appellate court in setting aside verdict.

3. CRIMINAL LAW ⊂⊃1088(7), 1144(4)—RECORD HELD TO SHOW PROPER PLEA OF NOT GUILTY.

Record stating that "defendant was asked if he was ready to enter a plea, and he stated that his plea was not guilty," *held* sufficient, under Pen. Code, § 1017, and in view of section 1019, as against contention that it does not appear that defendant was asked by the court, or by the clerk or district attorney under its direction, whether he pleaded guilty or not guilty, as provided by section 988; it being presumed, in the absence of a showing to the contrary, that the official duty was performed, and that there was no departure from the accustomed proceeding.

4. CRIMINAL LAW ⊂⊃1141(2) — BURDEN OF SHOWING ERROR ON APPELLANT.

The burden is upon appellant to show error.

5. CRIMINAL LAW ⊂⊃1167(5) — INFORMALITY OF PLEA OF NOT GUILTY HELD HARMLESS.

Where record shows that defendant pleaded not guilty to whatever offense was charged in the information, any informality in that respect was entirely without prejudice.

6. INDICTMENT AND INFORMATION ⊂⊃130—INFORMATION CHARGING THREE SEPARATE OFFENSES OF RAPE HELD NOT DEFECTIVE.

In view of Pen. Code, § 954, information for rape, charging three separate offenses of the same kind against prosecutrix on the same day, *held* not defective.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Augustine Airola, Jr., was convicted of rape, and he appeals. Affirmed.

Virgil M. Airola, of San Andreas, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1, 2] The defendant was convicted of the crime denounced by section 261 of the Penal Code, the female being of the age of 13 years. The only point made by the appellant in his opening brief is that the evidence is insufficient to support the verdict. There is no merit whatever in the contention. The prosecutrix testified to facts and circumstances from which it is a rational inference that the defendant committed the crimes charged in the information. The jury undoubtedly believed that her statements as to material matters were worthy of credit, and we are not justified in saying that there is no legal foundation for such belief and the verdict in accordance therewith. The trial judge, also, on the motion for a new trial, had an opportunity to review the sufficiency of the evidence, and he was satisfied that the defendant was properly convicted. We have no right, if we had the inclination, to interfere with the determination of the jury and the judge. The responsibility of determining the guilt or innocence of the accused was theirs, not ours. It is true that there are some inconsistencies and contradictions in the testimony of the prosecutrix, but that does not warrant us in setting aside the verdict. It is sufficient for this court to know and to say that there is nothing inherently improbable in the evidence pointing to the guilt of defendant, and that, in a legal sense, it amply supports the verdict.

The recital of the evidence would accomplish no good, and, in answer to the criticism by appellant of the story told by the prosecutrix, it is sufficient to refer to People v. Lewis, 18 Cal. App. 359, 123 Pac. 232; People v. Preston, 19 Cal. App. 675, 127 Pac. 660; People v. Crawford, 24 Cal. App. 396, 141 Pac. 824; People v. Slaughter, 33 Cal. App. 366, 165 Pac. 44; People v. Kaiser, 119 Cal. 456, 51 Pac. 702; People v. Moore, 155 Cal. 237, 100 Pac. 688. We may add that there was some corroborative evidence which, no doubt, was duly considered in the court below. In his closing brief appellant makes the additional point that—

"The trial and judgment were a mere nullity, as no plea was ever entered by the defendant to the offenses charged in the information and no issue joined therein."

The record shows that on July 9, 1919:

"Under instruction of the court the clerk duly arraigned the defendant. The court asked the defendant if he was ready to enter a plea to the information and through his counsel he answered that he was not. The defendant then asked for additional time in which to plead. The request was granted and the case was continued until Wednesday, July 16, 1919."

The record for July 16th shows the following:

"The defendant was asked if he was ready to enter a plea and he stated that his plea was not guilty. The trial of this case was then set for Monday, August 11, 1919."

This was a substantial compliance with the requirement of section 1017 of the Penal Code. The plea of not guilty put in issue every material allegation of the information. Pen. Code, § 1019. Appellant complains that—

"It does not appear by whom the defendant was asked the question nor does it appear whether or not the 'plea' mentioned had reference to this case. It does not appear that the defendant was asked by the court or by the clerk or district attorney under its direction whether he pleads guilty or not guilty to the information, as provided by section 988 of the Penal Code."

[3-5] But the burden is upon appellant to show error, and if the matters referred to should be deemed material, in the absence of a showing to the contrary, the presumption would follow that official duty was performed and that there was no departure from the accustomed proceeding. The record, indeed, does show with sufficient precision that the defendant pleaded not guilty to whatever offense was charged in the information, and, it may be added, that if there was any informality in that respect it was entirely without prejudice. People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184.

At the oral argument the point was made for the first time that the defendant should not have been charged with three separate offenses in one information. This course was authorized by section 954 of the Penal Code, providing that—

"The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts," etc.

[6] Herein the defendant was accused in separate counts of three offenses of the same kind against the prosecutrix on the same day. We can see no valid objection to the procedure. As said in Korth v. State, 46 Neb. 640, 65 N. W. 795:

"The offenses were all of the same general character, required for their proof the same quality of testimony, the same manner of trial and mode of punishment, and it was proper to try the [offender] upon the several counts at the same time."

In said opinion many authorities are cited in support of said ruling of the court.

Some of the cases hold that where different offenses are charged the prosecution, although permitted to introduce evidence of all of them, may be put to an election as to which a conviction will be demanded. However, that question is not presented here, as no such demand was made. We may add that, if the defendant had desired to be tried separately on each count, he should have made it known, and no doubt the learned trial judge would have exercised a wise discretion, as contemplated by said section 954, providing:

"That the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately."

We see no occasion for more extended consideration of the case.

The judgment and order are affirmed.

We concur: ELLISON, Judge pro tem.; HART, J.

46 Cal. App. 32

CHAMBERS v. SECURITY COMMERCIAL & SAVINGS BANK. (Civ. 3247.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

LANDLORD AND TENANT ⊂=232—INTEREST ON RENT RECOVERABLE WITHOUT PRAYER.

Under Code Civ. Proc. § 1174, requiring the tenant seeking relief from forfeiture of a lease to pay the rent due with interest thereon, and Civ. Code, § 3287, giving right to interest on unliquidated demands, the landlord is entitled to interest on the rent from the date when several installments became due, though he did not in prayer of his complaint particularly ask for interest.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by George J. Chambers against the Security Commercial & Savings Bank to recover possession of real property and for rent due. Judgment for the plaintiff for the amount of rent due but without interest thereon, and plaintiff appeals. Order that lower court modify the judgment by adding interest on rent from the dates due.

Crouch & Chambers, of San Diego, and Hunsaker & Britt and Leroy M. Edwards, of Los Angeles, for appellant.

Sweet, Stearns & Forward and Sam Ferry Smith, all of San Diego, for respondent.

JAMES, J. This action was brought to recover possession of certain real property, the prayer being for restitution of the premises and "for the sum of $18,000, treble the rent due," with costs and disbursements, and "all other and proper relief." In the complaint it was alleged that the defendant had failed to pay rental at the rate of $500 per month, as provided in a lease, on the first of each month for the year 1915, amounting in all to the sum of $6,000. A jury was called to find the amount of rent due, and a verdict was

returned fixing that amount as alleged in the complaint at the sum of $6,000; the verdict reciting that sum to be "the total amount of unpaid rent at the rate of five hundred dollars per month for 12 months in the year 1915." Before the entry of judgment, the plaintiff moved for a judgment on the verdict, and asked that the judgment include interest upon the installments of rental from the several dates of default in the payment thereof. The trial court refused to allow interest and entered its judgment only for the sum of $6,000 and the costs which plaintiff had incurred, amounting to $180 additional. There was no judgment for restitution of the premises and no damages provided to be recovered. Plaintiff has appealed from the judgment, specifying as the only objection thereto the failure of the court to include interest upon the rental installments from the dates when they matured.

We think that interest should have been allowed and that it should have been entered as an incident to the main judgment, regardless of the fact that plaintiff did not, in the prayer of his complaint, particularly ask for such allowance to be made. Under section 1174, Code of Civil Procedure, where forfeiture of a lease is declared, in order to be relieved from such forfeiture, the tenant is required to pay "the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs." Furthermore, the question seems to be settled by the provisions of section 3287, Civil Code, which gives the right to interest upon demands which are not unliquidated and which in character, both as to the amount thereof and their due date, are fixed and certain. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811. This case, as it was resolved by the judgment, took the final character of a suit for rent only; hence there appears to be a stronger reason, if any distinction can be drawn, why interest should be allowed, than where the usual judgment for restitution of premises and damages is made. In Mason v. Wolff, 40 Cal. 246, an unlawful detainer suit, the court remarked that, "in a certain sense, the suit is brought upon the lease." The judgment in this case was strictly a judgment upon the lease obligation for the rent due.

It is ordered that the superior court modify the judgment by adding thereto a provision that the plaintiff recover interest on the several installments of rental from the dates on which they became due up to the 10th day of June, 1918, at the rate of 7 per cent. per annum.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 83

WEBBER et al. v. HERBERT et al.

(Civ. 3272.)

(District Court of Appeal, First District, Division 2, California. Feb. 10, 1920. Hearing Denied by Supreme Court April 7, 1920.)

1. VENDOR AND PURCHASER ⊂=187—VENDORS HELD TO HAVE WAIVED PROMPT PAYMENT OF INSTALLMENTS.

Where vendors accepted eight installment payments aggregating in amount $2,000 on account of principal and $720 on account of interest, after purchasers had defaulted in making prompt payment of such installments, and where after particular installment was due vendors demanded payment by purchasers of the taxes, the vendors by their conduct had waived provision of contract making time of its essence, and had no right to refuse tender of installment made subsequent to date on which it was due, and declare a forfeiture for purchasers' failure to make prompt payment.

2. VENDOR AND PURCHASER ⊂=185—VENDORS' ACTION TO QUIET TITLE AFTER FORFEITURE CONTROLLED BY EQUITABLE CONSIDERATIONS.

Vendors' action to quiet title against purchasers, on the ground that purchasers had forfeited their rights under contract, is addressed to the equitable powers of court, and equity has always looked with marked abhorrence upon forfeitures.

3. VENDOR AND PURCHASER ⊂=187—INSISTENCE ON CURRENT CONDITION NOT ALLOWED BY PARTY REPUDIATING CONTRACT FOR PRIOR BREACH.

A party to a contract cannot insist on the performance of current condition, such as the payment of taxes, and thereafter repudiate the contract for a prior breach of which he must have known.

4. VENDOR AND PURCHASER ⊂=187—WHERE PROVISION MAKING TIME OF ESSENCE DISREGARDED, FORFEITURE FOR TRIFLING DELAY IN PAYMENT OF INTEREST NOT PERMITTED.

Vendor cannot for years disregard a provision making time of the essence of a contract little by little, getting half the value of his land, and then, without notice to purchaser who has been lulled to a false sense of security, enforce a forfeiture for a trifling delay in the payment of interest.

5. COSTS ⊂=260(4)—PENALTY FOR FRIVOLOUS APPEAL TAXED AGAINST VENDORS APPEALING FROM JUDGMENT REFUSING TO QUIET TITLE AGAINST PURCHASERS.

Where vendors appealed from judgment refusing to quiet title against purchasers on ground of a forfeiture, with no real foundation for the appeal, and for purpose of delay thereby, for more than three years, deprived purchasers of the beneficial use of the $2,000 they had already paid, vendors will be taxed the sum of $250 as a penalty for a frivolous appeal.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by R. H. Webber and others against Phillip D. Herbert and others. Judgment

for defendants, and plaintiffs appeal. Affirmed.

Geo. S. Hupp, of Los Angeles, for appellants.

Nathan Newby, of Los Angeles, for respondents.

BRITTAIN, J. The plaintiffs appeal on the judgment roll from a judgment in a suit to quiet title to land in Riverside county.

On February 24, 1912, the appellants entered into a contract with the defendants Phillip D. Herbert and Sallie L. Herbert, by which the appellants agreed to sell to the Herberts 80 acres of land for $4,000, payable in 10 annual installments of $400, with interest on deferred payments at the rate of 6 per cent., payable semiannually. The buyers were also bound to pay all taxes and assessments. The contract in terms provided for assignment by either of the two parties. It contained a clause making time of the essence of the contract, and providing for forfeiture of all prior payments upon any default.

The buyers assigned to John S. Webb an undivided interest in the land, and this fact was communicated to the sellers in February, 1915, when the sellers promised to notify Webb of any default on the part of the Herberts. An installment of $108 for interest became due in August, 1912, and was paid to the sellers and accepted by them two months later. Between that payment and an installment of $60 for interest which became due on August 24, 1916, there were eight payments accepted by the sellers after their respective due dates. The $60 was sent to the sellers and returned by them on October 7, 1916. At that time, apparently, the only default was the payment of the $60 on August 24. Under the terms of the contract, the buyers theretofore must have paid $2,000 on account of the principal and $720 on account of interest. The $60 was returned in reliance on the term of the contract making time of its essence. No notice was given to Webb of the default, and, notwithstanding the frequent delays in payments of from one or two days to more than two months, the sellers gave the buyers no warning that in the event of delay in the payment of either of the particular installment of interest or of all future payments the forfeiture of all prior payments would be enforced. The default, even though the provision of the contract making time of its essence had not been waived, must have been at the date when the payment became due. After that date, in reliance on the term of the contract binding the buyers to pay taxes, the sellers demanded of Webb that he pay the taxes for the year 1916–17. This he did. The defendants thereafter offered to pay the $60, and after suit brought tendered the amount of principal and interest which became due under the contract in February, 1917. The suit was commenced on October 20, 1916, a few days after the plaintiffs' demand on Webb for the payment of taxes.

[1] Upon findings from which the facts which have been stated appear, the trial court very properly concluded that the plaintiffs by their conduct had waived the provision of the contract making time of its essence, that they are the owners of the legal title to the land subject to the rights of the defendants under the contract, which is in full force, and that the defendants recover their costs, and judgment was entered.

[2-4] Such a suit is addressed to the equitable powers of the court. Equity has always looked with marked abhorrence upon forfeitures, and it has been said many times that any unquestioned evidence of sharp practices and over-reaching is sufficient to defeat a complainant in equity who has been guilty of such practices. Neither serious consideration nor citation of authority is necessary to support the conclusion that no party to a contract can insist on the performance of a current condition, such as the payment of taxes, and thereafter repudiate the contract for a prior breach of which he must have known. A court of equity does not permit parties who seek its aid thus to blow hot and cold. Neither may a seller for years disregard a provision making time of the essence of a contract, little by little getting half the value of his land, and then, without notice to the buyer who has been lulled to a false sense of security, enforce a forfeiture for a trifling delay in the payment of interest. Farley v. Vaughn, 11 Cal. 227; Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432; Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751; American-Hawaiian, etc., Co. v. Butler, 165 Cal. 519, 133 Pac. 280, Ann. Cas. 1916C, 44; Myers v. Williams, 173 Cal. 301, 159 Pac. 982; Newell v. E. B. & A. L. Stone Co., 184 Pac. 659; Bayside Land Co. v. Phillips, 184 Pac. 951.

[5] Notwithstanding the well-established rules of law governing such cases as this, by the pendency of this litigation the defendants since October 20, 1916, have been in a position where they could not deal with their property rights, for no one wants to buy even a good lawsuit. The judgment was entered more than a year and a half ago. The appeal is without real foundation and appears to have been taken only for delay. During the time the suit has been pending the respondents have lost the beneficial use of the $2,000 they have already paid.

The judgment is affirmed, and it is ordered that the respondents recover of the appellants the sum of $250 as a penalty for the frivolous appeal.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 43

SOUTHERN CALIFORNIA OIL SYNDICATE OF LONDON, ENGLAND, v. LOMPOC PRODUCE & REAL ESTATE CO.

(Civ. 2679.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

LANDLORD AND TENANT ⚖248(2) — LANDLORD'S CONTRACT WITH TENANT'S CREDITOR, WHO ADVANCED RENT, CONSTRUED.

Where landlord, to secure continuation of tenancy, made contract with tenant's creditor, whereby creditor, in consideration of landlord's agreement not to terminate tenancy for default in payment of rent, advanced certain sum toward payment of rent to constitute, together with other advances to certain amount, a lien on the crops, and whereby, after payment thereof, proceeds of crop should be applied to tenant's indebtedness to landlord, creditor, after reimbursement from proceeds of specified amount, was not entitled to recover therefrom advances made necessary for caring for the crop; the landlord being first entitled to indebtedness due it.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Southern California Oil Syndicate of London, England, against the Lompoc Produce & Real Estate Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. Kelley Hardenbrook, of Lompoc, and Wm. G. Griffith, of Santa Barbara, for appellant.

Richards & Heaney, of Santa Barbara, and J. F. Frick, of Lompoc, for respondent.

JAMES, J. This appeal is taken by the defendant from a judgment entered by the trial court, granting the relief to secure which the action was brought. In November, 1914, plaintiff was the owner of certain land, which had theretofore been and was at the time being held by one Tashiro as tenant. Tashiro was, at the time, indebted to the owner of the land for rental which had accrued under the terms of the lease. The tenant had also had business relations with the defendant produce company, which latter had handled crops grown by him. Tashiro, being unable to make payment of the amount due to the plaintiff from his own resources, interested the defendant to the extent that in consideration of the making of the contract hereinafter referred to, he was allowed to continue in the tenancy. The contract referred to was reduced to writing, and signed by the plaintiff and the defendant, plaintiff being the first party and defendant the second party, and contained the following terms:

"Whereas, S. Tashiro is the tenant in possession of certain land belonging to the party of the first part; and whereas, the party of the second part has this day advanced to said Tashiro the sum of $550, which has been paid to the party of the first part to apply on the rent for the year ending October 31, 1915; and whereas, the said Tashiro is indebted to the party of the first part in the sum of $1,650 on account of the balance of said rent due or to become due, and is also indebted to the party of the second part in certain sums, and has given to the party of the second part a mortgage of all crops to be grown on the above-mentioned premises during the ensuing year as security for said last-mentioned indebtedness and advances:

"Now, therefore, it is hereby agreed that the party of the second part shall have a first lien upon said crop under its mortgage for the sum of $550 this day advanced to be applied on the rent, and also for all further sums which the said party of the second part shall advance to said Tashiro after this date, said further advances not to exceed in all the sum of seven hundred ($700) dollars.

"It is further agreed that, after taking out of the proceeds of said crop the amount of said $550 and said advances, the said proceeds shall be applied upon the balance due the party of the first part as rental, and the party of the first part expressly agrees that said tenant shall not be held in default for nonpayment of rent until said crop shall have been harvested. After said rent shall have been paid, the balance of the proceeds of said crop shall be applied in payment of any indebtedness due from said Tashiro to the party of the second part."

The crops grown during the year 1915 were harvested and received by the defendant, and there was credited upon the books of the defendant the sum of $2,823.29 as the price thereof. Meanwhile the full amount of $550 and $700, covered by the agreement as advances to be made to the tenant by defendant, had been so advanced to Tashiro. The defendant, however, refused to account to the plaintiff for any part of the crop price, claiming that further advances and expenditures had been made in order to protect the crops of Tashiro, which advances and expenditures more than equaled the difference between the $550, plus the $700, and the amount credited as the price of the crop. Defendant, in its answer, made the following allegations:

"That on said 19th day of May, 1915, said premises had been planted to beans, which were growing thereon, and in order to properly tend and care for said crop of beans it then became and was necessary to expend considerable sums of money for labor, machinery, and supplies. That on said last-mentioned date said Tashiro was without funds or credit to enable him to properly tend and care for said crop, and said Tashiro did then and there refuse and fail to tend, take care of, and protect said crop well, or carefully, or at all, and said crop, by reason thereof, was in danger of becoming damaged and destroyed, so that neither plaintiff nor defendant might obtain any money or benefit from the proceeds thereof. That thereafter defend-

ant gave notice to plaintiff that the sum of $700 advanced to said Tashiro as aforesaid had been expended, and that in order to tend, care for, and harvest said crop it would be necessary to expend further sums therefor, which the said Tashiro was unable to provide, and defendant demanded of plaintiff that plaintiff advance such necessary sums or permit defendant to do so, and first deduct the same from the money received from the sale of said crop; but that plaintiff failed and refused to advance any sums whatever to be used in the protection, caring for and harvesting of said crop. That on the 31st day of July, 1915, the defendant, pursuant to the terms of said crop mortgage, and for the purpose of protecting the interests of defendant and plaintiff in said crops, entered upon the said premises and took possession thereof and of the crops growing thereon; and thereafter defendant took all necessary measures for the protection of said crops, harvested, threshed and sacked the same, and delivered them into a warehouse."

At the trial the treasurer of defendant company testified that, after the crops were harvested, a credit of $2,823.29 was given to Tashiro on the books of the defendant, and in this connection he further testified:

"Q. Was that a credit, Mr. Kahn, or was it a sale of the crop of Mr. Tashiro? A. It was a credit. The beans were in our possession at all times. A credit was made upon a sale to us. We bought that produce from Tashiro at that price."

On behalf of the defendant the same witness was asked as to whether his company had paid out additional money in raising, cultivating, and harvesting the crops during the summer of 1915, and as to what the condition of the crops was in May, 1915, and as to what measures were taken by the defendant to protect the crops, if any, and whether it became necessary for the defendant to expend money for the protection of the crops during the summer of 1915, and whether the defendant entered into the possession of the premises and took possession of the crops during that summer. All of these questions were objected to, and the objections sustained.

The main contention presented by this appeal involves the rulings of the court in sustaining objections to these questions. The evident theory of the defendant was that, notwithstanding the express and particular terms of the contract, entered into between defendant and the plaintiff, limiting the advances to be made to the two sums of $550 and $700, it was entitled to show other advances made for the purpose of protecting the crops for the mutual benefit of plaintiff and defendant. We think the court did not err in its rulings. The contract was quite plainly made with the intention of assuring the plaintiff that it would receive payment of the rental due it from Tashiro, provided the crop brought a sum of money in the market over and above the amounts specifically fixed as the maximum which the defendant was entitled to charge against the sale price. By the allegations of the answer it appears that the advances fixed by the contract were not sufficient, for the defendant states therein that "said Tashiro was without funds or credit to enable him to properly tend and care for said crop." Without a further agreement—and it appears there was none—covering that matter, we do not think that the defendant was entitled to expend further sums, even for the protection of the crops, and charge that expenditure against the sale price obtained, and so deprive the plaintiff of any right to participate in the proceeds. We must assume that it was to defendant's interest to secure a continuation of the tenancy of Tashiro, and it was by reason of the consideration expressed in the written contract that the plaintiff allowed the lessee to continue to crop the ground. The trial judge allowed offsets against the sale price of the crop for the $700 and $550 advanced by the defendant, and gave judgment in favor of the plaintiff for the rental due to it. In our opinion, the judgment was right.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 74

S. R. FRAZEE CO. v. ARNOLD et al.

(Civ. 3192.)

(District Court of Appeal, First District, Division 1, California. Feb. 9, 1920.)

1. MECHANICS' LIENS ⊂=313 — IF OWNER WOULD ESCAPE LIABILITY, HE MUST REQUIRE GOOD BOND FROM CONTRACTOR.

Under Code Civ. Proc. § 1183, providing that if the original contract is filed for record together with a bond of the contractor with sufficient sureties in an amount not less than 50 per cent. of the contract price, which bond by its terms inures to the benefit of laborers and materialmen, then the court must when equitable restrict recovery under liens to an aggregate amount equal to the amount found due the contractor, an owner desiring to restrict liability must require a bond which would continue good at least till expiration of the period during which laborers and materialmen can avail themselves of the benefit afforded by the bond.

2. MECHANICS' LIENS ⊂=313—SURETIES ON CONTRACTOR'S BOND REQUIRED BY OWNER HELD INSUFFICIENT.

Where the owner accepted contractor's bond, which was signed by the contractor's son and wife, and the son was worth less than $100, the wife's only property being a homestead on which she filed declaration, after execution of the bond the sureties on the bond must be deemed insufficient.

3. MECHANICS' LIENS ⟸304(1) — WHERE SURETIES ON CONTRACTOR'S BOND INSUFFICIENT, JUDGMENT AGAINST OWNER PROPER.

Where the sureties on contractor's bond taken pursuant to Code Civ. Proc. § 1183, providing that, where the contract shall be recorded and the owner shall require a bond with good and sufficient sureties for not less than the one-half the contract price, the court must when equitable restrict mechanics and laborers to the amount due the contractor, were wholly insufficient, the court properly allowed mechanics' lien claimant to recover against the property although there was nothing due from the owner to the contractor.

4. MECHANICS' LIENS ⟸157(4)—CHARGE FOR BRUSHES FURNISHED CONTRACTOR HELD ILLEGAL.

Where brushes furnished contractor were not used and there was nothing in the contract requiring the contractor who was to paint building to use brushes, a charge therefor in plaintiff's demand was an illegal charge.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the S. R. Frazee Company against R. H. Arnold and others for foreclosure of a mechanic's lien. From judgment of foreclosure, the named defendant appeals. Modified and affirmed.

Ralph E. Homann, of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

KNIGHT, Judge pro tem. This is an appeal from a judgment of foreclosure of a materialman's lien for materials furnished in the construction of certain apartment houses owned by the defendant and appellant, Arnold.

The defendant Joe Goetz, on January 7, 1916, contracted to perform the labor and furnish the materials for painting and papering said apartment houses for the sum of $2,930. The contract was in writing and was duly filed for record, together with a bond furnished by the contractor pursuant to section 1183 of the Code of Civil Procedure in the sum of $1,465, which said bond by its terms inured to the benefit of laborers and materialmen. On March 16, 1916, after Goetz, the contractor, had been paid $1,430, he abandoned the contract, and the owner, Arnold, necessarily expended the additional sums of $1,363.30 for labor and $215.42 for materials in completing the job, thereby making the total cost of the work and materials covered by the Goetz contract $3,008.72, excluding plaintiff's demand for $833.66.

Judgment was rendered against the contractor and his sureties for the amount of plaintiff's demand, and a foreclosure of the lien was decreed against the property. The owner of the property, Arnold, appeals.

Appellant contends, first, that having required the contractor, under section 1183 of the Code of Civil Procedure, to furnish and file a bond in the requisite amount, the terms of which inured to the benefit of laborers and materialmen, a recovery against him as owner should have been restricted to the amount found to be due from the owner to the contractor, and a judgment rendered against him as contractor and his sureties for the deficiency. Nothing was found to be due from the owner to the contractor, and therefore appellant claims that his property is not liable for any part of plaintiff's demand.

By section 1183 of the Code of Civil Procedure, among other things, it is provided that if the original contract is filed for record, together with a bond of the contractor "with good and sufficient sureties," in an amount not less than 50 per cent. of the contract price, which bond by its terms inures to the benefit of laborers and materialmen, "then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render a judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both."

Said section further provides:

"It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided."

The trial court found that said owner in good faith caused the contractor to furnish a bond for the required amount, but further found that the sureties on said bond were insufficient. Said sureties were, respectively, the son and the wife of the contractor. The evidence shows without conflict that the contractor's son was worth financially not more than $71, and that the only property possessed by the contractor's wife at the time she executed the bond or afterward was their home place where they were then living, claimed by her as community property, of the value of $3,000, subject to a mortgage of $800, and the evidence further shows without conflict that in March, 1916, the same month the contract was abandoned, a homestead was declared and filed on said property by the contractor's wife.

Appellant contends that since the property of Mrs. Goetz at the time she executed the bond had a net value of $2,200, which was

$735 in excess of the amount of the bond on which she qualified, her subsequent act in declaring a homestead upon the property did not have the retroactive effect of rendering her an insufficient surety at the time the bond was executed. In other words, appellant argues that so far as the property owner's liability is concerned under said section 1183, if he acts in good faith in requiring the contractor to file a bond, "the sureties should not be judged as of the time of the execution of the bond."

[1-3] We are satisfied that the finding of the court in holding that the sureties on the bond were insufficient was justified by the facts shown by the evidence and by the law as embodied in said section 1183. The bond mentioned is required to be furnished for the express purpose of protecting laborers and materialmen. The necessity of duty, therefore, devolved upon the owner to require a bond that would continue good at least until the period had expired during which said laborers and materialmen could avail themselves of the benefit afforded by said bond, and this not alone for the protection of the laborers and materialmen, but also for his own protection in the matter of the limitation of the recovery which might be had against him. Here the contractor was shown to be insolvent at all times. His son was wholly unqualified as a surety at any time, and his wife possessed only such property as she might reasonably be expected to preserve inviolate against her husband's obligations if such necessity should arise. It was therefore entirely within the discretionary power of the court, granted it under said section 1183, to hold that under the circumstances above mentioned it would not be equitable to restrict the recovery against the owner to the amount of the contract price.

[4] Appellant's next contention is that plaintiff's demand contained materials not called for by the specifications. We have examined the evidence on this point and find no merit in appellant's contention, except as to certain paint brushes. The evidence shows that the materials objected to were materials in fact called for by the specifications, but which were designated and furnished under a different name, or else they consisted of materials which were necessary to be used in connection with and as a part of the specified materials. All of such materials were actually used and consumed in the performance of the contract by the contractor. The paint brushes, however, which were of the value of $31.26, were not called for by the specifications, nor were they consumed in the performance of the contract. They were left on the premises after the contract was abandoned, and counsel for respondent stipulated during the trial that the specifications did not "specifically require the contractor to use brushes." In view of this stipulation, and in view of the further fact that the brushes were not consumed in the performance of the contract, the value of the same was an illegal charge against the owner.

Appellant's final point is that plaintiff charged appellant for said materials more than the price agreed upon between plaintiff and the contractor. There is no evidence, however, to support such claim, and in the absence of such showing we are not disposed to disturb the finding of the trial court.

It is directed that the judgment be modified by striking therefrom the reasonable value of the paint brushes, to wit, $31.26, and as thus modified the judgment will stand affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 51

HARPOLD v. SLOCUM et al. (Civ. 2740.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

NOVATION ⊂=4—NOTE GIVEN BY TRUSTEE OF PROPERTY HELD TO WORK NOVATION.

Where three persons interested in a garage exchanged the same for other property, title being taken in the name of one of them, and on request for settlement by plaintiff who owned the largest interest the trustee executed a note in plaintiff's favor of an amount equal to plaintiff's interest as computed, *held* that where plaintiff, though he did not surrender the contract providing for disposition of the proceeds by the trustee, considered that he received the note in payment, a novation was worked, particularly where the trustee disposed of the property, but failed to account, and on trial would not give information as to disposition of the proceeds.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by C. Harpold against Thos. A. Slocum and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 168 Cal. 364, 143 Pac. 609.

James R. Jaffray, of Los Angeles, for appellants.

Andrews, Toland & Andrews, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff upon a promissory note alleged to have been executed by the defendants. The note was set out in full in the complaint and its execution was not denied by the defendants, except that it was affirmatively alleged in the answer that the note was given in connection with a

separate contract as security only to the plaintiff that the defendants, parties to the alleged separate contract, would perform the obligations imposed upon them thereunder. This alleged separate contract was made on the 2d day of December, 1909, and the note on November 28, 1910. In so far as the facts relating to the transaction were agreed to, they show: That prior to December 2, 1909, plaintiff and the defendants had jointly owned a garage in a California town. In addition to his interest in the garage business, the plaintiff held a mortgage upon the building in which the business was being done to secure payment to him of the sum of $1,000. It being mutually agreeable to all, an exchange was effected by trading the garage property for a house and lot in the city of Los Angeles, title to which was taken in the name of defendant Thomas A. Slocum. Thereupon an agreement was signed by the three, which in its material parts provided as follows:

"That all three of the parties are the owners of a certain house and lot, on Twenty-Fifth street near San Pedro, for which they have traded the garage in Santa Paula, on which building C. Harpold owned a mortgage for one thousand (1,000) dollars; therefore be it understood and agreed between all parties hereto, that as consideration for surrendering the mortgage, aforesaid, the said C. Harpold shall receive as an interest in such property, or out of any money received for the sale of the aforesaid house and lot, or any trade that is made on or with said property as a basis, the first thousand (1,000) dollars after which all the remainder shall be divided among the several parties hereto in equal parts. It is understood and agreed among the three parties to this agreement that for convenience in handling the deed shall be made out in the name of Thos. A. Slocum, though the ownership shall be held in all three in the ratio aforesaid and that the said Thos. A. Slocum shall act as trustee."

It has been noted that the promissory note was made in November, 1910, almost a year after the exchange of properties was effected and the contract referred to executed. At this point the contentions of the plaintiff and defendants and the testimony as to the facts concerning the execution of the note are divergent. Plaintiff testified as follows:

"At the instance of Tom Slocum we traded the garage for the property in Los Angeles. This contract we have been talking about was made at the time we traded for the Los Angeles property. The understanding according to the contract, based on our dealings at Santa Paula, was, Slocum wanted a power of attorney, or whatever you call it. He wanted to sell the property or do something with it, and that is the reason they gave me that contract—so when the property was sold I was to have the first $1,000, and the rest of it was to be divided up in three equal shares between the three of us. That is the property referred to as being on Twenty-Fifth street near San Pedro. Well, it must have been something like a year after that I had been down in Nevada and was going back. I stopped at their office, and they made the proposition they would give me $1,750 for my part and leave them the rest of it; that they would give me a note for $1,750, payable in one year. They said they thought by that time they could dispose of the property. I told them that was satisfactory to me. They didn't say anything about the contract then that we had before. I supposed, when I got the note, that was the last of it; that everything belonged to them."

On cross-examination the plaintiff was asked whether he still retained the original contract, and he said that he thought he had it. Asked whether he was willing to turn it over, he said he didn't think he was. When asked why he didn't give up the contract when they gave the note, he said:

"They didn't ask me for it. I didn't suppose it was any good after I got the note. I supposed everything was canceled. Q. Will you now give it up? A. Under one consideration. Q. What is that consideration? A. Pay the note and interest."

Defendant Thomas A. Slocum testified that the occasion for the giving of the note was that Harpold was dissatisfied with the condition of affairs and "wanted something tangible, I suppose." He further testified:

"Q. How did that note come to be made in the sum of $1,750? A. That is what we figured that the third—Mr. Harpold was entitled to $1,000 out of everything we made, and the $750 was what I considered the property would bring, that is three times $750, after deducting the mortgage of $3,200 and this $1,000. Mr. Harpold spent more than that. We all did. The building at Santa Paula cost us something like $1,200 to $1,500, * * * and besides that Mr. Harpold must have put in about $400 cash into this house, as well as my brother and myself."

When asked what had become of the house and lot in Los Angeles, Thomas A. Slocum admitted that he had disposed of it. The record shows that the following then occurred:

"Q. What has it been turned into? A. It has been turned into other properties. Q. What are the properties? (No answer.) Q. What is the answer? A. I have not given any yet. I was trying to decide where the properties were. That is something that would have to be worked out in detail. Q. You ought to know where it is, hadn't you? A. I suppose so. Q. Now, where is it? A. Well, it is not in tangible form right now. Q. What form is it in? A. In undivided interests that would have to be figured out. I am not ready to give a statement to-day on it."

It is clear beyond question that there was ample evidence upon which to base a finding that the promissory note had been given in extinguishment of any right that the plaintiff had to the proceeds to be derived from the sale of the house and lot in Los Angeles. Not only was the plaintiff's testimony positive to this point, but there was the further

persuasive circumstance that the promissory note was not made simultaneously with the contract, but was dated nearly a year thereafter. Practically the whole contention of counsel for appellant is that because the plaintiff had not delivered up the copy of the contract of date December, 1909, and because he expressed himself as unwilling at the trial to so deliver it up, it could not be said that he had ever legally accepted the note obligation of the defendant in lieu of his right to share in the proceeds of the sale of the house and lot. While it does appear as a fact that Thomas A. Slocum was to hold the property as trustee, it also appears that he had power to dispose of the same, and would be chargeable to account only for the share of the proceeds to the plaintiff and the other Slocum. Under such circumstances, we think that the novation worked by the acceptance of the promissory note operated to cancel any interest of the plaintiff in the property or the proceeds therefrom, and that the fact that the plaintiff may have retained in his possession his copy of the original contract was not evidence of a lack of consummation of the agreement effected by the note transaction. The plaintiff himself looked to the obligation of the defendants upon the note alone, and by his acceptance of the note and his acts with relation thereto he would be conclusively estopped from claiming that the earlier contractual obligations assumed still survived. He himself testified:

"I supposed, when I got the note, that was the last of it, that everything belonged to them."

Thomas A. Slocum, the only one of the defendants who testified, admitted that he had disposed of the house and lot; had never made any accounting therefor to the plaintiff, and, surprising as it may appear, was unable to tell the court what property he had gotten in exchange for the house and lot, contenting himself generally with the statement that "it is not in tangible form right now." We are scarcely able to see how a trial court would have justified a judgment different from that entered in the case.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 558

VERDIER v. STOLL. (Civ. 2496.)

(District Court of Appeal, Second District, Division 1, California. Jan. 26, 1920.)

1. APPEAL AND ERROR ⟸110—APPEAL FROM DENIAL OF NEW TRIAL DISMISSED.

There being no right of appeal from order denying motion for new trial, such an appeal will be dismissed.

2. SALES ⟸24—ONE TAKING UNDER OPTION, THOUGH AFTER TIME LIMITED, LIABLE FOR THE PRICE.

Even if a contract was an option to defendant to buy horses, and he did not take possession till the day after the time limited, he in accepting the horses took under the contract and subject to the obligation to pay the price therein named.

3. COSTS ⟸260(1)—DAMAGES AWARDED FOR APPEAL FOR DELAY.

There appearing to have been no reason for the appeal other than for delay, damages will be awarded.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Marie Verdier against V. J. Stoll. From a judgment for plaintiff and an order denying new trial, defendant appeals. Appeal from order dismissed, and judgment affirmed.

See, also, 36 Cal. App. 573, 172 Pac. 1127.

R. J. Hudson, of Woodland, for appellant.

Alfred Siemon, of Bakersfield, for respondent.

CONREY, P. J. [1] Defendant appeals from the judgment and has also attempted to appeal from an order denying his motion for a new trial. There being no right of appeal from such an order, the appeal from the order denying the motion for a new trial is dismissed.

[2] By a contract in writing signed by one J. B. Estribou, it was stipulated that he agreed to sell and did thereby sell to defendant certain horses described in the contract. Five dollars in cash was paid at the signing of the contract, and the remaining $765 was to be paid within five days from date of the contract. Estribou assigned the contract to one O. S. Dormitzer, who assigned to the plaintiff. Appellant claims that the contract as written was only an option and that therefore an action cannot be maintained against him for the contract price. But the evidence shows that defendant took possession of the horses, which never were returned to the plaintiff or to either of her assignors. Assuming, as claimed by appellant, that he did not take possession of the horses until the day following the expiration of the five days named in the contract, there is no escape from the conclusion that in accepting the property he took it under that contract and subject to the obligation to pay the consideration therein named. Counsel for appellant admits that if plaintiff proved the allegations of her amended complaint the judgment was correct. He has failed to convince us that any of said allegations were not proved.

[3] There appears to have been no reason for this appeal other than that it was made for delay.

For that reason the judgment is affirmed,

and it is further ordered that the plaintiff recover from the defendant the additional sum of $50 damages.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 35

LOS ANGELES HUMANE SOC. v. ADLER et al. (Civ. 3143.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. PLEADING ⊂=17—MATTERS OF SUBSTANCE MUST BE ALLEGED IN DIRECT TERMS.

Matters of substance in a complaint must be alleged in direct terms, and not by way of recital or reference, and much less by exhibits merely attached to the pleading.

2. GUARANTY ⊂=85(1)—COMPLAINT HELD INSUFFICIENT IN NOT ALLEGING EXECUTION OF GUARANTY.

In an action on a note signed by one of the defendants, on the back of which appeared a recital that appellant, another defendant, guaranteed one-half of the amount, the complaint is defective where it did not specifically allege appellant's execution of the guaranty, for that matter could not be inferred from the note which was attached as an exhibit.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Los Angeles Humane Society (for Children), a corporation, against M. C. Adler, Emma S. Brusch, and others. From a judgment for plaintiff, defendant Adler appeals. Reversed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

William Lewis, of Los Angeles, for respondent.

JAMES, J. Appeal by defendant Adler from a judgment entered against him for money after he had suffered default to be taken. The action was brought to enforce payment of a promissory note executed by defendant Brusch, which note was secured by mortgage upon real property of the said Brusch. That portion of the complaint referring to the execution of the note reads as follows:

"That on the 14th day of February, 1912, at Los Angeles county, in the state of California, defendant Emma C. Brusch, a widow, made, executed and delivered to the Los Angeles Humane Society (for Children) her promissory note for the principal sum of $1,100.00 in words and figures as follows, to wit:

"Note Secured by Mortgage.

"$1,100.00. Los Angeles, Cal., February 14, 1912.

"Three years after date for value received, I promise to pay to the Los Angeles Humane Society (for Children), or order at the city of Los Angeles, state of California, the sum of eleven hundred ($1,100.00) dollars, with interest from date until paid, at the rate of six (6%) per cent. per annum, payable quarterly. Should the interest not be so paid it shall become part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a mortgage upon real property.

"Emma C. Brusch."

Indorsed on back:

"We hereby guarantee the payment of the within sum; I for one-half thereof, viz, $550.00 and interest thereon.

"Elmar R. McDowal.

"And I for one-half thereof, mainly $550.00 and interest thereon.

"M. C. Adler."

The further allegation referred to the mortgage having been executed by Brusch and the mortgage was attached as an exhibit to the complaint. In the prayer of the complaint, judgment against this appellant was asked for such proportion of the deficiency that might result upon the sale of the property as appellant had contracted to be responsible for.

[1, 2] The principal point made upon this appeal is that the complaint failed to state a cause of action against appellant, and with this contention we agree. No allegation is contained in the complaint to the effect that Adler executed the guarantee attached to the note, and without such an allegation the complaint was insufficient to show any obligation assumed by appellant.

"Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 49 Pac. 573; Estate of Cook, 137 Cal. 184, 69 Pac. 968; San Francisco Sulphur Co. v. Ætna Indemnity Co., 7 Cal. App. 98, 93 Pac. 888.

The further point is made that the judgment was entered without foreclosure sale of the property of the defendant Brusch, which action the court was unauthorized to take. It appears from the recitals in the judgment that the court determined that the security had been exhausted by reason of a prior mortgage claim held by one of the defendants in this action, in consequence of which no decree of foreclosure was made in this action. This determination of the court was based upon a stipulation as to facts entered

into between the plaintiff and such prior mortgagee. The conclusion already expressed, that the complaint failed to state a cause of action against this appellant, makes it unnecessary, we think, to enter upon a discussion as to whether, in the absence of an allegation made in the complaint as to the insufficiency of the security, the court was authorized to accept the stipulation and therefrom determine that no decree of foreclosure should be entered. The first point made and here considered goes to the very foundation of the right of the plaintiff to any judgment against appellant.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 98

HYMAN et al. v. HARBOR VIEW LAND CO.

(Civ. 2065.)

(District Court of Appeal, Third District, California. Feb. 12, 1920. Rehearing Denied March 13, 1920.)

1. VENDOR AND PURCHASER ⟸335—VENDOR ENTITLED UPON DEFAULT TO RETAIN PAYMENTS MADE.

Vendor in a contract of sale of land, under which time is of the essence of the contract, upon default of the vendee in payments of installment without legal excuse, is entitled to retain the moneys that have been paid thereon.

2. FRAUD ⟸59(2) — DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUE MEASURE OF DAMAGES.

Measure of damages which a vendee of land is ordinarily entitled to recover in an action against his vendor for deceit is the difference between the actual value of the property and its value had the property been as represented, and the measure of recovery is not affected by the price paid.

3. FRAUD ⟸47—VENDEE MUST ALLEGE ABILITY AND WILLINGNESS TO PERFORM.

In a vendee's action against vendor for deceit, where the contract is executory, the plaintiff must allege his ability and willingness to perform the contract.

4. VENDOR AND PURCHASER ⟸117—VENDEE CANNOT RETAIN POSSESSION AND REFUSE PAYMENT.

A party in possession of land on an executory contract to purchase it cannot while retaining possession refuse, because of fraud, to make the payments provided by his contract.

5. VENDOR AND PURCHASER ⟸334(4)—NOTICE BY VENDOR THAT HE "RESCINDED" HELD NOT TECHNICAL RESCISSION ENTITLING VENDEE TO RETURN OF PAYMENTS.

A notice by a vendor under an executory contract of sale of land that he elected to "rescind" because of nonpayment of installments due *held* not to be construed to mean a technical rescission as defined by the Civil Code such as would entitle the vendee to a return of installments paid, when considered together with correspondence between the parties and the contract of sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rescind.]

6. VENDOR AND PURCHASER ⟸335—VENDEE AFTER CANCELLATION BY VENDOR CANNOT RESCIND FOR FRAUD AND RECOVER PAYMENTS.

A vendee, under executory contract of sale of land, who retained possession and refused to pay certain installments because of fraudulent representations made at the time of the sale, cannot, after the vendor has elected to cancel under the contract, move from the premises and give notice of rescission so as to become entitled to a return of installments paid; there being no mutual rescission.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. G. Hyman and another against the Harbor View Land Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Goodwin & Morgrage, of Los Angeles, for appellant.

Richard Goodspeed, of Los Angeles, for respondents.

ELLISON, Presiding Justice pro tem. This action was brought to recover from the corporation defendant moneys paid by plaintiffs on a contract for the purchase of a residence lot, with the buildings and improvements thereon, situate in Los Angeles. The plaintiffs had judgment, and the defendant appeals therefrom.

On the 1st day of November, 1913, the defendant, as party of the first part, entered into a written agreement with the plaintiffs, as parties of the second part, whereby said party of the first part agreed that upon the performance of the covenants to be kept by the plaintiffs it would convey to them the lot and premises described therein. The plaintiffs were to pay for the said property the sum of $3,250, with interest on deferred payments at the rate of 7 per cent. per annum. Payments were to be made, as follows: $150 upon the execution of the agreement, and $30 per month on the 1st day of each and every month thereafter until the full purchase price was paid. Said $30 per month was to include interest, taxes, and insurance. The agreement contained this clause:

"It is further agreed that time is of the essence of this agreement, and if the second parties shall fail and make default in any of the payments by the second parties hereinafter promised to be made as the same may mature or become due, then this contract may be rescinded at the option of the party of the first part, and the first party shall thereupon be released from all obligations in law or equity to convey, or cause to be conveyed said property, and the second parties shall forfeit all right

thereto, and all moneys paid to the first party be forfeited and retained by it as rent and agreed liquidated damages."

Plaintiffs paid the $150 agreed to be paid on the execution of the agreement, and made the agreed monthly payments of $30 per month to March 23, 1915. On the 17th day of March, 1915, the defendant, at the request of plaintiffs, reduced the monthly payments to be made from $30 per month to $20. After this reduction the plaintiffs were dilatory in paying the $20 per month, as agreed, and by letter were often reminded of the delay. On December 28, 1915, the plaintiffs had defaulted in making the payment of November 1st of $20 and of December 1st of $20, and taxes agreed by them to be paid in the amount of $9.53, making in all a total of $49.53. Prior thereto, and on the 9th day of December, the defendant had addressed a letter to the plaintiffs from which we quote:

"We have to call your attention to the fact that you are now two months in arrears in the payments of your contract. In view of the fact that some time ago we reduced the monthly payments for you, we think you should make payments promptly. We cannot continue the contract in its present condition, and we will ask you to send us the two monthly payments. We also call your attention to the fact that the taxes are now past due, and we will ask you to be good enough to give this matter your attention by return mail."

On December 13th the defendant wrote to the plaintiffs again:

"We addressed you last Thursday calling attention to the condition of your contract. We should have had an answer from you on Saturday. Up to the present time we have not heard from you, and we have to call your attention to the fact that you are two months in arrears on the payments and that this condition cannot be allowed to continue. Unless you take the necessary steps to meet these obligations we will have to protect our interest in the property by appropriate measures."

Again, on December 21st the defendant wrote to the plaintiffs. In this letter, after calling attention to the clause in the contract hereinbefore set out in full, making time the essence thereof, and so forth, the letter proceeded:

"On December 9th we addressed a communication to you, calling your attention to the fact that you were at the time two months in arrears in your payments, and, also, that you had failed to pay the taxes, as provided in the contract. To this communication we received no reply. We then on December 13th addressed you again, calling your attention to the fact that you had failed to reply to the previous communication, and advised you unless we did hear from you we would take the necessary steps to protect our interest in the property. To this communication we received no reply. We therefore beg to advise you that, in view of the fact that you are in arrears in the payments on your contract, and also failed to pay the taxes, as provided, that unless by Monday, December 27th, 1915, you make the payments now past due, and also pay the taxes, we will, in accordance with the rights we have in the above mentioned contract, terminate it, and cancel it, and, as provided in the contract, your payments will be forfeited, and you will cease to have any rights in the property, or any rights whatever."

Not having received any communication from the plaintiffs, the defendant, on December 28th, served upon the plaintiffs the following notice:

"Notice is hereby given that the contract between you and the Harbor View Land Company, dated the 1st day of November, 1913, for the purchase and sale of lot 13, block 8, tract 2085, as per map recorded in Book 21, page 168, of Miscellaneous Records of Los Angeles County, in the office of the county recorder of said county, as modified by our letter to you dated March 19, 1915, is hereby rescinded for breach of conditions contained in said contract on your part, to wit, for failure to make the following particular payments: November 1, 1915, $20.00; December 1, 1915, $20.00; one-half of 1915–1916 taxes, $9.53. * * * $49.53. Immediate possession of said premises is hereby demanded."

On January 8, 1916, the defendant brought an action in the superior court of Los Angeles county to quiet title as against the plaintiffs to the lot in question. To this complaint the plaintiffs filed an answer and also a cross-complaint. In the cross-complaint they alleged the same matters and also the fraudulent misrepresentation as are in the complaint in this action, to which reference will be made later, and prayed for a judgment for the return to them of the moneys they had paid upon the contract. To this cross-complaint the defendant filed an answer, and the cause came on regularly for trial, whereupon the court excluded, upon objection of the plaintiff therein, all evidence offered in support of the cross-complaint therein, upon the ground, as stated, that the cross-complaint could not be tried in said action. Thereafter, judgment was entered in said action in favor of the plaintiff (defendant herein), quieting plaintiff's title to the property in dispute, and enjoining the defendants from ever asserting any claim thereto.

On February 15, 1916, the plaintiffs in this action served upon the defendant a notice, as follows:

"You will please take notice that we hereby elect to rescind our contract with you, bearing date November 1, 1913, regarding the purchase of lot 13, in block 8, because of the discovery of the falseness of your representations regarding a car line to be built to and from said property, and regarding the construction of the house upon said property. You will also please take notice that we vacated said premises on February 10, 1916, and possession of the same is hereby surrendered to you. Demand is hereby made on you for the payment to us of the sum of $780.00 paid by us on this contract, and for

the further sum of $500.00 damages for the injury we have suffered as the result of your false and fraudulent representations to us."

Thereafter, on August 14, 1916, the present action was begun by the plaintiffs against the defendant. The complaint alleges the making of the contract between the parties hereinbefore referred to, and then in detail sets out various alleged fraudulent representations that had been made by the defendant to induce the plaintiffs to enter into said contract. Briefly stated, it was alleged that the property, when they purchased it, was a remote distance from the business center of San Pedro and street car service, and that its value depended upon car service largely, and that the defendant, as an inducement for them to buy it, stated that $8,000 had already been deposited with the Pacific Electric Railway Company, and that a street car line would be built near the said property, and the construction thereof would be begun not later than the 1st day of February following; that a certain reservoir site near the property was to be removed, and a street projected through the land occupied by it; that the house was a new house and cost $2,500, and was well constructed, and built on a firm and solid foundation. The plaintiffs then allege that all of these allegations were false; that the house was not properly constructed; was not on a good foundation; that neither $8,000, nor any other sum, had been deposited to obtain an extension of the electric railroad to a point near the property in dispute, etc. The complaint alleged that, subsequent to the making of the said agreement, they had paid, pursuant to the contract, the sum of $780; that the plaintiffs had rescinded the contract; and asked for a judgment for the return to them of said $780.

The defendant filed an answer, denying the principal allegations of the complaint. Upon the trial thereof, the court found the alleged charges of fraud and misrepresentation to be true; found that the contract had been rescinded by the plaintiffs on February 10, 1916; and also found that the contract had been rescinded by the defendant on or about January 1, 1916, and that said rescission was concurred in by the plaintiffs, and that the plaintiffs joined in said rescission by giving notice thereof to the defendant within a reasonable time thereafter; and entered judgment in favor of the plaintiffs for the sum of $375, and $26.25 interest, making a total of $401.25, the said amount representing the $780 that had been paid on the contract, less the sum of $405 allowed for 27 months' rental of the premises while occupied by the plaintiffs.

The appellant's main contention on this appeal is that by virtue of the terms of the contract, when it exercised its option to declare the contract ended for default in payments, the money that had heretofore been paid by the plaintiffs to it became its property, and that it is entitled to retain it, unless there has been a rescission of the contract which changed the rights of the parties; and it is its contention that the evidence in the case does not sustain the finding of the court that the contract was rescinded by the defendant on or about January 1, 1916, or that it was rescinded by the plaintiffs February 10th, or at any other time, or that the plaintiffs concurred in any rescission that has been made by the defendant.

[1] After some uncertainty and fluctuation in the opinions, the law is well settled in this state that the vendor in a contract, such as we have before us, upon default of the vendee without legal excuse, is entitled to retain the moneys that have been obtained thereon.

At the outset it is proper to ascertain the nature of the case now before the court, and it may be first stated that it is not an action for damages for fraud and deceit. The complaint is not based upon such a theory of the case.

[2] In Hines v. Brode, 168 Cal. 507, 143 Pac. 729, it is stated that the rule of damages in an action for deceit is as follows:

"The measure of damages which a vendee of land is ordinarily entitled to recover * * * is the difference between the actual value of the property and its value had the property been as represented, and the measure of recovery is not affected by the price paid."

In the complaint in this case, there is no allegation of any damages resulting from the alleged fraudulent representations. There is no prayer in the complaint for the damages as representing the difference between these two values, but the complaint asked simply for the return of the money that had been paid on the contract. The findings of the court follow the complaint in this feature, in that there is no finding of the difference between the value of the property as it was and the value of the property as it would have been had the representations alleged to have been made been true, but simply a finding of the amount that had been paid and a judgment for the return thereof, less rental value while used by plaintiffs.

[3] Further, in an action for deceit, where the contract is executory, the plaintiff must allege his ability and willingness to perform the contract.

"Where, under an executory contract, a plaintiff seeks recoupment in damages for deceit while affirming the contract (and it must necessarily be an affirmance if the action be not after rescission), it must be conclusively taken as to such plaintiff that he stands ready and willing to pay the full consideration called for by the contract." Hines v. Brode, supra.

There is no allegation in the complaint that the plaintiffs stand ready and willing to pay the consideration mentioned in the contract and no finding of such willingness or ability.

The plaintiffs' notice of February 15, 1916, makes it manifest that they had no intention of paying any installment of the purchase price due or to become due.

[4] It not being an action for damages growing out of the alleged fraudulent representations, and the alleged fraudulent representations, not being made a basis for the recovery of damages based thereon, it is somewhat difficult to ascertain with accuracy what legitimate place the fraudulent allegations have in the pleadings, or what part they are entitled to play in the final decision of the case. The law is well settled that a party in possession of land on an executory contract to purchase it cannot, while retaining possession, refuse, because of claim of fraud, to make the payments provided by his contract. The fact, if it be a fact, that the vendor has no title to convey, or that the contract was entered into by reason of fraudulent representations of the vendor, furnish no legal justification for neglect or refusal to pay the installments when due so long as possession is retained. Los Molinos Land Co. v. Mackay, 175 Cal. 305, 165 Pac. 926; Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Empire Investment Co. v. Mort, 169 Cal. 733, 147 Pac. 960; Garvey v. Lashells, 151 Cal. 531, 91 Pac. 498.

The plaintiffs' case must be considered as one wherein a vendee is seeking, after an alleged rescission of a contract of purchase of real estate, to recover back the moneys paid thereon. And whether he is entitled to recover or not depends upon whether there has been such rescission.

[5] 1. We are of the opinion that the finding of the court that the defendant, on or about January 1, 1916, rescinded the contract of purchase, is not sustained by the evidence. It is true that in its notice to the plaintiffs, dated December 28, 1915, it used the word "rescind"; but this, in view of the terms of the contract and the previous letters written by it to the plaintiffs, could not be construed as intended to mean a technical rescission, as defined by the provisions of the Civil Code.

It will be observed that the contract between the parties provides that if default is made in the payment the vendor might "rescind" the contract, but in the same connection it provided that if it did so it should retain all moneys that had been paid as rent and liquidated damages. This is entirely inconsistent with the technical rescission defined by the Civil Code.

Again, in the letter of December 21, 1915, it was called to the attention of the plaintiffs as to what would result if their payments were not made and they were given an extension of time to the 28th to make them, wherein it was stated:

"We therefore beg to advise you that, unless by Monday, December 27th, 1915, you make the payments now past due, and also pay the taxes, we will, in accordance with the rights we have in the above mentioned contract, terminate it, and cancel it, and, as provided in the contract, your payments will be forfeited, and you will cease to have any rights in the property, or any rights whatever."

The contract, and these various letters, and the final notice served upon the plaintiffs to vacate the premises, are properly to be construed together in determining the intention of the defendant in its conduct towards the plaintiffs, and it is clear from all these that it did not intend, by its notice of December 28th, to make a technical rescission in accordance with the Code provision, and that the notice served upon the plaintiffs was nothing more than a notice in line with the provisions of the contract if they failed to make the payments their rights under the contract would be terminated. There was then no rescission by the defendant on January 1, 1915, and the finding of the court to that effect is not sustained by the evidence.

In Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007, it is held:

"Upon the default of the vendee, without excuse, to perform the conditions of the bond, the mere service of a notice on him by the vendor, calling attention to the particulars in which the default consisted, and declaring the bond to be forfeited and all the interest of the vendee in the property to be terminated, and demanding possession of the property, and the subsequent peaceable taking possession of the property by the vendor, and his bringing an action to quiet his title thereto, did not constitute a rescission of the contract by the mutual consent of the parties, so as to give the vendee a right of action against the vendor for the recovery of the portion of the purchase price paid under the contract or for disbursements made in the performance of other conditions thereof."

[6] 2. When the defendant had exercised the option given to it by the contract to declare it forfeited and ended for nonpayment of installments due, the money that had been paid by the very terms of the contract became the property of the defendant, and nothing that the plaintiffs could thereafter do without the consent of the defendant, would have the effect of transferring title to the money from the defendant to the plaintiffs and give them a right of action for its recovery. The attempted rescission by the plaintiffs on February 15, 1916, gave them no right of action for the money. If, before the contract had been ended for nonpayment, the plaintiffs had surrendered possession of the premises and rescinded the contract, they would have had a right of recovery upon proving fraudulent representations sufficient to justify such rescission. But the decisions all hold that, after default without legal excuse, no recovery can be had for moneys paid, unless there is a mutual rescission.

In List v. Moore, 20 Cal. App. 622, 129 Pac.

964, the decisions are reviewed at some length, and it is there said:

"But there could seem to be no controversy as to what are the controlling principles of law here in view of the decision in the Glock Case [123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17]. Therein, it is clearly held that 'under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the purchaser is made a condition precedent to a conveyance, and upon his breach of the contract he is declared to forfeit all rights thereunder, and all moneys paid thereon, the purchaser cannot, after his default without excuse shown therefor, by a tender of the amount due, acquire either an equitable or legal right to maintain an action to recover back the moneys paid under the contract.' Furthermore, that 'where time is expressly made of the essence of the contract for the purchase of land, equity will not ignore such provision but follows the law and will neither make a contract for the parties, nor violate that which they have entered into; nor will it relieve a purchaser who has made unexcused default under such a provision, and has not fulfilled conditions precedent to the vesting of his right of action.' It is declared also that the right of the vendor to retain the part of the purchase price paid after the default of the vendee is independent of any express clause in the contract for forfeiture of rights or for retention of the purchase money as liquidated damages, that such clauses are merely declarations in express terms of the legal rights of the parties under such a contract, without them, and that the validity of such express clause is immaterial. It is furthermore held that in such case it is only where the vendor, after default of the vendee, agrees to a mutual abandonment and rescission that the vendee is entitled to receive the purchase money paid."

And in the recent case of Russell v. Hawxhurst, reported in 187 Pac. 146, it is said:

"It is now the settled law of this state that a vendee under a contract for the purchase of real property cannot continue to hold the possession thereof after making default in the payments as therein provided, regardless of whether the vendor has title or not, and that the vendee cannot refrain from making payments as by the contract provided, and also continue to hold possession of the land; nor can the vendee, under any circumstances, be entitled to the return of the money by him theretofore paid thereunder while he continues to hold possession of the land; nor can the vendee after making default in his payments without legal excuse ever recover the return of any of the money he may have paid thereon when the vendor was not in default of anything on his part to be kept and performed, except when there has been mutual rescission—citing Glock v. Howard, 123 Cal. 10 et seq., 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Haile v. Smith, 128 Cal. 419, 60 Pac. 1032; Bruschi v. Quail Mining Company, 147 Cal. 120, 123, 81 Pac. 404; Garvey v. Lashells, 151 Cal. 526, 531, 91 Pac. 498; Oursler v. Thacher, 152 Cal. 739, 745, 93 Pac. 1007; Gervaise v. Brookins, 156 Cal. 103, 108, 103 Pac. 329; List v. Moore, 20 Cal. App. 616, 129 Pac. 962; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Min. Co. v. Champion Mines, 164 Cal. 205, 213, 128 Pac. 315."

The fraud alleged not being a legal excuse for the nonpayment of the installments so long as plaintiffs held possession of the property, and such fraud being the only excuse suggested for such nonpayment, it follows that, when the defendant declared the contract ended, the plaintiffs were in default without legal excuse, and no recovery could thereafter be had without a mutual rescission of the contract. As no such rescission took place, it necessarily follows that the plaintiffs are not entitled to recover.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 139

REED v. OAKDALE IRR. DIST. (Civ. 2101.)

(District Court of Appeal, Third District, California. Feb. 13, 1920.)

1. EMINENT DOMAIN ⊂=280—OWNER SILENT UNTIL AFTER CONSTRUCTION OF DITCH IN HIGHWAY HELD LIMITED TO COMPENSATION.

The rule that, where property is taken for a public use by a public service corporation, and the property owner has not in an appropriate way objected to the taking, but has by silence permitted the use to be inaugurated and carried on for some time, he has waived or lost his right of ejectment or abatement, and is limited to his compensation in damages guaranteed by Const. art. 1, § 14, applies to right of abutting owner against irrigation company which has so constructed and operated a ditch in a highway.

2. APPEAL AND ERROR ⊂=907(2)—FINDINGS PRESUMED SUPPORTED BY EVIDENCE.

In the absence of the evidence from the record, it must be presumed that it supports the theory of the findings and judgment that an irrigation ditch running along the center of a highway does not cover its entire width, and that removal of sand thrown out in cleaning the ditch will furnish opportunity for travel on the highway.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Elizabeth H. Reed against the Oakdale Irrigation District. From judgment for less relief than demanded, plaintiff appeals. Affirmed.

F. W. Reeder, of Oakdale, for appellant.
P. H. Griffin, of Modesto, for respondent.

HART, J. Plaintiff brought the action to recover from defendant the sum of $3,000, as damages caused by obstructions to a highway by means of a ditch constructed there-

in and sand thrown from said ditch into the highway, and to have said obstructions removed. A jury, called to pass upon the question of damages, awarded plaintiff $150, and she was given judgment for that amount and costs. As to the remaining issues, the court made findings of fact and conclusions of law and entered judgment in accordance therewith. Plaintiff appeals from the whole of said judgment on the judgment roll alone.

The following findings will sufficiently indicate the matters in dispute:

It was found that defendant is a public corporation organized and existing under the laws of the state of California; that for more than seven years last past plaintiff has been the owner and in possession of lots 14 and 15 of the Oakdale Syndicate tract, in Stanislaus county, as per the official map of said tract filed for record in the office of the county recorder on the 1st day of April, 1890.

"(5) That along the southerly boundary of" said lots "there is laid out and dedicated by said map so filed as aforesaid a public highway, used by the public for highway purposes, 40 feet in width, which plaintiff and her employés have used as a means of ingress and egress to said lots * * * ever since her ownership of same or since the 29th day of March, 1911.

"(6) That said public highway is the only means of ingress and egress to plaintiff's property.

"(7) That during the months of July and August, 1915, defendant entered in and on the said public highway and constructed an irrigation ditch along the center of said highway" from a certain point to a point "beyond the westerly boundary line of lot 14 of plaintiff's property.

"(8) That during the month of December, 1917, defendant enlarged and cleaned out said irrigation ditch and threw the dirt upon the embankments of same in such a manner as to entirely obstruct the whole highway" between the points above mentioned.

"(9) That said ditch is constructed in sandy soil, and in the cleaning and enlarging of said ditch great quantities of coarse white sand were thrown out on each side of said ditch completely obstructing said highway and making same impassable for loaded animal or motor drawn vehicles of any kind and preventing the ingress and egress of plaintiff to her said property.

"(10) That plaintiff's property is planted to alfalfa and almond-bearing nut trees, and produce large crops of alfalfa hay and almond nuts.

"(11) That it is necessary at different times to go upon said lands of plaintiff with horses and farming implements to take care of the irrigation ditches located thereon, and to cultivate, prune, and spray the said almond trees, and to cut, rake, and haul the alfalfa grown on said lands, and harvest and haul to market the almond nuts and hay grown thereon.

"(12) That by reason of the obstruction of said public highway by defendant plaintiff is prevented from going upon her said lands and taking loaded vehicles to and from said lands over said highway.

"(13) That said irrigation ditch is of a width at the top of from 20 to 30 feet and of a depth of 4 feet, with embankments thrown out on either side of said ditch, all of which embankments and ditch are located in the highway mentioned in plaintiff's complaint."

It was also found that an allegation in the answer that plaintiff consented to the construction of said irrigation ditch in said highway was untrue.

The judgment is:

"(1) That plaintiff recover $150 damages.

"(2) That the sand deposited in the road * * * by the defendant * * * from said irrigation ditch is a nuisance, and that said nuisance be abated.

"(3) That the public rights have intervened as to the ditch, and that same cannot be abated as a nuisance.

"(4) That plaintiff, by reason of the conveying to her and her predecessors in interest of" said lots, "has acquired an easement on said highway, but that said easement is subordinate to the public rights of the Oakdale irrigation district in reference to the maintenance of said irrigation ditch in said highway.

"(5) That the road in question * * * is a public highway.

"(6) That plaintiff have her costs of suit."

The defendant is a public service corporation, engaged in distributing water to the public for farming and domestic purposes within the territory to which the water from its ditch is available. From the findings it appears that the defendant's ditch was constructed over and along the portion of the highway to which it is alleged in the complaint it constitutes an obstruction in the year 1915. The complaint here was filed by the plaintiff on June 18, 1918, approximately three years after the ditch had been constructed and presumably in active operation. Thus it is clear that the portion of the highway over and along which the ditch was constructed, and which portion, according to the complaint, is thus so far obstructed as to prevent vehicles from passing over it to and from the plaintiff's place, had, long before plaintiff made any complaint in reference thereto, or objected to the maintenance of the ditch at that point on the highway, been taken for and devoted to a public use. In other words, according to the findings, which we must presume were authorized by the evidence, the plaintiff remained passive and made no protest at the time of the construction of the ditch at the point on the highway referred to and remained so and still made no objection to the construction of the ditch until after it had been fully completed and was being operated as an irrigating ditch.

[1] It is plain to us that the facts of this case bring it squarely within the cases which hold that, where property is taken for a public use by a public service corporation, and the owner of the property has not in an appropriate way objected to its being so taken, but has, by silence or quiescence, permitted

the public use to be inaugurated and carried on for some period of time, he has thus waived or lost his right to proceed against such use of his property by ejectment or abatement. In such case, if he had suffered damage to his property by reason of such taking and use of his property, he is, of course, entitled to be compensated in damages. The Constitution expressly gives him this right (Const. art. 1, § 14), and such right in the plaintiff here is not denied by the respondent. But in the case stated the owner is restricted to the relief which is obtainable in an action for damages. The theory of the rule as above stated is that after property is taken for a public use by a public service corporation and has been devoted to that purpose the public thereby and thereupon acquires rights in such public use which cannot be divested or destroyed at the behest of a private individual upon the ground or for the reason that his property will suffer damage or deteriorate in value, or even become valueless for the purposes to which it is peculiarly adapted and for which it has always been used, by reason of the act depriving him of such of his property rights as were necessary for the installation and prosecution of the public use.

In Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940, the plaintiff had extended its canal so that it crossed over the lands of one Poyser and one Johns. These parties made no objection at the time against the construction of the canal extension over and across their lands. They subsequently conveyed the lands to the defendants, who, upon taking possession, proceeded to cover up and fill in the portion of the canal crossing said lands, claiming that the same was extended over the lands without and against the consent of their grantors, Poyser and Johns. The plaintiff instituted an action against defendants to enjoin the destruction of the canal and for damages. The trial court found that Poyser and Johns never gave their consent to the extension of the canal, and judgment accordingly went to the defendants. An appeal was taken to the Supreme Court from the order denying plaintiff a new trial, and the order was reversed, Chief Justice Beatty, the author of the opinion, saying, among other things:

"The court, amongst other things, finds that Poyser and Johns never consented to the extension of the canal. The evidence of Poyser and Johns sustains this finding so far as an express consent is concerned, but a tacit consent evidenced by conduct quite as significant as any express words could possibly be is proved by evidence which is not only uncontradicted, but is expressly admitted by Poyser and Johns to be true. It is confirmed also by the circumstances and situation of the parties."

Again, the late Chief Justice further said in that case:

"The plaintiff is the agent of the state in the administration of a public use (Const. art. 14, § 1), and is within the protection of the principle of the decision, and of the authorities cited in Fresno St. Ry. Co. v. Southern Pacific R. R. Co., 135 Cal. 202 [67 Pac. 773], and of Southern California Ry. Co. v. Slauson, 138 Cal. 342 [71 Pac. 352, 94 Am. St. Rep. 58]. It is to be presumed that a farming community dependent for a vital necessity upon the continuous operation of this canal has become established upon the lands which it covers. The establishment of such a community with the improvements and expenditures necessarily involved was one of the results of the acquiescence of Poyser and Johns in the extension and increased efficiency of the canal. They may have had a right to demand and receive a reasonable compensation for any damage to their lands caused by such extension. But they had no right to abate the canal by action, and no right to injure or destroy it."

In Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, the action by plaintiff was in ejectment to dispossess defendant of a certain described portion of plaintiff's lands and premises, over and across which a public wagon road or highway leading from the city of Red Bluff to the eastern boundary of Tehama county had for over 40 years existed and been maintained. The defendant, a public service corporation, organized for the purpose and engaged in the business of furnishing the public with electricity for power, heat, and lighting, and also furnishing municipalities, cities, and towns with electricity for like purposes, including the lighting of highways, had erected its power lines along said highway, digging holes and erecting poles for that purpose. The late Mr. Justice Lorigan prepared the opinion in that case, and his clear and forceful discussion of the principles governing cases whose facts are analogous to those of the case at bar involves the consideration of so much that has peculiar and cogent application to the present case that to give the views as therein set forth as they should be given would necessitate the reproduction of the entire opinion herein, and this we do not deem necessary, for it will be sufficient to give here a brief statement of what is decided in that case, viz.: (1) That, while the maintenance of the defendant's power line in the highway over the land of plaintiff was not for a purpose incidental to the use of such highway and is inconsistent with the dedication of the highway to the use of the public, and was therefore an invasion of the plaintiff's property rights for which he was entitled to redress, his remedy under the circumstances of the case, he not having complained or objected until after the power line had been installed and put in operation and public rights had intervened therein, was entirely in an action for damages, and not in ejectment. (2) That among the exceptions to the general rule that one may maintain eject-

ment against either an individual or a corporation who has without right entered upon his land is, in the case of a public corporation, where it appears that, notwithstanding that the entry was originally without right, the owner permitted the corporation to make the entry on his land and construct the works for which the land was thus appropriated, and failed to bring any action until after public interests, by reason of the construction, had intervened. In such case the right to maintain ejectment is denied, and the owner of the land is remitted and limited to an action for damages for redress. (3) That the principle which underlies this rule is not based on any consideration of rights pertaining to the public service corporation itself, but solely upon considerations of public policy. Nor is the rule based so much upon the doctrine of estoppel, but mainly on the great principle under which the rights of the citizen are sometimes abridged in the interest of the public welfare.

"Public policy requires that, under such circumstances [where the owner of land has suffered by silence or quiescence a public service corporation to enter thereon, and expend large sums in the construction of the works, before he complains of the trespass], the remedy of ejectment should be denied to plaintiff, when the effect of a judgment in such an action would be to destroy the efficiency of the electric line system by taking possession from defendants of that part of it constructed over the land of plaintiff, and thus destroying the public rights which have intervened."

In Miller & Lux v. Enterprise Canal & Land Co., etc., 169 Cal. 415, 147 Pac. 567, Mr. Justice Shaw examines exhaustively the principles above enunciated, and reviews in extenso the cases in which they have been applied. We refer to that case as a clear exposition of the doctrines referred to, and also to the cases therein cited and considered.

The case of Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915, Ann. Cas. 1917A, 1143, cited by appellant, is not pertinent to the facts of this case. There the controversy was between private individuals, and no question as to the intervention of public rights arose.

No point is made here that the compensation awarded plaintiff for damages sustained by her by the act of the defendant in invading her property rights in the manner described is inadequate. The abatement of the ditch was properly denied on the doctrines enunciated and applied in the cases above considered and referred to.

[2] But plaintiff further contends that the judgment is inconsistent with the findings and that it is uncertain and ambiguous. It is not necessary to follow in detail the ramifications or course of reasoning to which learned counsel for the plaintiff resorts to support this contention. It is considered quite enough to say that a comparison of the judgment with the findings and the plaintiff's complaint will show that there is no inconsistency between the findings and the judgment or any uncertainty or ambiguity in the judgment. The complaint alleges:

"That during the month of December of the year 1917 defendant enlarged and cleaned out said irrigation ditch and threw the dirt upon the embankments of same in such a manner as to entirely obstruct the whole highway, from the intersection of said before-mentioned public highway with Central avenue, of said Oakdale Syndicate tract, running westerly along said avenue, and in front of plaintiff's property, to the western boundary line of lot fourteen of said tract; that said ditch is constructed in sandy soil, and in the cleaning out and enlarging of said ditch, great quantities of coarse white sand were thrown out on each side of said ditch, completely obstructing said highway and making same impassable for animal or motor drawn vehicles of any kind and completely preventing the egress and ingress of plaintiff to her said property."

The court found those allegations to be true, and that to that extent the defendant was maintaining a nuisance, and thus had trespassed upon or infringed the plaintiff's property rights, and obviously upon those findings the court awarded damages to the plaintiff and decreed the abatement of the nuisance so maintained. This is as far as the findings and the judgment go, so far as the plaintiff's rights are concerned. They, in other words, found and decreed that there was a total obstruction of the highway resulting from the dumping thereon by defendant from its ditch, when in December, 1917, it enlarged and cleaned out the same, of large quantities of dirt and sand, and that such obstruction constituted a nuisance, and abated it. Then the findings declare and the judgment decrees that, public rights having intervened by reason of the construction of the ditch, no action by an individual would lie to abate the maintenance of the ditch. There is no inconsistency between the latter finding and the judgment in that respect and the adjudication of the plaintiff's rights, as found and decreed by the court and above referred to. Counsel argues, however, that the finding and that part of the judgment decreeing that plaintiff has an easement in the highway and the finding and that part of the judgment declaring that the ditch cannot be abated are irreconcilably inconsistent, because, as he asserts, the ditch and its bank cover the entire width of the highway, and that the mere removal only of the sand dumped upon the highway from the ditch when the ditch was enlarged and cleaned out would not make the highway suitable for use as such. But the findings do not show that the entire width of the highway is covered by the ditch. From finding 7 it appears that the ditch runs along the center of the highway, and we cannot assume, in the ab-

sence from the record of evidence touching that proposition, that the ditch itself covers the whole width of the highway. To the contrary, the presumption is, under the state of the record before us, that there was evidence which supports the theory of the findings and thus to show that the plaintiff could, with the removal from the highway of the sand and dirt dumped there by defendant when in 1917 the ditch was enlarged and cleaned out, enjoy her easement in or right to the use of the highway for all the purposes which the exigencies of her business as a farmer and fruit grower might require.

Without further consideration of the matter, we hesitate not to state our conclusion to be that a careful examination of the findings and the judgment in comparison with the averments of the pleadings will show that the complaint that there is an inconsistency between the findings and the judgment, or that the judgment is ambiguous and uncertain in its terms, is without foundation.

No reason appears to us for disturbing the judgment appealed from, and it is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 40

ZIMMERMAN v. PRIOR et al. (Civ. 2481.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. CONTRACTS ⟸337(2)—COMPLAINT HELD TO SUFFICIENTLY ALLEGE NONPAYMENT.

Complaint, alleging that defendants formed a voluntary association known as the Venice Road Race Association, and that such association employed plaintiff to perform labor and services in the repair of the streets, and that the services were performed, and that no part of claims had been paid, *held* a sufficient averment of nonpayment.

2. CONTRACTS ⟸333(1)—COMPLAINT HELD TO SUFFICIENTLY ALLEGE PROMISE TO PAY FOR SERVICES.

A complaint, alleging that plaintiff was engaged by Road Race Association to improve public streets, that he did so, but had not been paid, *held* sufficient allegation that the services were performed at the request of the association, and that it agreed to make payment of reasonable value thereof.

3. ASSOCIATIONS ⟸16—MEMBERS INDIVIDUALLY LIABLE.

Under Code Civ. Proc. § 388, recovery may be had from the individual members of an association.

4. APPEAL AND ERROR ⟸907(3)—PRESUMED THAT EVIDENCE SUPPORTED FINDING.

Where an appeal is on the judgment roll, it will be presumed that the evidence was sufficient to support the findings of the court.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by C. E. Zimmerman against Thomas W. Prior and others, City of Venice, a municipal corporation, and Dana Burks and others. From a judgment for plaintiff, the defendants first named appeal. Affirmed.

Ernest B. Coil and C. E. McDowell, both of Los Angeles, for appellants.

Goudge, Robinson & Hughes, E. O. Leake, Charles W. Lyon, and Fredericks & Hanna, all of Los Angeles, for respondent.

JAMES, J. This action was brought against the defendants to recover for labor and services performed. Certain of the defendants have appealed from the judgment entered against them. As to these defendants, it was alleged in the complaint that, prior to entering into the contract with the plaintiff and his assignors, they had formed a voluntary association, known as the Venice Road Race Association; that said association employed plaintiff and his assignors to perform labor and services in the repair of public streets in the city of Venice; that services were performed as agreed, and that no part of the claims "had been paid by the defendants, or any, or either, of them." The court made findings determining the facts that said association had been formed and that appellants were members thereof; that the services of plaintiff and his assignors had been performed at the request of said association and the association had agreed to pay the reasonable value thereof, and that "no part or portion of either or any of said amounts has been paid to either or any of said persons." The court made further finding that the association, at the time the services were performed, was engaged in promoting, for the purpose of advertising the city of Venice, a road race, and that appellants were at the time engaged in conducting an amusement enterprise in said city of Venice, and expected, as the result of the holding of said race, to derive a profit therefrom.

[1] Appellants first contend that the complaint failed to state facts sufficient to constitute any cause of action. This upon two main grounds: First, that the allegation of nonpayment of the debts was insufficiently stated; second, that the complaint failed to show sufficient consideration moving to the appellants to sustain the alleged contracts. The allegation of nonpayment, we think, was sufficient. The criticism made in certain cases, wherein it was held that the words "due and owing" were not tantamount to an allegation of nonpayment because they expressed mere conclusions of law, such as Knox v. Buckman Contracting Co. et al., 139

Cal. 598, 73 Pac. 428, and Roberts v. Treadwell, 50 Cal. 520, is not applicable here. The allegation here made is as to the fact and directly that the defendants had not paid any part of the debt. This allegation, we think, is sufficient under decisions made in O'Hanlon v. Denvir, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19; Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072.

[2-4] We think, also, that the complaint in its allegations was sufficient as to the statement of a good contract, for it was alleged that services were performed at the request of the association, and that the latter promised to make payment of the reasonable value thereof. The recovery from the individual defendants, members of an association, is expressly authorized under the provisions of section 388, Code of Civil Procedure. The appeal being on the judgment roll, it will be presumed, of course, that the evidence was sufficient to support the findings of the court.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 15

ZIERATH et al. v. CLAGGETT et al.

(Civ. 3178.)

(District Court of Appeal, Second District, Division 2, California. Feb. 5, 1920.)

1. CORPORATIONS ⟸232(3) — STOCKHOLDERS LIABLE ON UNPAID SUBSCRIPTIONS ISSUED ON EXCESSIVE VALUATION.

Where the promoters of a corporation had transferred an oil lease to the company in exchange for all of the stock of the corporation as fully paid up and nonassessable, and the valuation so placed upon the lease was so grossly excessive as to be constructively fraudulent as to creditors, the creditors could recover from the stockholders amounts equal to their unpaid subscriptions, notwithstanding the honest belief of the directors as to the value of the property at the time of the exchange.

2. CORPORATIONS ⟸244(5)—TRANSFEREES OF STOCK TAKE SUBJECT TO OBLIGATIONS OF SUBSCRIBERS.

The same liability attaches to transferees of corporate stock as original subscribers, and by purchasing from the original subscribers the transferees assume as a matter of law all the liabilities that the transferors of the stock to them were under and take it subject to all their obligations.

3. CORPORATIONS ⟸240(1)—CREDITOR NOT ESTOPPED TO ENFORCE STOCKHOLDERS' LIABILITY WHERE HE DID NOT KNOW THAT STOCK WAS NOT FULLY PAID.

In an action by a creditor of a corporation to enforce stockholders' liability, the defense that the creditor was estopped to set up its complaint because it had extended credit wholly upon its own representations of results that could be obtained from the use of the drilling rig sold to the corporation and that sales of stock would furnish the funds necessary to pay the creditor could not be maintained where the evidence showed that the creditor did not know that the stock subscribed had not been fully paid.

4. CORPORATIONS ⟸228—CREDITOR ENTITLED TO COLLECT JUDGMENT FROM UNPAID STOCK SUBSCRIPTIONS.

When credit is extended to a corporation, it is done under the presumption that the capital stock that is issued has been or will be paid for in full if necessary to pay creditors, and, where capital stock has not been paid for in full, the creditors, if they are unable to collect directly from the corporation, are entitled to seek to satisfy the judgment out of the unpaid portions of such subscribed and issued stock.

5. EVIDENCE ⟸373(2) — CORPORATE BOOKS HELD SUFFICIENTLY IDENTIFIED TO BE ADMISSIBLE IN SUIT TO ENFORCE STOCKHOLDERS' LIABILITY.

In an action by trustees of a corporation to enforce stockholders' liability, the books of the corporation were admissible in evidence as against an objection that it had not been shown by the books that they truly showed the amount of capital stock issued or the names of subscribers or holders of the capital stock, where the first secretary of the corporation identified the books; the presumption being that such books continued to be the books of the company in view of Code Civ. Proc. § 1963, subd. 32.

6. PLEADING ⟸127(2)—ADMISSIONS HELD TO SHOW IDENTITY OF STOCKHOLDERS AT COMMENCEMENT OF ACTION TO ENFORCE THEIR LIABILITY.

In action to enforce stockholders' liability, admissions in defendants' answers as to the ownership of stock *held* sufficient to show that such defendants were stockholders at the time of commencement of the action.

7. APPEAL AND ERROR ⟸1011(1)—FACT FINDINGS ON CONFLICTING EVIDENCE NOT DISTURBED.

Findings of fact on conflicting evidence will not be disturbed on appeal.

8. JUDGMENT ⟸150 — AMENDMENT OF COMPLAINT GOING TO SUBSTANCE OPENS DEFAULT.

The test as to whether an amendment opens a default is that, if it goes to the substance, the default is opened, but, if only to the form, it is not.

9. JUDGMENT ⟸150 — AMENDMENT OF COMPLAINT IN ACTION TO ENFORCE STOCKHOLDER'S LIABILITY HELD NOT TO OPEN DEFAULT.

In an action to enforce stockholders' liability, an amendment of the complaint setting up an additional count identical with the first except that it contained by reference every paragraph of the first count except one, for which it alleged that the promoters of the corporation had transferred a certain purported oil lease to the company in exchange for all the stock of the corporation, and that the valuation on

such lease equal to the full capital stock was so grossly excessive as to be fraudulent, instead of alleging a flat payment per share as set forth in the first count, did not go to the substance of the complaint so as to open a default by defendants.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by A. C. Zierath and others, as trustees for the stockholders and creditors of the Zierath Combination Drill Company, against S. F. Claggett and others. Judgment for plaintiffs, a new trial was denied, and certain of the defendants appeal. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellants.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondents.

THOMAS, J. This is an action brought by the trustees of a defunct corporation to ascertain and to have adjudicated the amount due from each of the 248 defendants other than the corporation defendant, as subscribers, owners, and holders of shares of stock of the defendant Midway Southern Oil Company of Long Beach, and to have and recover judgment against each of the defendants herein for the amount found to be due plaintiff, not to exceed, as to any defendant, the amount found due from said defendant, and for general relief.

The second amended complaint is in two counts. Each count is based upon a judgment recovered by plaintiff against said corporation defendant—the Midway Southern Oil Company of Long Beach. There was a specific denial of each and every material allegation of this complaint upon which the action was tried. Trial was had before the court without a jury, and findings were entered in favor of plaintiff in the sum of $4,727.84, with interest, adjudicating "that in no event are the plaintiffs entitled to a judgment against any defendant in an amount to exceed 80 cents per share upon the number of shares owned by such defendant," and fixing the limit of liability as to each defendant, beyond which plaintiff could not proceed in any event, in exact dollars and cents. There was a motion for a new trial, which was denied. The appeal is from the judgment so entered, and is taken by but 32 of the defendants named herein.

[1] Many points are urged by appellants for the reversal of the judgment herein, and they will be considered in the order presented. The first point urged constitutes an attack on findings VI and VII, as not supported by the evidence. It is urged by appellants that there was "no evidence of intentional fraud * * *; the land in this case was taken solely for mining purposes. There was no certainty as to what would be obtained from it any more than if the parties had purchased a prospect for any other mineral substance and formed a company to develop the property by a discovery of the minerals in it;" and hence, that "it is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believed it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud." This is only another way of arguing that "incorporators of mining companies should be permitted to violate the law and deliberately deceive the public, but incorporators of manufacturing enterprises should not; and this notwithstanding the truth that the same specific statute grants no greater power to one than the other, and fixes the same liabilities upon the stockholders in each." With such contention we cannot agree. A mere cursory perusal of the record will, we think, disclose the fact that these findings are amply supported by the evidence. In support of their contention appellants urge that the case of In re South Mountain C. M. Co. (D. C.) 5 Fed. 403, is in point. We do not think so. The Supreme Court of this state has repudiated the doctrine therein enunciated in cases such as the one at bar ever since its decision of the case of Vermont Marble Co. v. Declez, etc., Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, decided February 25, 1902; and this fact is made clear by the case of Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, wherein it is said:

"We think the case of Vermont Marble Co. v. Declez Granite Co. * * * establishes the opposite rule in this state."

Then, too, in the case at bar defendants failed to show by the evidence, or at all, that the business of the Midway Southern Oil Company of Long Beach came within the class of cases to which the South Mountain C. M. Co. Case is applicable, were that doctrine applicable in this state.

[2] Appellants further urge that "the defendants are transferees, and not liable." For our present purpose we think it needless to differentiate, distinguish, or try to show the fine technical variations or shades of meaning between the words "stockholder" and "subscriber," in view of the fact that both the Supreme Court of this state and this court have said that "the same liability attaches to transferees * * * as original subscribers. By purchasing from the original subscribers the transferees assumed, as a matter of law, all the liabilities that the transferors of the stock to them were under, and took it subject to all their obligations." Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; Rhode v. Dock-Hop Co., 194 Pac. 11.

[3, 4] It is next urged that "plaintiffs did

not rely upon the capital stock of the corporation in extending credit," but, on the contrary, that "the plaintiff company extended credit wholly upon its own representations of results that could be obtained from the use of its drilling rig and upon the understanding that the defendant corporation had no funds; that certain of its stockholders should furnish necessary funds to start the work; that a log or report of the work would be furnished; and that sales of stock would furnish the funds necessary to pay for the drilling of the well and payment for the rig." In other words, as we see it, this contention, for all practical purposes, simply amounts to a claim that plaintiffs are estopped to set up their complaint because of the purported facts contained in the statement just quoted. We know of no law, and none has been called to our attention, that supports such contention. Assuming for the present that the statement is true, still that condition itself is impotent to relieve these defendant stockholders from liability in this case. Certain it must be that no citation of authorities is needed to support the statement that, when credit is extended to a corporation, it is done so under the presumption that the capital stock that is issued has been or will be paid for in full if necessary to pay creditors, and that where capital stock has not been paid for in full the creditors, if they are unable to collect directly from the corporation, are entitled to seek to satisfy their judgment out of the unpaid portion of such subscribed and issued capital stock. It is held in Sherman v. Harley, 178 Cal. 584, 174 Pac. 901, that, where a creditor at the time credit was given extended such credit with full knowledge of the difference between the par value of the stock and the value of the property received for such stock, he would have no claim upon the shareholders for further contribution of capital. It would seem that defendants had this case in mind, and by proper pleading brought themselves within it. Hence this question was before the court at the time of the trial. The allegation of the answers presenting this defense was as follows:

"That at the time of extending the credit represented by said alleged judgment, the Zierath Combination Drill Company well knew that none of the defendants named in said second amended complaint had paid the full amount of the par value of the capital stock owned by them in said corporation, and well knew that none of said defendants had paid more than 20 cents per share to apply thereon, and that said Zierath Combination Drill Company in extending said credit did not rely upon the capital stock of said corporation which was then and there issued, and upon the professed capital stock of said corporation having been in fact paid up in full, but extended said credit of said corporation wholly upon the responsibility of the corporation itself."

The record fails to disclose that the Zierath Combination Drill Company, or any of its officers or agents, had any such knowledge; and the court, after trial on the issues thus presented by the defendants themselves, found against them, which finding is supported by the evidence, being the testimony of the former officers of the company last mentioned. Here, then, we have the concrete evidence of the fact that the trial court proceeded in accordance with the doctrine laid down in the Sherman Case, supra, as a matter of law; but it finds, as a matter of fact, that said Drill Company was in no way brought within the exception pointed out in that case. This being true, the plaintiffs were not estopped to seek to satisfy their judgment against the defendant corporation out of the unpaid subscriptions of stockholders.

[5] It is also a contention of these appealing defendants that the books of the defendant corporation were inadmissible in evidence, having been admitted over defendants' objection that it had not been shown by the books "that they truly show the amount of the capital stock issued by this corporation, or that they correctly show the names of the subscribers or holders of the capital stock which was authorized under the charter of the corporation." The answer to this is found in the evidence of the witness Brooks, who testified that he was the first secretary of the defendant company, and identified the very books against which the objection was directed as the books of the defendant corporation during the time he was such secretary. Presumptively, until shown to be otherwise, these books continued to be the books of the company. Subdivision 32, § 1963, Code Civ. Proc. This, therefore, was a sufficient showing to support the correctness of the court's ruling.

The language of the Supreme Court of this state, in the case of Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047, is pertinent, and, we think, applicable to the case at bar:

"The evidence, it is said, is not sufficient because there may be other subscribers for stock besides those whose names appear in these books, and the liability of stockholders is made to depend upon the number of shares subscribed for. The burden, it is said, was on the plaintiff not only to show that there were certain stockholders, which, at the most, is all the books introduced show, but also to prove that no more shares had been subscribed for. * * * The book introduced seems to have been designed for the stock and transfer book. It is true that its contents are not shown here further than is above stated. So far as its contents are set out it corresponds with what is required by the Code. The fact that the book is not named as the Code requires is not material. The Code does not require that there shall be a subscription book, nor direct how subscriptions shall be made. It does not appear that this corporation had any other book

showing who the subscribers were. The suit is by strangers to the corporation against its stockholders. I think these books, together with the testimony, sufficient. Evans v. Bailey, 66 Cal. 112 [4 Pac. 1089]."

[6] In connection with appellants' further argument on this same point they say:

"The defendants R. R. Teemley, H. P. Coleman and S. M. Gardiner testified that they each held no stock in the company at the time the action was brought, and that no re-registry was made or attempted to be made by them. There is no proof in the record showing what the holdings of any of the other defendants appealing were; and the finding that they were the holders of the shares set opposite their names finds no support in the evidence."

The answer to this is that the record discloses conclusively: (1) That the majority of the defendants and appellants admitted, by their answers, the ownership of stock as alleged in the complaint; and (2) that under such condition of the record no further proof as to the last-mentioned defendants was necessary; hence the proof which was offered and received over appellants' objection was necessarily limited to those defendants who had by their answers denied such allegations of the complaint as charged them with owning the amount of stock alleged. Manifestly this must be true when the answers of the three defendants referred to are examined. So far as the appellants Teemley, Coleman, and Gardiner are concerned, the issue, so far as material here, was presented by their answers in the following language:

"* * * Defendants deny that they are subscribers or owners or holders of shares of stock," etc.

It is contended that this is not a denial that they were owners at the time of the filing of the complaint. This contention is without merit, so far as this case is concerned. The record discloses that on the trial, when this became apparent, counsel for these defendants stated that it had been their intention to put these matters in issue as of the time of the filing of the complaint, which statement was accepted by plaintiffs' counsel, who thereupon proceeded to prove their case accordingly.

[7] Of the seven defendants who answered, joining issues on the foregoing alleged fact, the evidence did not support the allegations of the complaint as against two of them—Cody and Shippey—and hence in the findings and judgment each of them was eliminated as not being stockholders at the time of the commencement of this action. As to the remaining five contending defendants, there can be no doubt, we think, about the correctness of respondents' contention. The findings are amply supported by the evidence. There was some little conflict in some of the evidence on this issue, but that has been resolved by the lower court in plaintiffs' favor. This being true, we cannot interfere.

[8, 9] This brings us to the consideration of the last point urged by appellants. It appears from the record that as to certain defendants default had been entered for their failure to answer the first amended complaint, and that thereafter, by leave of court, a second amended complaint was filed, which was not served on any of such defaulting defendants. The second amended complaint, appellants contend, contained an amendment in matters of substance, thereby opening the defaults theretofore entered; and hence, no service having been made of such second amended complaint upon the defaulting defendants, the judgment was improperly entered against them. We have examined both complaints. The first amended complaint was in one count. The second was in two counts. For all practical purposes, the second amended complaint is identical with the first, except that the second count thereof contained, by reference, every paragraph of the first count, except the ninth; and for this it was alleged that the promoters of the corporation had transferred a certain purported oil lease to the company in exchange for all of the stock of the corporation, as fully paid up and nonassessable, and that a valuation upon such oil lease equal to the authorized capital stock of the corporation was so grossly excessive that it would be, as to the creditors, constructively fraudulent, instead of alleging a flat payment of 20 cents per share upon the stock, as set forth in the first count. It is conceded that the test as to whether an amendment opens a default is that, if it goes to the substance, the default is opened, but, if only to the form, it is not. Did the amendment in this case go to the substance? We think not. The first count of the first amended complaint stating a cause of action, the default admitted the truth of its allegations; and the judgment against the defaulting defendants was no more than an admission of said allegations, which showed the amount to which the plaintiff corporation was entitled. It was therefore not necessary to serve said defaulting defendants with the second amended complaint.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

46 Cal. App. 24

E. BASTHEIM CO. v. SCHULTZ et al.

(Civ. 2538.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. ESTOPPEL ⟸75—PAWNBROKERS AND MONEY LENDERS ⟸5—PLEDGEE NOT ENTITLED TO RELY ON MERE POSSESSION IN PLEDGOR AS TITLE OR RIGHT TO PLEDGE.

A person purchasing or receiving in pledge personal property from another is bound to ascertain what the title and right is of the proposed vendor or pledgor, mere possession at best only furnishing prima facie evidence of ownership; but where an owner allows another to assume the apparent ownership of property for the purpose of making any transfer of it, he cannot, under Civ. Code, § 2991, defeat the right of a pledgee, who in good faith has made advances, relying upon the apparent ownership of the possessor.

2. APPEAL AND ERROR ⟸931(1)—INFERENCE FROM FINDINGS IN FAVOR OF JUDGMENT MUST BE CONSISTENT WITH OTHER FINDINGS.

An inference to be drawn from findings in support of judgment must not only be reasonable, but be consistent with other express and direct findings on material issues.

3. PAWNBROKERS AND MONEY LENDERS ⟸9—FINDINGS HELD TO DETERMINE THAT PLEDGOR'S POSSESSION WAS WITHOUT AUTHORITY FROM OWNER TO TRANSFER TITLE.

In owner's action to recover diamonds against pledgee, who had received diamonds from a third person, findings *held* to definitely and sufficiently determine the fact that third person's possession was without any right or authority given him by the owner to transfer any title to any one.

4. PAWNBROKERS AND MONEY LENDERS ⟸5—PLEDGE MADE WITHOUT AUTHORITY FROM OWNER GIVES PLEDGEE NO TITLE.

Where owner gave pledgor possession of diamonds for the sole purpose of permitting another party to inspect them, and without any authority to transfer title, loan broker, to whom pledgor in excess of his authority transferred diamonds had no title as against owner, under Civ. Code, § 2991.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the E. Bastheim Company against H. C. Schultz and others. From the judgment rendered, plaintiff appeals. Reversed, with directions.

Hollzer & Greenberg, of Los Angeles, for appellant.

W. I. Foley and Cleveland Schultz, both of Los Angeles, for respondents.

JAMES, J. This action was, as framed by the complaint, in form, claim and delivery for the recovery of possession of two certain diamonds. Omitting the more formal allegations of the complaint, it was alleged that on the 4th day of December, 1916, defendants Schultz and Schlager obtained the diamonds from the plaintiff—

"upon the representation that they desired to exhibit the same to a third party for the purpose of inspection, and then and there promised and agreed to promptly return the same to said plaintiff."

It was alleged, on information and belief, that the said Schultz and Schlager had deposited the diamonds with defendants Cohn under some agreement, the true nature of which plaintiff did not know. By supplemental allegation the complaint was made to show that subsequent to the commencement of the action plaintiff had, by replevin process, caused possession to be taken of said diamonds from defendants Cohn.

Defendant Schlager defaulted; defendants Cohn and Schultz made answer. The answer of Schultz was, in substance, a specific denial of the allegations of the complaint, while that of the Cohns showed that they had, in the regular course of their business as loan brokers, loaned to Schlager, on the 4th day of December, 1916, the sum of $100 on each diamond, and that they held the diamonds in pledge as security for the repayment of said loan. The court upheld the right of the defendants Cohn to retain possession of the diamonds as security, and directed that possession be redelivered to them, with the condition that if plaintiff should pay the amount loaned by the Cohns upon the diamonds it should be entitled to possession of the property. Plaintiff appeals from the judgment and presents the appeal upon the judgment roll.

[1] In support of its appeal, plaintiff insists that under the facts found by the court in its decision the judgment should have been in favor of the plaintiff. By the court's findings it was determined to be true that the plaintiff was the owner of the property in question and that it was entitled to the possession thereof were it not for the fact that Schlager, having possession of the diamonds, had pledged them with the defendants Cohn as security for the loan. Before making a further analysis of the findings, the well-established rule may be adverted to, to wit, that a person purchasing or receiving in pledge personal property from another is bound to ascertain what the title and right is of the proposed vendor or pledgor, and that mere possession alone, at best, only furnishes prima facie evidence of ownership. This rule is, by the Code, made subject to one modification, and that is that where an owner allows another to assume the apparent ownership of property "for the purpose of making any transfer of it" (Civ. Code, § 2991), he cannot defeat the right of a pledgee who, in good faith, has made ad-

vances, relying upon the apparent ownership of the possessor. The case of Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72, contains a very full discussion as to the rights of an owner of personal property who has permitted possession to pass to another, and also of the modifying effect of the code section. In the decision in that case it is said:

"The rule of the Code permits the owner to show that the property was not intrusted to the bailee or person assuming ownership, for the purposes of sale, but for transportation or temporary custody and the like objects. * * * 'Mere possession of a chattel is not title; and one taking a pledge of it is bound to satisfy himself that the pledgor is the owner; and if he relies solely upon the pledgor's possession, he takes the risk of having to surrender the property to the true owner.'"

In that case—it being one very similar to this in that it involved the pledging of jewelry rightfully in the possession of the pledgor, but which he had received not for the purpose of making a transfer of it—the court reversed a judgment in favor of the pledgee and directed the trial court, upon the findings made, to enter judgment in favor of the plaintiff. In point, also, are the cases of Akron, etc., Co. v. First Nat. Bank, 3 Cal. App. 198, 84 Pac. 778, Coolidge v. Austin, 22 Cal. App. 334, 134 Pac. 357, and a case recently considered by this court, to wit, Knapp v. Lyman, 186 Pac. 386. Our examination of the findings made in the case will therefore necessarily be limited to a determination of the one question as to whether such findings, expressly or by reasonable inference, determined that the plaintiff, when it delivered the diamonds to Schlager, made such delivery with the authorization to Schlager to make a transfer of the property. As material to that point, we quote from the findings of the trial judge:

"That on the 4th day of December, 1916, at said city of Los Angeles, the defendant Schlager obtained said diamonds from said plaintiff upon the representation that he desired to exhibit the same to a third party for the purpose of inspection, and then and there promised and agreed to return the same to said plaintiff. That by reason of said representation and at the request of the defendant Schultz, and upon the promise and agreement of said defendant Schultz to have said diamonds returned to it, said plaintiff then and there delivered said diamonds to said defendant Schlager, for the purpose of inspection only, and said defendant Schlager then and there executed a receipt for the same, in words and figures as follows, to wit:

" 'E. Bastheim Company, Wholesale Jewelers, Title Guaranty Building, Broadway at Fifth, Los Angeles. Telephones Home F—3216, Main 2700, 1703. Memorandum Bill. We request report on all goods charged on memorandum within five days.

" 'Dec. 4, 1916.

" 'To H. C. Schultz: The goods described and valued as below are sent to you for your examination, remaining our property and subject to our order, and shall be returned to us on demand. E. Bastheim Company.

" '2 Br # 5000 1.75/100 at 290 per ct

" 'HJC Deld to S. Schlager .

" 'These goods are the property of E. Bastheim Company and are not for sale until selection is approved by E. Bastheim Company, and regular bill of sale rendered.'

"That thereafter, and on or about the 9th day of December, 1916, said defendant Schultz approved in writing the delivery of said diamonds, made to said defendant Schlager, as aforesaid. That said representation made by said defendant Schlager to plaintiff was false, and was known by said defendant Schlager to be false at the time the same was made."

It will first be noted that the court directly found that Schlager obtained possession of the diamonds upon a representation, falsely made by him, that he desired to exhibit the same to a third party and that he would return them to plaintiff. Referring to the action of defendant Schultz (the reason for which is not apparent from the findings), the court found that—

"By reason of said representation, and at the request of the defendant Schultz, and upon the promise and agreement of said defendant Schultz to have said diamonds returned," plaintiff delivered the same to Schlager "for the purpose of inspection only."

We think it is quite clear that the court sufficiently determined the fact to be that the diamonds were not delivered to Schlager with any authorization to Schlager or any one else to make a transfer of them. Able counsel who represents the respondents Cohn attaches particular significance to an expression in the findings where it is recited:

"That thereafter, on or about the 9th day of December, 1916, said defendant Schultz approved in writing the delivery of said diamonds, made to said defendant Schlager, as aforesaid."

The argument is that, in view of the rule that every reasonable inference should be drawn from the findings of the court in order to support a judgment, it should be inferred from the expression last quoted that the court intended to say that Schultz was an agent of the plaintiff and, as such agent, authorized Schlager to make transfer of the property.

[2-4] In view of the direct findings as to the conditions under which the diamonds were delivered (already referred to), we think that no such inference is permissible. Any such inference permitted to be drawn must be not only reasonable, but be consistent with other express and direct findings upon material issues. And so we conclude that the findings should be considered as having definitely and sufficiently determined the fact that Schlager's possession of the diamonds was without any right or authority given him by the plaintiff to transfer any

title to any one. The conclusions of law made by the trial judge, and the judgment which followed, are therefore erroneous.

The judgment appealed from is reversed; it is directed that the superior court amend its conclusions of law in conformity with the views expressed in this opinion, and with the findings of fact as made, and enter judgment thereon in favor of the plaintiff as prayed for in its complaint.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 765

PEOPLE ex. rel WOOLWINE, Dist. Atty., v. FERAUD et al. (Civ. 3189.)

(District Court of Appeal, First District, Division 1, California. Feb. 4, 1920.)

1. NUISANCE ⊜88—EXPENSES OF INVESTIGATION NOT TAXABLE AS "PLAINTIFF'S COSTS" UNDER REDLIGHT ABATEMENT ACT.

There is no authority in Redlight Abatement Act, §§ 7, 8, for allowance as costs of plaintiff's expense of investigations resulting in the suit, but the expression "plaintiff's costs" in section 8 means only those ordinarily allowed in equitable proceedings in which costs incurred by prevailing party for his own benefit in the preparation of his case are not taxable.

2. NUISANCE ⊜85—UNDER REDLIGHT ABATEMENT ACT COURT MAY NOT PLACE KEEPERS IN POSSESSION BEFORE JUDGMENT.

Under Redlight Abatement Act, §§ 4, 7, prior to judgment the court may not take possession of the questioned premises by placing keepers therein, nor may it order the same closed.

3. NUISANCE ⊜88 — REDLIGHT ABATEMENT ACT CONTROLLING AS TO COSTS.

Although a proceeding under the Redlight Abatement Act to enjoin a nuisance is one in equity, the recovery of costs is purely statutory, and, as the provisions of such act do not provide for cost of service of guards in the premises prior to judgment, they are controlling.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceeding by the People of the State of California, on the relation of Thomas Lee Woolwine, District Attorney, against Mary R. Feraud and others. From an order denying her motion to retax costs, the named defendant appeals. Order reversed, and trial court directed to grant motion and to strike from the judgment the amount of the contested items.

Gurney E. Newlin and A. W. Ashburn, both of Los Angeles (Eugene D. Williams, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for respondent.

KNIGHT, Judge pro tem. This is an appeal by the defendant Feraud from an order denying her motion to retax costs in a suit instituted by the district attorney of Los Angeles county under the "Redlight Abatement Act." Stats. 1913, p. 20.

The contested items aggregate $435.65 and constitute two charges: First, for the services of plaintiff's agents in investigating and securing evidence before the commencement of the suit of the existence of the alleged nuisance; and, secondly, for the services, meals, and car fare of "guards" placed by plaintiff in charge of the premises in question after the commencement of suit and before trial, pursuant to the terms of the preliminary injunction.

Appellant is the owner of the property, but she is not charged in the complaint with knowledge of the existence of the nuisance, nor does the court find that she had such knowledge.

[1] The sections of the Redlight Abatement Act bearing upon the disputed costs are sections 7 and 8 thereof. By section 7 it is provided that—

"If the existence of a nuisance be established in an action as provided herein, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building or place shall be and remain in the custody of the court."

Said section further provides that for the removal and sale of the movable property the officer shall be entitled to the same fees as are allowed under execution, and that "for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court."

By section 8 it is provided that the proceeds of the sale shall be applied:

"1. To the fees and costs of such removal and sale; 2. To the allowances and costs of so closing and keeping closed such building or place; 3. To the payment of plaintiff's costs in such action; 4. The balance, if any, shall be paid to the owner of the property so sold."

And it is further provided that, if the proceeds of the sale of the movable property are insufficient to pay such costs, then the "building and place" shall be sold, etc.

These sections, of course, should be read together, and, as thus read, we find no authority therein, nor elsewhere in the act, for the allowance, as costs, of the expense of

plaintiff's investigations which resulted in the filing of the suit. Indeed, our attention has been directed to no case wherein a defendant, unsuccessful in the result of trial, has been required to reimburse the prevailing party for the costs incurred by the prevailing party in making the investigations and in collecting the evidence upon which the action is brought. It is true that subdivision 3 of section 8, above quoted, provides for the payment of "plaintiff's costs in such action," but, in the absence of more extensive expression than is here used, we are inclined to the opinion that by the use of the term "plaintiff's costs" the Legislature intended to include only such costs as are ordinarily allowed in an equitable proceeding, and in such proceedings it has been held, in numerous instances, that costs incurred by a prevailing party for his own benefit in the preparation of his case are not taxable in the action. Among such instances are the cost of the preparation of a map (Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 536), the expenses of an expert accountant employed to dissolve a copartnership (Faulkner v. Hendy, 79 Cal. 265, 21 Pac. 754), and the fees of a surveyor for obtaining data from which maps are prepared (Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158).

Under the terms of said act a private citizen may commence and maintain, in his own name, an action to abate an alleged nuisance. The far-reaching effect of respondent's contention, if sustained, would mean that such citizen would have the authority, in conducting investigations and collecting evidence against certain premises, to create expense without limit, and afterward recover the same from the owner of the property, who might be entirely innocent of the wrongful purpose to which the property was being devoted.

In the absence of any authority in the act for the allowance of the costs incurred by plaintiff in making and conducting the investigations before the commencement of suit, we are of the opinion that said costs constituted illegal charges and should have been disallowed.

[2] The second contention of appellant raises the direct question of whether or not, under said act, the court is granted the authority to take possession of, or place keepers in, the premises in question at any time before trial and judgment. According to the terms of said section 7, it would seem that such authority does not exist, and that the drastic features of the act attach only after trial and judgment. In that section it is expressly stated that the order of abatement and for the closing and keeping closed the premises in question shall be made "a part of the judgment in the case," and then only "if the existence of the nuisance has been established." There are no other provisions in the act which tend to modify or change the operation of said section 7 in this respect.

Section 4 provides that, if the existence of a nuisance is shown to the court by a verified complaint or affidavit, it shall allow a temporary injunction to abate and prevent the continuance or recurrence of such nuisance, the disobedience to or violation of which shall be deemed a contempt, punishable by fine of not less than $200 nor more than $1,000, or imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment. But apparently punishment for contempt is the limit of the court's power prior to judgment.

In view of the plain terms of said section 7, we are of the opinion that prior to judgment the court may not take possession of the questioned premises, by placing keepers therein, nor may it order the same closed. To hold otherwise not only would be contrary to the express provisions of the act itself, but it might lead to unjust results. For instance, as we have already seen, a private citizen, in a verified complaint or affidavit, may charge any establishment, however reputable, with being a nuisance within the meaning of the Redlight Abatement Act, and, if the law were as contended for by respondent, such person, upon an ex parte application based solely upon said verified complaint or affidavit, would be entitled to an order closing said establishment until trial; whereas upon trial it might develop that the charge was entirely unfounded, and the proceedings would accordingly be dismissed. No bond or other indemnity being necessary to institute said action, the owners, or other persons conducting the establishment would be without redress, notwithstanding the fact their establishment had been unjustly closed between the time of the filing of suit and the trial of the action.

[3] It is argued by respondent that, although express authority for the allowance of the contested items may not be found in the provisions of said act, yet implied authority is granted by reason of the fact that the court, in administering the Redlight Abatement Act, exercises its jurisdiction as a court of equity. In this contention respondent is not supported by the authorities. It has been held on numerous occasions that the right to recover costs is purely statutory, and that, in the absence of statute, no costs can be recovered by either party. Williams v. Atchison, etc., Ry. Co., 156 Cal. 140, 103 Pac. 885, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260; Bond v. United Railroads, 20 Cal. App. 124, 128 Pac. 786; Kummeth v. Atkisson, 23 Cal. App. 401, 138 Pac. 116; Fox v. Hale & Norcross S. M. Co., 122 Cal. 219, 54 Pac. 731. And in Sierra Union Water & Mining Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038, it was held that the allowance of costs

does not depend upon the form or nature of the action, but upon whether or not the case comes within the terms of the statute relating to costs.

The provisions of the Redlight Abatement Act, therefore, are controlling. They do not provide for the cost of the services of "guards" placed in said premises prior to judgment, and for that reason said costs constituted an illegal charge and should have been disallowed.

The order denying appellant's motion to retax costs is reversed, and the court is directed to grant the same in accordance with the views herein expressed, and to strike from the judgment the amount of said contested items.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 29

CITY OF LOS ANGELES v. McKEAG et al.
(Civ. 2760.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1920.)

1. MUNICIPAL CORPORATIONS ⟸187 — ORDINANCE GOVERNING AWARD TO WIDOW OR CHILDREN OF DECEASED POLICEMAN FROM PENSION FUND CONSTRUED.

The allowance provided by section 7 of the ordinance of the city of Los Angeles governing the administration of the police pension fund, established pursuant to Charter, § 2, subd. 45, to be made to the widow, child, or children of a police officer dying from natural causes, is to be attended by the same limitation as contained in section 4 of the ordinance relative to disability by injuries or sickness in course of duty, and does not permit any allowance after child reaches 16 years, or after the marriage of widow.

2. MUNICIPAL CORPORATIONS ⟸187—"CHILD OR CHILDREN" AS USED IN ORDINANCE RELATING TO POLICE PENSION FUND APPLY TO MINORS.

Under section 7 of the ordinance of the city of Los Angeles governing administration of the police pension fund established under Charter, § 2, subd. 45, providing that when any member of the police department dies from natural causes his widow, child, or children shall receive an amount based on the number of years of his service, the words "child or children" naturally apply only to minors, and do not include adults.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child.]

3. MUNICIPAL CORPORATIONS ⟸187—DISCRETION OF POLICE PENSION COMMISSIONERS FINAL ONLY ON MATTERS WITHIN JURISDICTION.

The fact that police pension commissioners of the city of Los Angeles were vested with jurisdiction over the police pension fund meant that their discretion when exercised was final only as to matters and persons confided to their jurisdiction by Charter, § 2, subd. 45, providing for the fund, and the ordinance of the city governing its administration.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the City of Los Angeles against Wm. H. McKeag, Jr., and Charles E. McKeag. From judgment for plaintiff, defendants appeal. Affirmed.

Davis, Kemp & Post, of Los Angeles, for appellants.

Albert Lee Stephens, City Atty., and Wm. P. Mealey, Deputy City Atty., both of Los Angeles, for respondent.

JAMES, J. This action was brought by the city of Los Angeles to recover the amount of $1,000, alleged to have been improperly and without authority paid to the defendants out of the policemen's pension fund of said city. Defendants were the sons of W. H. McKeag, Sr., who at the time of his death was a police officer employed by said city, and he had been such police officer for more than ten years prior to his death. The defendants, at the time of the death of their father, were of adult age. It was alleged in the complaint that McKeag, Sr., died from natural causes, "and that the sickness which caused his death was not caused by the discharge of his duties as a member of said police department." In their answer defendants, stating that they had no information or belief sufficient to enable them to answer concerning the cause of the sickness resulting in the death of McKeag, denied "that the sickness which caused his death was not caused by the discharge of his duties as a member of said police department." The answer further sets up the charter provisions which authorized the establishment of the police pension fund. Plaintiff gave notice of motion for a judgment on the pleadings, which the court granted and defendants appealed.

Referring first to the charter provisions which are set forth in the answer of defendants, we find there the plan outlined under which the police pension fund was established; also the limitations governing the application of such fund. We quote, in part, subdivision 45 of section 2 of that charter:

"To create and maintain and provide for the disbursement of a policemen's relief, health, life insurance, and pension fund, to be used for the payment of pensions to members of the police department of the city who shall be retired from such department; for the payment of pensions to members of such department who shall become physically disabled by reason of bodily injuries received in, or by reason of sickness caused by, the discharge of their duties, and for the payment of pensions to the widows and children of members of such police department who shall have died from bodily injuries re-

ceived, or sickness or disease contracted in the performance or discharge of their duties. Said fund shall be created, maintained and disbursed in such manner as may be prescribed by ordinance. * * * The disbursement of said 'Policemen's Pension Fund,' as provided for by ordinance, shall be left to the exclusive control, discretion and judgment of a commission of three persons, to be called the 'Policemen's Pension Commission,' the said commission to consist of the chief of police, the health commissioner, and the president of the council. Said commission shall make semiannual reports to the city council of all moneys received and disbursed by them."

From an examination of these provisions it must be concluded that the fund when created could only be used in the furtherance of the purposes therein specified. Those purposes included the payment of pensions to members of the department who should become physically disabled by reason of bodily injuries received in, or sickness caused by, the discharge of their duties, and for the payment of pensions to widows and children of such members who should die from bodily injuries received or "sickness or disease contracted in the performance or discharge of their duties." For the purpose of carrying out the intent of the charter provisions an ordinance was passed wherein a complete plan for the administration of the fund was provided for and the cases in which allowances might be claimed were enumerated. Among other things, it is provided by section 4 of the ordinance that when a member of the police department shall become disabled by reason of bodily injuries received or sickness caused by the discharge of his duties, such member may be retired and paid a yearly pension, and that, if he should die leaving a widow or children, they should participate so long as the widow should remain unmarried or the children be under the age of 16 years. All of the provisions of the ordinance except those contained in section 7, which will be hereinafter referred to, limit any allowance to children to those only who are under the age of 16 years. By section 7 it is provided that when any member of the police department dies from natural causes, "then his widow, child, or children, or his dependent father or mother, if there be no such widow, child, or children, shall receive from said fund an amount based upon the number of years of service of such person in said department as fixed in the following schedule, to wit." It was evidently under the authority assumed to be given by this provision of the ordinance that the money was paid by the pension commission to defendants.

[1] As a matter of construction, and viewing the preceding terms of the ordinance, it seems both fair and reasonable that the allowance provided to be made there to the widow, child, or children is to be attended by the same limitation as is contained in the other provisions, which do not permit any allowance or continuation thereof to be made after a child reaches the age of sixteen years, or after the marriage of the widow. In a similar case, and where similar provisions governing the disbursement of a police pension fund were under consideration, the construction which we have indicated was enforced. Mackey et al. v. Mott et al., 25 Cal. App. 110, 142 Pac. 1082.

[2] Under this construction of the provisions of the ordinance before us it matters not whether the illness which caused the death of McKeag was caused by or contracted during the performance of duties as a member of the police department, and even though we were not to construe the ordinance in its entirety, and were considering section 7 alone, the natural construction to be given to the words "child or children" would be to consider such provision as applying to minors alone and not to include adults. The determination of the one question just considered necessarily compels an affirmance of the judgment.

[3] The fact that the police pension commissioners were vested with exclusive authority over the fund means that their discretion, when exercised, is final only as to matters and persons confided to their jurisdiction.

It is unnecesssary to consider other questions presented affecting the condition of the pleadings relating to alleged issues raised by the answer.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 135

HIGGINS v. JENNINGS, Sheriff. (Civ. 3184.)

(District Court of Appeal, First District, Division 1, California. Feb. 13, 1920.)

1. FRAUDULENT CONVEYANCES ⊂=104(2)—MORTGAGE ASSIGNED BY SOLVENT HUSBAND TO WIFE FOR SUFFICIENT CONSIDERATION NOT ATTACHABLE.

Where assignment by solvent husband of note and mortgage to his wife was based upon a sufficient consideration and was not fraudulent as to husband's creditors, the note and mortgage were not subject to attachment in action against husband 15 months after assignment.

2. FRAUDS, STATUTE OF ⊂=139(1)—EXECUTED TRANSFER BETWEEN HUSBAND AND WIFE OF PROCEEDS OF HOMESTEAD HELD VALID.

Oral agreement between husband and wife made in good faith, whereby proceeds of the sale of their homestead property are to be transferred to the wife, will not be held invalid, where the agreement has been fully executed by the making of such transfer.

3. APPEAL AND ERROR ⊂=1011(1)—FINDINGS ON CONFLICTING EVIDENCE WILL NOT BE DISTURBED.

Findings on conflicting evidence will not be disturbed.

Appeal from Superior Court, San Diego County; A. Sloane, Judge.

Action by Sarah A. Higgins and another against Fred M. Jennings, Sheriff, etc. Judgment for named plaintiff, and defendant appeals. Affirmed.

Henning & McGee, of San Diego, for appellant.

Shreve & Shreve, J. T. Reed, and Theodore Stensland, all of San Diego (Shreve, Reed, Sample & Reed, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff Sarah A. Higgins against defendant, Fred M. Jennings, sheriff of San Diego county, in an action in claim and delivery and by which said plaintiff was decreed to be entitled to the possession of a certain promissory note for $9,600, together with a mortgage on real property given to secure its payment, which the defendant as such sheriff had taken into his possession as the property of one B. B. Higgins, husband of said plaintiff, under an attachment issued in an action pending against him.

The facts of the case are very fully found by the court, and may be briefly summarized as follows: In the year 1904 Sarah A. Higgins married said B. B. Higgins, who at the time was a widower with two young children, and the owner of and living upon a ranch in said county, upon which there was a mortgage for $2,000. She had been his housekeeper for two years, and there was due to her from Higgins some $300 or $400 as unpaid wages. She was also the owner of five acres of land, with a few head of cattle and other personal property, including $200 or $300 in cash. Higgins had requested her to marry him, promising that if she would do so and raise his two children and assist him in paying off the mortgage on his said ranch he would give her the property. She consented and became his wife, sold her land, and devoted the proceeds to the removal of said incumbrance, and otherwise carried out the terms of her undertaking. No immediate transfer of the ranch was made to Mrs. Higgins, but in the year 1911 she declared a homestead upon it, her husband not joining in said declaration, and indeed not knowing of it until after the declaration was made. In September, 1913, after negotiations conducted through R. E. Harrison, the other plaintiff in this action, the ranch was sold, Mrs. Higgins joining in the deed, and thus relinquishing her homestead right upon the understanding with Higgins that the proceeds of the sale should be paid to her. Through a misunderstanding by Harrison of his instructions, a note and mortgage, taken as part payment for said ranch, and which constitute the bone of contention in this action, were assigned to Higgins, upon discovering which a few days later, Mrs. Higgins took exception to it, and she and her husband went to a lawyer and had the error rectified by an assignment of said note and mortgage from Higgins to his wife. Some 15 months thereafter, viz. in December, 1914, an attachment was issued in an action pending against said B. B. Higgins and brought by the Bank of Oceanside upon a promissory note executed by said Higgins, and said attachment was levied upon the note and mortgage now in controversy, and which was then in the hands of one Alden, having been assigned to her by Sarah A. Higgins as security for a loan of $600. A few days thereafter, viz. on December 7, 1914, said Alden assigned said note and mortgage to said Harrison, who later, in the month of February, 1915, assigned them to Sarah A. Higgins. The defendant having secured possession of the note and mortgage by virtue of said attachment, said Harrison and Mrs. Higgins, as plaintiffs, brought this action against him for their recovery, and upon giving the necessary replevin bond regained possession of the property.

It further appears that on February 1, 1915, B. B. Higgins filed a petition in bankruptcy in the United States District Court, and was on that day adjudicated a bankrupt. A trustee was appointed, and qualified, and in the course of said proceeding the Bank of Oceanside made proof of its claim, being the same obligation upon which its pending

suit against Higgins was based. At the time of the trial of the present action, which took place nearly three years after its commencement, the suit of the Bank of Oceanside against Higgins had not been tried, nor had the trustee in bankruptcy of the defendant therein intervened in said suit, but he had by an independent action sought to recover said note and mortgage as assets of the estate of his bankrupt. In due time Higgins procured his discharge in said proceeding. In the meantime and between the time of the commencement of this action and its trial in May, 1917, Mrs. Higgins, in consideration of a loan of $2,000, assigned said note and mortgage to one Gottstein, and in conjunction with said assignee, commenced a suit in foreclosure upon said note and mortgage. She recovered judgment therein, the property was sold, and a deficiency judgment entered in her favor.

The court found the facts generally as above narrated, and also that the transfer by Higgins to his wife of said note and mortgage was made for a valuable consideration and without intent to hinder, delay, or defraud the creditors of the husband, and at a time when the latter was not insolvent, in these respects rejecting the contentions of the defendant as set up in his answer to the amended supplemental complaint. The court concluded as matter of law that at the time of the commencement of the action and of the trial of the cause said Sarah A. Higgins was entitled to the possession of said personal property, and rendered its judgment accordingly and for her costs. The defendant appeals.

[1] In the briefs of counsel for the respective parties hereto quite a number of legal propositions are discussed, with copious citations of and extracts from cases pro and con; but to our minds most, if not all, of these questions are not necessary of decision herein in the face of the foregoing facts as found by the trial court, which findings an inspection of the record shows to have been based upon conflicting testimony. If, for example, the evidence supports—as we think it does—the finding of the trial court that B. B. Higgins was not insolvent at or prior to the date of his transfer of the note and mortgage in question to his wife, and that such transfer was based upon a sufficient consideration, and was not fraudulent as to his creditors, then it follows, as a legal conclusion requiring no citation to support it, that the note and mortgage so transferred were not subject to attachment some 15 months after the said transfer at the suit of one of the creditors of said B. B. Higgins, and hence that the defendant, as the sheriff levying such attachment, can found no right to withhold said note and mortgage from the rightful owner thereon; and thus the fact that B. B. Higgins thereafter went into bankruptcy becomes an immaterial factor in the decision of this case.

[2] As to the right of a husband and wife acting in good faith to enter into an oral agreement with respect to what shall be done with the proceeds of the sale of their homestead property by the terms of which such proceeds are to be transferred to the wife, we have no doubt as to the validity of such an oral understanding when the same has been fully executed by the making of such transfer. Freitas v. Freitas, 31 Cal. App. 16, 159 Pac. 611; Hussey v. Castle, 41 Cal. 239; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Ferrell v. Stanley, 83 Kan. 491, 112 Pac. 155, 33 L. R. A. (N. S.) 777.

[3] The foregoing two propositions are decisive of the case at bar, since under either the defendant herein cannot be heard to question the correctness of the court's conclusion based, as we have seen, upon findings in favor of the plaintiff on evidence which, while conflicting, sufficiently supports the plaintiff's case.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

182 Cal. 450

OHIO ELECTRIC CAR CO. v. LE SAGE et al. (L. A. 5285.)

(Supreme Court of California. March 17, 1920.)

1. APPEAL AND ERROR ⊜193(9)—THAT COMPLAINT DOES NOT STATE CAUSE OF ACTION MAY FIRST BE RAISED ON APPEAL.

The objection that a complaint failed to state a cause of action may first be raised in the appellate court.

2. PLEADING ⊜34(7)—COMPLAINT FIRST ATTACKED IN APPELLATE COURT WILL BE LIBERALLY CONSTRUED.

Where the sufficiency of a complaint to state a cause of action was first attacked in the appellate court, it will be liberally construed.

3. GUARANTY ⊜27—CONTRACT OF GUARANTY SHOULD RECEIVE FAIR AND REASONABLE INTERPRETATION.

The language of a contract of guaranty should receive a fair and reasonable interpretation under the same rules of construction that are applicable to other written instruments, but the liability of the guarantor cannot be extended by implication.

4. GUARANTY ⊜70—GUARANTY OF COLLECTION REQUIRES DILIGENCE AGAINST PRINCIPAL; "UNCONDITIONAL GUARANTY"; "GUARANTY OF COLLECTION."

A guaranty to hold plaintiff harmless as a result of its sale of automobiles to a dealer is not an "unconditional guaranty," within Civ. Code, § 2806, so as to come within the rule of section 2807 that a guarantor is immediately liable upon default of the principal, but being in effect a "guaranty of collection" within section 2800, the guarantor is under sections 2801, 2802, discharged if proceedings against the principal are not taken with reasonable diligence, unless no part of the debt could have been collected, or the principal has removed from the state having no property from which the obligation might have been satisfied.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Guaranty of Payment and Collection.]

5. GUARANTY ⊜47 — "GUARANTY OF PAYMENT" AND "INDEMNITY AGAINST LOSS" CONTRASTED.

In case of "guaranty of payment," the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, but "indemnity against loss" partakes of the nature of a guaranty of collection; no liability being incurred until after by use of reasonable diligence the creditor has become unable to collect the debt from the principal.

6. GUARANTY ⊜85(1) — COMPLAINT AGAINST GUARANTOR OF COLLECTION HELD NOT TO STATE CAUSE OF ACTION.

A complaint, alleging that defendant agreed to hold plaintiff harmless from loss by reason of its sale of automobiles, but which failed to allege that any steps were taken against the principal, or that diligence would have proved unavailing, is insufficient to state a cause of action.

7. PLEADING ⊜433(7) — DEFECTIVE COMPLAINT NOT CURED BY FINDINGS.

Where a complaint was insufficient to state a cause of action against one guaranteeing collection because not showing that steps had been taken against the principal, findings in language similar to the complaint that no part of the debt due from the principal had been paid, that demand had been made, and that there was due from the guarantor to plaintiff a specified sum, are insufficient to cure the defect.

8. EVIDENCE ⊜448—UNAMBIGUOUS WRITTEN CONTRACT OF GUARANTY CANNOT BE EXPLAINED BY CIRCUMSTANCES.

Under Civ. Code, § 1639, and Code Civ. Proc. §§ 1856, 1860, where a written contract of guaranty was not ambiguous, evidence of the extrinsic circumstances is inadmissible to explain the meaning of the language, nor is the conduct of the parties admissible to show their construction.

9. CONTRACTS ⊜238(2) — WRITTEN CONTRACT CANNOT BE ALTERED BY ORAL AGREEMENT.

Under Civ. Code, § 1698, a written contract cannot be altered by a parol agreement unless executed.

10. GUARANTY ⊜85(1)—COMPLAINT ON CONTRACT IN NATURE OF GUARANTY OF COLLECTION HELD DEFECTIVE.

Where a complaint on a contract in the nature of a guaranty of collection was defective because failing to show proceedings against the principal, general allegation that plaintiff had sufficiently performed all of the conditions of the contract on its part to be performed will not supply the deficiency.

11. GUARANTY ⊂⊃47 — MERE NONPAYMENT DOES NOT GIVE CAUSE OF ACTION ON GUARANTY OF COLLECTION.

Mere nonpayment of a debt when it becomes due does not constitute a loss or damage within the meaning of a guaranty of collection.

Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Ohio Electric Car Company against Gideon Le Sage and others. From a judgment for plaintiff, the named defendant appeals. Reversed.

Julius V. Patrosso, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, and Parker & Parker, of Pasadena, for respondents.

SHAW, J. The defendant Le Sage appeals on the judgment roll alone from a judgment against him. His only point is that the complaint does not state a cause of action against him.

[1, 2] The plaintiff contends that the appellant cannot raise this point because the demurrer to the complaint was a joint demurrer in behalf of all the defendants, and that, as the complaint is conceded to be good as against some of the defendants, it must be held good as to all of them upon a joint demurrer. In Asevado v. Orr, 100 Cal. 300, 34 Pac. 777, the court said that—

"A joint demurrer by all of the defendants must be overruled if the complaint is good against either of them."

We need not attempt to explain this remark or to show that it is inapplicable to the present case. It is immaterial whether the point was properly raised by the demurrer or not. The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by the failure to demur, but may be raised for the first time upon appeal. Code Civ. Proc. § 434; Arnold v. American Ins. Co., 148 Cal. 663, 84 Pac. 182; Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236. It is true that, where the objection is not made good until after judgment, the complaint will be liberally construed, and if the necessary facts appear by implication only, or as a conclusion of law, the complaint will be upheld. But where there is an entire absence of an essential allegation, the complaint will be held bad, even when the point is first raised upon appeal.

[3-6] The complaint here contains five counts. Upon the fifth count judgment was given in favor of the defendants, and it need not be further considered. So far as the defendant Le Sage is concerned, the action is based upon a guaranty by him and Duffet attached to a contract executed by the defendants, MacIntosh and MacIntosh, under the name of Washington Street Electric Garage Company. We will hereafter refer to them as the "garage company." The contract between the plaintiff and the garage company provided that the garage company should have the exclusive right, in the city of Los Angeles, to sell electric automobiles manufactured by the plaintiff. It also provided that the plaintiff would sell such automobiles to said garage company at a discount from the list price and upon specified terms of payment. Attached thereto, after the signature of the said partners, was the guaranty signed by Le Sage and Duffet upon which Le Sage is sought to be held liable, which was in the following words:

"Whereas, we are interested in the Washington Street Electric Garage Company and at our request the Ohio Electric Car Company has consented to deliver certain automobiles to the said Washington Street Electric Garage Company, without payment therefor in cash, and that the said Ohio Electric Car Company has further, at our request, entered into the foregoing contract with the Washington Street Electric Garage Company, we hereby guarantee to hold the Ohio Electric Car Company whole and harmless from any and all loss or damage by reason of any transaction or transactions between it and the Washington Street Electric Garage Company."

The complaint alleges that certain automobiles were purchased by the garage company from the plaintiff at specified prices upon which partial payments had been made. The allegations of nonpayment were in the same phraseology in each count. It will be sufficient to quote the clause of the first count upon that subject:

"That no part of said $1,928.70 or of the interest thereon has been paid to the plaintiff and there is now due and owing to it thereon, from said defendants, E. D. MacIntosh, R. B. MacIntosh, Geo. E. F. Duffet, and Gideon Le Sage, said sum of $1,928.70, with interest thereon at 6 per cent. per annum from the 14th day of July, 1915."

There is no allegation that the plaintiff has suffered any loss or damage by reason of any transaction with the garage company, or that the plaintiff has taken any legal proceedings to collect from said company indemnities alleged to be due it, or that said company is insolvent, or that for any other reason legal proceedings against them would be unavailing. No facts are alleged to indicate that the debts of the garage company could not have been enforced by ordinary legal proceedings. The appellant contends that the complaint is insufficient against him because of the want of such allegations, and we think this contention must be sustained.

The appellant's only liability is upon the guaranty signed by him. The language of the guaranty is to receive a fair and reasonable interpretation upon the same rules of construction that are applicable to other written

instruments, but the liability of the guarantor cannot be extended by implication beyond the terms of the guaranty when so construed. London & San Francisco Bank v. Parrott, 125 Cal. 482, 58 Pac. 164, 73 Am. St. Rep. 64. The guaranty of Le Sage is not an unconditional guaranty, as described in section 2806 of the Civil Code, and hence it does not come within the rule of section 2807 that—

"A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

The guaranty clearly imports a condition, that is, that the plaintiff must suffer some loss or damage from the transactions guaranteed, in order to make the guaranty operative. It is, in effect, a guaranty of collection such as that mentioned in section 2800 of the Civil Code. Such a guaranty imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence. If such proceedings are not taken, the guarantor is discharged unless "no part of the debt could have been collected thereby" or unless the principal obligor has removed from the state leaving no property therein from which the obligation might be satisfied. Civ. Code, §§ 2801, 2802. The complaint does not show any of these facts, or any excuse for the failure to take legal proceedings first against the principal. The rule in regard to such guaranty is well stated in Pierce v. Merrill, 128 Cal. 471, 61 Pac. 67, 79 Am. St. Rep. 63, in a quotation from Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325, as follows:

"There is a well-understood difference between a guaranty of payment and a contract of indemnity against loss as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor."

In Fernandez v. Tormey, 121 Cal. 515, 53 Pac. 1119, a mortgage was given by the defendant to secure Fernandez "against any loss which he may ever sustain by reason of the transfer and assignment by him to Henry Rogers" of certain obligations particularly described. Concerning the meaning and effect of this clause of the mortgage, the court said, "Its natural import is indemnity against loss contingent and not yet accrued" (121 Cal. 520, 53 Pac. 1119), and held that the mortgagee could not recover unless he proved, not only that Rogers had failed to discharge his obligations on account of such assignments, but that the mortgagee had, as a consequence thereof, suffered some loss from the failure. There are many authorities to the same effect. Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Willson v. McEvoy, 25 Cal. 172; Prader v. Grimm, 28 Cal. 12; Roussin v. Stewart, 33 Cal. 208; 20 Cyc. 1447.

[7] There is nothing in the findings which cures this defect in the pleadings. On the contrary, they also merely state, in language similar to that of the complaint, with respect to each item found to be owing from the garage company to the plaintiff, that no part of the same, or any interest thereon, has been paid to the plaintiff; that a demand has been made therefor and that there is now due from said defendants to the plaintiff the sum of money specified. Upon the principles relating to such guaranties as above set forth, the findings not only do not cure the complaint, but they are insufficient to sustain the judgment against the defendant Le Sage.

[8, 9] The surrounding circumstances cannot be resorted to for the purpose of giving a different meaning to the terms of the guaranty. There is nothing ambiguous in those terms, nor were any facts alleged which create an extrinsic ambiguity, and in such cases extrinsic evidence to control or explain the meaning of the language is inadmissible. Civ. Code, § 1639; Code Civ. Proc. §§ 1856, 1860. Nor was any conduct of the parties in construing the contract contrary to its terms shown which could have the effect of giving the language a different meaning with respect to the particular transactions here involved, whatever effect such conduct may have had upon other obligations covered by the guaranty. A written contract cannot be altered by an oral agreement except when such oral agreement is executed. Civ. Code, § 1698. There has been no oral agreement made or executed purporting to alter the guaranty as to the claims sued on. No foundation is laid in the pleadings for any claim that the defendant Le Sage was a partner in the garage company and directly liable as such for its obligations. Hence the judgment cannot be supported by any presumption to that effect.

[10] The allegation in the complaint that the plaintiff "has sufficiently performed each and all of the conditions of said contract on its part to be performed" manifestly refers, on the face of the complaint, solely to the contract between the plaintiff and the garage company as distinguished from the guaranty appended thereto. The same statement in the findings appears in the same connection and must have the same application and meaning. They cannot be considered as sufficient to authorize a judgment against the plaintiff on the theory that they are equivalent to an allegation and finding that the plaintiff had prosecuted an action against the garage company with due diligence and had failed to recover anything therein.

[11] The mere nonpayment of a debt when

it becomes due is sufficient foundation for an action to recover the same, but it does not constitute loss or damage within the meaning of a guaranty such as that here under consideration. The authorities already referred to sufficiently demonstrate this proposition. We are of opinion that the complaint does not state facts sufficient to constitute any cause of action against the appellant Le Sage, and that the judgment against him is not supported by the findings.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.

181 Cal. 604

URY v. VAN EVERY et al. (L. A. 5306.)

(Supreme Court of California. Dec. 1, 1919.)

1. BANKRUPTCY ⟸302(1)—DEFINITENESS OF COMPLAINT IN ACTION TO RECOVER PROPERTY.

A bankruptcy trustee's complaint, alleging the bankrupt had transferred property to a sister upon a secret understanding to hold it for his use, and also that he had fraudulently conveyed it to her with intent to defraud his creditors, etc., *held* not subject to demurrer upon ground that complaint is not clear as to whether it is desired to impress a trust on property or set aside the transfer on account of fraud, since, if the property was transferred without consideration under a secret understanding, the trustee would be entitled to its return, and pleading actual fraud does not essentially change the action.

2. BANKRUPTCY ⟸143(10) — INTEREST IN TRUST ESTATES PASSES TO TRUSTEE.

Where one for whom property is held in trust becomes a bankrupt, his entire interest in the trust estate passes to the trustee in bankruptcy, and such ownership draws with it the right of possession, in so far as such interest is capable of possession.

3. BANKRUPTCY ⟸143(10)—SECRET TRUST FOR BANKRUPT PASSES TO TRUSTEE.

Any property, in which there is a secret trust for the bankrupt's benefit, no matter how much covered up, passes to the trustee.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Loren Ury, Jr., a minor, by L. G. Ury, his guardian, now Wm. H. Moore, Jr., trustee for the estate of John L. Van Every, bankrupt, as substituted plaintiff, against J. L. Van Every and Jessie L. Van Every. Judgment for defendants, and plaintiff appeals. Reversed, with instructions.

Simpson & Simpson, of Pasadena, Elmer I. Moody, of Los Angeles, and Ticknor & Carter, of Pasadena, for appellant.

A. K. Hancock, S. M. Johnstone, and Hancock & King, all of Los Angeles, for respondents.

MELVIN, J. This is an appeal by plaintiff from a judgment entered after a demurrer to the third amended complaint had been sustained.

The pleading held defective by the superior court contained allegations that Loren Ury, Jr., a minor, appearing by his guardian ad litem L. G. Ury, was a judgment creditor of John L. Van Every, the amount of the judgment being $1,000; that after Loren Ury, Jr., sued defendant by his guardian ad litem, Van Every was adjudged a bankrupt December 31, 1914; that William H. Moore, Jr., was appointed trustee of the estate in bankruptcy; and that subsequently said Moore, as trustee, was by order of court substituted for Ury as plaintiff.

It was further alleged that on February 10, 1913, J. L. Van Every made and executed a certain instrument purporting to convey to his sister, Jessie L. Van Every, certain described property; that other property, description of which was unknown to plaintiff, had been similarly conveyed; that Van Every had also given into the hands of his sister money and other personal property prior to the adjudication of the fact that he was a bankrupt; and that all of such transfers were without consideration and "with the understanding and agreement between the said John L. Van Every and the said Jessie L. Van Every, that she was to hold the same as and for the property of the said John L. Van Every." It was further averred that the estate of John L. Van Every, bankrupt, owned all the property; that Jessie L. Van Every held it as the property of her brother and for his use and benefit; that she received it in trust for said John L. Van Every; that she had no right, title, or interest in the said property received by her prior to the bankruptcy of her brother.

It is conceded by respondents that, if the pleading had contained only such averments, it might have properly passed demurrer, but the complaint also contains allegations which, with those epitomized above, made it, as respondents assert, demurrable as both ambiguous and uncertain. In substance, these averments (based upon information and belief) are that John L. Van Every willfully and fraudulently transferred and assigned the property, prior to bankruptcy, "under a secret trust agreement with the said Jessie L. Van Every, and with the intent for a purpose of avoiding and escaping the payment of just debts of the said defendant, John L. Van Every, and for other purposes unknown to this plaintiff, and that the said John L. Van Every and the said Jessie L. Van Every refused to deliver to the trustee of said bank-

rupt the said property so held by said trustee, and both of said defendants are fraudulently withholding said property from the trustee of said bankrupt, thereby preventing the payment of just debts of the creditors of the said John L. Van Every in the estate." According to the complaint, claims to the amount of $1,025 have been proved and filed in the bankruptcy proceeding; the trustee has no money or property in his possession; and it is necessary that he obtain possession of the property held by Jessie Van Every that it may be sold and the proceeds used in paying claims and expenses of administration in the estate of the bankrupt.

The prayer is for a decree declaring Jessie L. Van Every trustee as to the property involved in the suit; requiring her to reconvey, assign, and transfer all of said property to the estate of the bankrupt; and restraining her from asserting any adverse claim thereto as against the estate.

[1] Respondents take the position here, as evidently the superior court did, that it is impossible to determine, from the pleading, whether the object of the action is to impress a trust on the property in the hands of defendant Jessie L. Van Every, or to set aside the transfer on the ground of fraud.

We are of the opinion that this criticism is without merit. If the property was transferred to Jessie L. Van Every without consideration as the property of her brother under a secret understanding that she was to hold it as his, the effect was to work a deception upon his creditors unless she should be required to return it to his estate. This would be true whether actually a deception was intended or not. The pleading of actual fraud, therefore, does not alter the essential characteristics of the action. Whether the trust be considered voluntary or involuntary, the officer having control of the bankrupt's estate would be entitled to conveyances or assignments.

[2] "Where one for whom property is held in trust becomes a bankrupt, his entire interest in the trust estate passes to the trustee in bankruptcy, and such ownership draws with it the right of possession, in so far as such interest is capable of possession." 7 Corpus Juris, 118.

[3] "Any property, in which there is a secret trust for the bankrupt's benefit, no matter how much covered up, passes to the trustee." Brandenburg on Bankruptcy (4th Ed.) § 853.

In view of the principles above announced, we feel constrained to hold that the complaint is sufficient as against the demurrer.

Judgment reversed, with instructions to the superior court to overrule the demurrer to the complaint.

We concur: LENNON, J.; WILBUR, J.

182 Cal. 523

KING et al. v. CAVE et al. (S. F. 9075.)

(Supreme Court of California. March 26, 1920. Rehearing Denied April 20, 1920.)

APPEAL AND ERROR ⊂⊃1011(1)— FINDINGS ON CONFLICTING EVIDENCE NOT DISTURBED.

Findings of fact by the court upon substantially conflicting testimony will not be disturbed on appeal.

Department 2.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Percy S. King and another, as executors of the last will and testament of Johanne Augusta Emily Marx, deceased, against A. R. Cave and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for appellants.

U'Ren & Beard, of Napa, and Milton T. U'Ren, of San Francisco, for respondents.

WILBUR, J. An action upon two promissory notes of the defendants to Mrs. Emily Marx, deceased, payable two years after date with interest at 8 per cent., the first dated August 11, 1918, for $2,000, and the second dated October 1, 1918, for $1,000. These notes, given in renewal of two notes of the same amounts and tenor executed in 1909, and a third note of $5,500, dated January 11, 1910, payable in five years, together with 9,000 shares of the capital stock of the Wes Johnson Company, were held by the Anglo & London Paris National Bank in San Francisco for decedent at the time of her death. It is admitted by the defendants that they received from the payee of the notes the sum of $8,500; that because of that fact they gave the notes in question, deposited the stock as security, and paid the interest thereon. The defendants claim that the $8,500 which they received from the deceased was a conditional gift; that the payment of interest, the placing of the security, and the giving of the notes were either consistent with such gift, or, if not, that they were without consideration, because the money was conditionally given them. The claim is that the purpose of the testatrix was to secure to herself interest upon the money given during her life as an annuity, and at her death the principal was to belong to the makers of the notes. All the evidence that either party deemed material to the elucidation of the question at issue was presented to the trial court without objection, in accordance to a stipulation to that effect. The trial court found that there was no such agreement as that claimed by the defendants, and accordingly rendered judgment for the plaintiffs. Defendants ap-

peal, and claim that the evidence without substantial conflict sustains their contention. In addition to the admitted facts above stated, there is also in evidence correspondence between the parties and the bank concerning the notes, and other evidence which supports the finding of the trial court that the transaction was a loan. It is therefore sufficient for the purposes of this appeal to point out that, notwithstanding the number of witnesses who testify to statements of the deceased that she intended to give, or had given, $8,500 to the makers of the notes, and the testimony of the defendants that such was the understanding, the case comes within the rule that, where the testimony in the trial court is substantially conflicting, we cannot interfere with the findings of fact by that court. It becomes unnecessary, therefore, to consider the question as to whether or not the transaction sought to be shown by parol, if proved, comes within the rule that such evidence cannot be received to contradict or vary the terms of a written instrument, or whether or not, if a gift of the $8,500 was proved prior to the giving of the notes, they were therefore without consideration. The evidence sufficiently sustains the findings.

Judgment affirmed.

We concur: KERRIGAN, Judge pro tem.; LENNON, J.

182 Cal. 457

PEOPLE v. RULIA SINGH. (Cr. 2270.)

(Supreme Court of California. March 17, 1920. Rehearing Denied April 16, 1920.)

1. HOMICIDE ⊂=253(1) — EVIDENCE HELD TO SUPPORT CONVICTION OF FIRST-DEGREE MURDER.

In prosecution for murder in first degree committed by one Hindu upon another, evidence, including that of threats by defendant, and the dying declarations of deceased that defendant had killed him, *held* sufficient to support conviction, despite defendant's claim of alibi.

2. HOMICIDE ⊂=218, 221—COURT PASSES ON ADMISSIBILITY OF DYING DECLARATIONS, AND JURY DETERMINES WEIGHT.

In California it is the function of the trial court primarily to pass upon the admissibility of alleged dying declarations, and of the jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine credibility and weight to which they are entitled.

3. HOMICIDE ⊂=203(1), 221—DYING DECLARATIONS NOT CONSIDERED IF REASONABLE DOUBT OF EXTREMIS; OTHERWISE IF EXTREMIS APPEARS.

If jury is not convinced beyond a reasonable doubt that deceased, claimed to have made dying declarations, was in extremis, and believed at the time that he was, in arriving at verdict they must disregard such declarations, but, if satisfied he acted under a sense of impending death, they must determine what facts, if any, are established by his declarations, and apply them accordingly.

4. CRIMINAL LAW ⊂=763, 764(21)—INSTRUCTION ON DYING DECLARATIONS HELD NOT ERRONEOUS.

In prosecution for murder, instruction as to dying declarations that jury had right in considering whether or not they should accept declaration as a correct statement to determine whether it was made under a sense of impending death *held* not erroneous as leading jury to understand that, if they found deceased to have had sense of impending death, he was making a correct statement.

5. CRIMINAL LAW ⊂=763, 764(21)—INSTRUCTION ON DYING DECLARATIONS HELD NOT ERRONEOUS.

In a prosecution for murder, instruction on dying declarations that jury were at liberty to disregard declarations, if not satisfied they were made under a sense of impending death, *held* not erroneous in that jury were not instructed they must disregard declarations in such case.

6. CRIMINAL LAW ⊂=823(10)—ERRONEOUS INSTRUCTION ON DYING DECLARATIONS CURED BY SUBSEQUENT CORRECT CHARGE.

In a prosecution for murder, instruction on dying declarations, erroneous in that jury were not told they must disregard such declarations if not made under a sense of impending death, *held* cured by a following instruction that, if satisfied beyond a reasonable doubt the declarations of deceased were so made, they might be considered.

7. CRIMINAL LAW ⊂=763, 764(21)—INSTRUCTION AS TO DYING DECLARATIONS OF DECEASED HELD NOT INVASION OF JURY'S PROVINCE.

In a prosecution for murder, instruction that certain statements made by deceased had been admitted in evidence "on the theory" they were dying declarations *held* not an invasion of the province of the jury, in view of the quoted language.

8. HOMICIDE ⊂=216 — DYING DECLARATIONS HELD ADMISSIBLE ALTHOUGH COURT DID NOT DETERMINE ADMISSIBILITY BY PRELIMINARY PROOF ADDRESSED TO ITSELF ALONE.

In a prosecution for murder, where there was much foundation testimony for the admission of the dying declarations of deceased, all indicating his settled conviction of pending dissolution, trial court did not err in not determining by means of preliminary proof addressed to itself alone question as to admissibility of declarations.

9. CRIMINAL LAW ⊂=682—ADMISSION AS PART OF PROSECUTION'S CASE IN CHIEF OF EVIDENCE ATTACKING DEFENDANT'S ALIBI HELD NOT ERRONEOUS.

In a prosecution for murder, admission as part of the people's case in chief of testimony responsive to theory of prosecution that defendant by going to a hospital had fabricated an alibi *held* not erroneous; prosecution not having been required to defer its attack on the alibi until evidence in support was first intro-

duced, while evidence of whereabouts of defendant at time of murder was indispensable to case of prosecution in chief.

10. CRIMINAL LAW ⊂=682—EVIDENCE REBUTTING PRESUMPTION OF INNOCENCE ADMISSIBLE FOR PROSECUTION IN CHIEF.

Any competent evidence which tends to rebut the presumption of innocence is always admissible as a part of the prosecution's case in chief.

11. HOMICIDE ⊂=158(4)—NECESSARY ADMISSION OF TESTIMONY OF THREATS BY DEFENDANT AGAINST OTHERS THAN DECEASED NOT ERRONEOUS.

In a prosecution for murder, where threats by defendant toward deceased necessarily involved proof of collateral threats towards persons other than deceased—that is, defendant's wife and her daughter, the wife of deceased—there was no error in admission of such evidence.

12. CRIMINAL LAW ⊂=1168(4)—REFUSAL TO STRIKE UNRESPONSIVE ANSWER HARMLESS WHERE SIMILAR TESTIMONY ADMITTED WITHOUT OBJECTION.

Refusal to strike out answer of witness claimed not to be responsive to question was harmless, where testimony to same effect had already been admitted without objection.

13. CRIMINAL LAW ⊂=413(1)—STATEMENT BY DEFENDANT IN HOSPITAL BEFORE KILLING INADMISSIBLE AS SELF-SERVING.

In a prosecution for murder, any statement as to how he felt, made by defendant in the hospital, on the night of the killing, before its time, *held* inadmissible as a self-serving declaration.

14. CRIMINAL LAW ⊂=419, 420(6)—PRIOR INCONSISTENT STATEMENT OF WIFE OF DECEASED INADMISSIBLE AS HEARSAY.

In a prosecution for murder, certain former inconsistent statements of the wife of deceased as to his dying declarations, considered as independent evidence, *held* hearsay and inadmissible.

15. WITNESSES ⊂=388(10)—IMPEACHMENT BY SHOWING INCONSISTENT STATEMENTS MUST BE PRECEDED BY INQUIRY AS TO TIMES, PLACES, AND PERSONS PRESENT.

In view of Code Civ. Proc. § 2052, in a criminal case before the statements of a witness inconsistent with his present testimony may be shown, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them.

16. CRIMINAL LAW ⊂=670—TO RESERVE EXCEPTION TO EXCLUSION OF QUESTION NOT APPARENTLY MATERIAL, QUESTIONER MUST REFRAME IT.

Where a question does not show on its face whether or not it is material, the questioner, in order to reserve exception, must formally reframe the question so that its materiality is apparent.

17. HOMICIDE ⊂=160—EVIDENCE OF KEEPING OF PISTOL BY DEFENDANT HELD TOO REMOTE.

In a prosecution for murder, testimony of defendant's wife that he kept a pistol at the head of his bed *held* inadmissible as too remote.

18. HOMICIDE ⊂=338(3)—ADMISSION OF EVIDENCE AS TO KEEPING OF PISTOL ADMITTED AND EXPLAINED BY DEFENDANT HELD HARMLESS.

In a prosecution for murder, admission of testimony of defendant's wife that he kept a pistol at the head of his bed, which in fact was inadmissible as too remote, *held* harmless to defendant, whose statement that he kept such pistol and that it belonged to his partner was not questioned.

19. WITNESSES ⊂=62—STATUTE HELD TO REMOVE WIFE'S INCOMPETENCY AS WITNESS AGAINST HUSBAND WHERE ACQUIESCENCE OR NO OBJECTION.

The rule of the common law that the wife was absolutely incompetent to testify against her husband has been modified in California by Pen. Code, § 1322 (Code Civ. Proc. § 1881), so that either spouse may testify with the consent of the other, which may be express or implied, as from a lack of objection and apparent acquiescence by the other.

20. WITNESSES ⊂=75—OBJECTIONS TO QUESTIONS TO DEFENDANT'S WIFE INSUFFICIENT TO RAISE QUESTION OF HER COMPETENCY.

In a prosecution for murder, defendant's objections to questions to his wife that they were incompetent, irrelevant, and immaterial *held* insufficient to raise the competency of the wife as a witness under Pen. Code, § 1322.

21. CRIMINAL LAW ⊂=1036(2)—OBJECTIONS TO COMPETENCY OF WITNESSES NOT MADE BELOW NOT CONSIDERED ON APPEAL.

If objections to the competency of witnesses are not made in the trial court, they will not be considered on appeal.

22. WITNESSES ⊂=76(3)—PRIVILEGE TO OBJECT TO SPOUSE AS WITNESS NOT MADE AT THE TIME AND ON CLEAR GROUNDS DEEMED WAIVED.

If one spouse, a party, and present in court, relies on the incompetency of the other to testify, the objection must be made at the time and on such grounds as to bring clearly before the court the question of the incompetency of the witness, or the privilege will be deemed to have been waived.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Rulia Singh was convicted of murder in the first degree, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

D. V. Noland, of Los Angeles, and O. V. Willson, of El Centro, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., Jerry H. Powell, of Los Angeles, E. R. Simon, Dist. Atty., of El Centro, and J. F. Seymour, special prosecutor, for the People.

LAWLOR, J. This is an appeal taken by the defendant from a judgment of conviction of murder of the first degree after a verdict fixing the punishment at imprisonment for life. The defendant also appeals from an order denying his motion for a new trial.

It was charged in the information that on November 21, 1918, in the county of Imperial, the defendant killed and murdered one Albert Joe. The defendant and the deceased were Hindus. The deceased was sometimes called "Joe Albert" and "Alberto," and the defendant is also referred to by the Christian name of "Raoul." The deceased was the husband of Alejandrina Cardenaz and the defendant of Valentina Alvarez, her mother. The wives are Mexicans. At the time of the marriage of Alejandrina Cardenaz to the deceased in November, 1917, Valentina Alvarez had three other daughters, Romana, Andria, and Anna Maria, who made their home with her and the defendant on a ranch some six or seven miles northwest of the town of Holtville. The deceased lived with his wife and their baby on a ranch about the same distance in a southeasterly direction from the said town. Gajan Singh was the brother of the deceased and lived in a house about one mile from the latter's ranch. Following the marriage between the deceased and Alejandrina, sometimes known as "Mrs. Albert Joe," trouble arose between the defendant and his wife. The latter, explaining why she left him, said:

"I had good reasons to separate from him: * * * First, he didn't give me enough for my family; * * * secondary, he was very quarrelsome, always mad at me all the time. * * * He saw when I was telephoning, and he told me to stop and not to telephone any more, that he would send me to 'Chingada,' * * * and then he grabbed me by the hair and threw me on the floor. * * * The main reason of the quarrel was that I wouldn't give my consent for his partner to marry my daughter, Romana. * * * He told me that by and by we would remember him; that he was going to kill Alberto. * * * He did drive me away; he drove me away. * * * I went because he drove me from the house; he said he didn't want me in the house any more."

According to the evidence, in the month of May, 1918, the wife telephoned Mrs. Albert Joe to come out to the ranch and take her away. The deceased and his wife went out to the Rulia Singh place, and, after some loud words in Hindustani had passed between the men, and the defendant had said to his wife, "You go with your daughter, and some day your daughter will think of me," they brought Valentina Alvarez and her three daughters in Albert Joe's automobile to the latter's ranch. Two weeks later Valentina, Romana, Andria, and Anna Maria went to San Diego, where they remained until the death of Albert Joe, the defendant making two visits to that city with the object of inducing his wife to return to him, which she declined to do. The separation of the defendant and his wife, and her refusal to return to him, apparently caused bad feeling on the part of the defendant toward the deceased and his wife; for several Hindus and the Mexican women testified to threats made by Rulia Singh against the life of Albert Joe on various occasions. These threats, according to the prosecution, culminated in the assassination of the deceased. It is conceded that the deceased died from the effects of a 38-caliber bullet fired into his body, but whether from a revolver or a rifle does not appear.

In order more fully to understand the points urged as grounds for reversal we shall set forth the evidence somewhat in detail. On the afternoon of November 21, 1918, the deceased and his wife were in the town of Holtville on business. The evidence is not clear as to the exact hour, but it was late in the afternoon when they returned to their ranch in their automobile. When they arrived they stopped for a little while, put some provisions in the automobile, and then went on to the house of his brother, Gajan Singh, where they milked the cows. They then returned home, and he and his wife sat down to supper.

The deceased and his wife lived in two "tent houses," each containing only one room. One was used as a "parlor," and the other as a "kitchen." About 150 feet south of the "kitchen," and about 80 or 90 feet from the highway, was a small milk house containing a cream separator. This was a frame building about 10 feet square, and, excepting for 3 feet at the base, the walls were made of wire screen.

The wife testified that while they were eating their dog commenced a loud barking very close to the kitchen, and that—

"My husband came out and called him and he came in and I gave him his supper and then he went off again. * * * He barked a great deal. I was in the house and did not notice which way he went. * * * He barked all around there by the milk house."

After supper the deceased went out to operate the cream separator. At the same time his wife started to fill and light the oil lamps in the tents. According to her testimony the dog's barking was still audible at a distance. The night was dark; there was no moon; a lighted lantern hung in the milk house. From the spot where the deceased was found in the milk house immediately after the shot was fired, the location of the cream separator, a hole made by the bullet in the screen 4½ feet from the floor, a scar made by the bullet on the wooden handle of the separator, and minor wounds in the thumb and finger of one of Albert Joe's hands, it may be assumed that at the time he was shot he was standing, facing south,

turning the machine. The bullet came through the wire screen on the south side of the milk house, and footprints were found the night of the shooting leading to and away from a point about 8 or 10 feet south of the house, in a direct line with the bullet hole in the screen and the scar on the handle of the separator.

About 15 minutes after the deceased had gone out to the milk house, as his wife was re-entering the kitchen carrying the second lamp, which she had just filled, she heard the only shot that was fired. She immediately rushed into the kitchen, lighted the lamp, and then ran over to the milk house, where she found her husband on the floor suffering from a gunshot wound in his abdomen. She testified that while she was running toward the milk house she heard her husband cry out, "Raoul has killed me! Raoul has killed me!" On cross-examination she said that his exclamation was: "Raoul is killing me! Raoul is killing me!" She testified further that when she reached her husband she asked him if he had seen Raoul Singh, and that he replied, "Yes," and that Raoul Singh had said, "Now, you son of a b——h, you remember what I told you; you would not let Valentina come with me, and now see what you got." Questioned further, her version of this latter statement of the deceased was, "You son of a b——h, why didn't you let Valentina come to my house?"

The wife placed the deceased in a small milk cart and wheeled him over to the ranch house. She testified that as she was crossing the 50 yards between the milk house and the kitchen she heard the dog barking to the north of the tent houses, and, from the same direction, the sound of buggy wheels on the Holtville road. After leaving her husband lying on the floor, inside the ranch house, she took her baby and ran about one-quarter of a mile to the dairy of a neighbor, Manuel Magruda, who promised to telephone for a doctor, and then hurried to the house of Gajan Singh, her brother-in-law. The latter accompanied her back to the Albert Joe ranch.

As the result of a telephone call, Dr. H. B. Graeser arrived about 20 minutes later and made an examination of the injured man. The physician questioned Albert Joe as to who shot him. The deceased answered, "Rulia Singh shot me." In response to another question, "How do you know Rulia Singh shot you; did you see him?" his reply was "No." Later, C. L. Gillett, city marshal of Holtville, Dr. David A. Stevens, and A. R. Underwood, a constable, appeared on the scene. They were followed by Undersheriff H. L. Barker and Deputy Sheriff J. L. Ridgway. Dr. Stevens testified that as he came into the room where the dying man lay the first words he heard were those of Dr. Graeser "telling him [the deceased] that he was a goner and he was dying." Dr. Stevens and Dr. Graeser then held a consultation in the presence and hearing of the deceased during which Dr. Graeser remarked to Dr. Stevens, referring to the deceased, "that he was a goner." Dr. Stevens then examined Albert Joe and told him that he was going to die. In response to this the wounded man said, "Rulia Singh killed me." The following is the substance of what passed between Dr. Stevens and Albert Joe: When the doctor inquired why Albert Joe thought that the defendant had shot him and what reason Rulia Singh would have, he replied that it was a long story. Again the doctor suggested to Albert Joe that it could not have been the defendant, because he had been put in the hospital at 2 o'clock that afternoon. The injured man reiterated that the defendant had killed him. The undersheriff asked Albert Joe who shot him, and he replied, "Rulia Singh; he is my only enemy; all men are my friends." To similar questions by the city marshal, Albert Joe declared that the defendant shot him. His words were, "Mr. Charlie, it is a long story; I cannot tell you; I am going to die pretty soon, but I know Rulia Singh killed me."

After a consultation between the physicians, Dr. Graeser, the city marshal, Gajan Singh, and Mrs. Albert Joe took the injured man to Holtville in an automobile. Stopping in front of the Holtville Hospital, Gajan Singh detailed the following conversation with Albert Joe:

"After he stopped the machine, I said, 'Brother dear, so you no live, you have got to be die, you better talk now; after he start the machine to go to El Centro, maybe too far; maybe you talk again, and maybe not talk again.' * * * He say: 'Rulia Singh shot me; at the same time he shot, he talk bad talk. He says, "Son * * *" at the same time he started to shoot. * * * Rulia Singh said, "Son * * *" and knock me down.' * * * I said, 'You tell me all you got, everything of your business.' He say: 'I buy bull, a little one, and I no pay; he got paper, notes. * * * Anybody got my signature, I have notes and everything; some Hindu he take five, ten dollars, maybe give Albert Joe note, you give it note. See. Anybody got note paper of any kind of me you pay. Pay everybody got my papers. You watch my baby; you look after my baby.' Me cry and me no say nothing, and he talk talk, and that is all. * * * Yes, sir; he told me sure, 'I got bad place, I die, I die,' he say, 'die.'"

The party then left for the hospital in El Centro, but the deceased died on the way about midnight. Dr. Stevens, the undersheriff, and the deputy sheriff went in an automobile to the Holtville Hospital, on the first floor of which Dr. Stevens had his office, to see the defendant, who had gone there in the afternoon. The party arrived about midnight.

The trial lasted eight days, and many wit-

nesses, mostly Hindus and Mexicans, were examined. In support of its claim that the defendant committed the murder, the prosecution assigned as the motive for the crime the grudge which he conceived against Albert Joe when Valentina Alvarez left his ranch and refused to return to him, and that this motive was made evident by the conduct of Rulia Singh toward Albert Joe, and especially by his repeated threats against the life of the deceased. The defense relied upon two main contentions as to the evidence—that the prosecution failed to prove the defendant guilty, and that, on the other hand, his alibi established his innocence.

There is much evidence of threats against Albert Joe in addition to the one made by defendant at his ranch the day his wife left. Mrs. Albert Joe testified that two days after the separation the defendant came to the Albert Joe ranch and said to her, "Alejandrina, you tell your mother to come back to my house, and, if you don't, I will kill Joe Albert." According to this testimony, he also said, "You tell your mother if she don't return to my house I will kill Alberto." Mrs. Albert Joe stated further that defendant made a second visit to the Albert Joe ranch two months later and asked her for the address of his wife, who at that time was in San Diego, and that "he got very mad at my husband; they used to talk very angrily."

Valentina Alvarez and her daughter, Romana, testified that defendant had a pistol, which he kept at the head of his bed. They also corroborated the testimony of Alejandrina as to the threats made by the defendant on the occasion of his first visit to the Albert Joe ranch after his wife left him. According to the testimony of his wife, when the defendant visited her in San Diego for the first time, he asked her to go out with him, and, when she declined, "he told me to go to hell; * * * that I would remember him; that there would be no more Capt. Alberto." When he saw her for the second and last time in San Diego, he told her "* * * by and by there would be no more Alejandrina and no more Albert Joe; that it didn't make any difference; he would kill them all."

The daughter, Romana, testified that the defendant spent at least two days in San Diego on the occasion of his second visit to his wife in that city, that she, Romana, saw him on the second day of his visit, and that he then told her and her mother "he didn't give up hope of killing Albert Joe."

One Lav Singh testified that in a conversation held with the defendant about 20 days before the murder the latter said, "I am going to kill Albert Joe; he took my wife; she wants to come home, and he won't let her come home."

Sher Singh, husband of a sister of the defendant's wife, testified to four conversations held with the defendant between the time that the latter's wife left him and the date of the murder. About 20 days or one month after defendant's wife had gone to the Albert Joe ranch, he visited the witness and his wife at their ranch in Imperial county and suggested that perhaps Sher Singh's wife could get her sister to come back to him. Ten or 15 days later the witness met the defendant on the street in Holtville, and on this occasion the defendant said, "Joe Albert took my wife, and I am going to kill him." Again, on meeting the witness on the street in Holtville about 2 weeks later, the defendant said, referring to the deceased, "I am going to kill him." In the course of a fourth conversation subsequently held with the defendant in front of the cotton gin in Holtville, Rulia Singh said to the witness, "I am going to kill him; if I can get somebody, I can spend $400 or $500 to try and have him killed by somebody; I will spend $400 or $500."

Rul Singh, Chet Singh, and Deva Singh all testified to the substance of a conversation held between the three and Rulia Singh near the courthouse in Holtville in the month of October, 1918. Rul Singh stated that the defendant "abused to Albert Joe," and said, referring to the deceased, "He is my son-in-law and I am his father-in-law, and I will see him some time; * * * I am not going to settle up." The testimony, in part, of Deva Singh is as follows:

"Rul Singh say, 'You and Albert Joe pretty mad; * * * you had better settle up.' Rulia says, 'I cannot settle with him; I no want him; I want to kill him;' and he talked more to him about it, and he was pretty mad. After I talk to Rulia Singh, I say, 'You and Joe pretty bad mad, and that is no right; you had better settle up, and I go with you, and take some more men.' Rulia Singh say to me, 'He cannot settle with me; I no want him, and he no want me.' He says, 'I fix him pretty soon, you see.'"

Chet Singh testified that in the course of the conversation last mentioned Rul Singh urged the defendant to "shake hands and be friends hereafter," and Rulia Singh replied, "Should I shake my hands with him; I am going to kill him."

Sunder Singh testified that about 3 o'clock on the day of the killing Rulia Singh came to his ranch, about six miles north of Holtville, in an automobile and held a conversation with the witness in the course of which he said, "I will kill that Albert Joe, the son * * *; I no want him at all to keep my wife on the place."

Appellant's position with respect to his alibi is thus stated in his brief:

"The appellant and his witnesses gave evidence * * * that * * * the defendant had been ill at his ranch of influenza, treating himself and without the services of a physician during the ten days preceding the day and the night of the shooting, and that in the fore part

of the afternoon of November 21, 1918, the appellant had come from his ranch * * * to Dr. David A. Stevens, * * * who examined him * * * and directed him to a hospital in the business district of Holtville, where the appellant went about 2 o'clock in the afternoon, * * * and in which hospital * * * he stayed until he was taken out under arrest the next day by one of the officers."

The first witness called in support of the alibi was Mrs. Anna Miller, a graduate nurse, in charge of the Holtville Hospital. She testified on direct examination that on November 21, 1918, about 1:30 p. m., the defendant, accompanied by one T. D. Sherm, applied for admission to the hospital; that the defendant said he was convalescing from la grippe; that he was assigned a room, undressed, and put to bed, and that his temperature was taken and noted on a chart made for that purpose; that at that time there were in the hospital two other patients, one of them a Hindu, Neer Singh, very seriously ill, who died less than two days later; that the defendant was given lunch that day and some medicine about 3 o'clock in the afternoon after the doctor had called and prescribed for the patient; that either she or her husband took the defendant's temperature at 3 p. m., and recorded it on the chart at the time; that about 5 p. m., while she was ministering to a patient across the hall, "I seen a Hindu passing from this Neer Singh's room, and I looked in and saw Rulia Singh in bed"; that about half past 5 "Rulia Singh came through the hall and inquired where the toilet was"; that Dr. Graeser, who was attending another patient, showed him the toilet, and that shortly after she saw defendant return to his room; that her husband took supper to the defendant about 6 o'clock; that she saw the defendant again at 7 o'clock; that she and a Mrs. Ramsay saw the defendant in bed at 9 o'clock, "his regular medicine time"; and that about half past 11 when she was called by City Marshal Gillett, she went up to the defendant's room and saw him in bed. On cross-examination she said that it was between 1 and 2 o'clock when the defendant first came to the hospital; that she was "pretty nearly" sure that she made a record of his temperature on the chart at the time she took it; that Dr. Stevens came in between 2 and 3 o'clock and left a prescription for the defendant; that she was not positive where the doctor left the prescription; that she "thought" she and her husband had the prescription filled by 3 o'clock; that she was "quite positive" that the first medicine was given the defendant about 3 o'clock, but, when further pressed on the subject, admitted that she did not remember; that she "thought" she gave the defendant medicine at 6 o'clock; "At 6 o'clock he had a —I guess he had the medicine again;" that she did not see Rulia Singh asleep at any time while he was in the hospital; that "Rulia Singh didn't have any temperature when he came in; his temperature was 99; he wasn't sick;" that she didn't see Rulia Singh come out of the toilet to which he was shown by Dr. Graeser at half past 5, but that she did not think he went out of the building; "I heard Rulia Singh coming back to his room with his shoes unlaced; I suppose it was him; his shoes was unlaced and they were making a noise on the carpet as he walked along." When further questioned, she was not so positive as to whether she or her husband administered the medicine. The above-mentioned chart was introduced in evidence, and Mrs. Miller admitted that the entries thereon did not correspond with her visits to the defendant to which she had just testified, but accounted for the discrepancy with the statement that "we were short of help and we didn't keep our records." She further stated that Rulia Singh did not seem to need much attention; admitted that she and her husband were in the habit of writing down the various items on the chart whenever they had an opportunity to do so and not necessarily at the time indicated; and said that she could not remember whether, at the time Dr. Stevens arrived at the hospital, about 11 o'clock the night of the shooting, the entries then appeared on the chart or were added subsequently. She admitted that when Undersheriff Barker and Deputy Sheriff D. J. Matlock called on her a few days after the murder to get the hospital chart, she told them that she had not seen the defendant between 6 and 9 on the night of November 21, 1918, and that she made the same statement to the district attorney, Undersheriff Barker, and a stenographer when they called at her house during the month of December, 1918. On this latter occasion she also said that when, about 5:30 p. m., the defendant came out of his room, as she had already stated he was dressed; that "he could have gone out easy enough, as there was a sick Hindu man in the next room, and the Hindus kept coming up to see him in bunches of two and three all afternoon and the early part of the night, so you see he could have gone out and come back with some of them, and we would never have known the difference; * * * He could have done it easy; * * * he was always awake."

Undersheriff Barker testified that when he saw the chart in the hospital at midnight on November 21, 1918, the only entries appearing thereon were those of the defendant's temperature and pulse, taken when he was admitted to the hospital on that day. Dr. Graeser testified that his "recollection" was that the Hindu to whom he showed the toilet was fully dressed.

Mrs. Miller's husband, Delos M. Miller, a carpenter by trade, testified that on the after-

noon the defendant was admitted to the hospital he was assisting his wife; that he saw the defendant in bed at 3 o'clock and again at 6 o'clock, when he took him his supper; that he could not remember whether he or his wife gave the defendant his medicine; that he did not see the defendant go out of the hospital that afternoon, but that he might have left the building while the witness was in one of the other wards; that he "thought" he took the pulse or temperature of the defendant at various times during the afternoon and early evening. On cross-examination he said that he did not think the defendant had any medicine between 6 and 9 o'clock; that it was possible that Rulia Singh had passed out of the hospital after 6 o'clock and then slipped back before 9 o'clock; that there was a door from the defendant's room out onto the roof of Dr. Stevens' office, from which descent to the ground was practicable by means of a ladder placed on the east side of the building.

Basant Singh testified that at 6 o'clock on the evening of the shooting, accompanied by Jewn Singh, he went to the hospital to visit his brother, Neer Singh; that while there they made one visit to the defendant in the latter's room; that they remained in defendant's room about five minutes; that, according to Jewn Singh's watch, it was 7:25 p. m. when they left; and that the witness "went about 20 times to the hospital that day because he [Neer Singh] was so sick and on the point of death."

Jewn Singh testified that he went to the hospital that day with Basant Singh; that he heard Rulia Singh coughing and went into his room and talked with him about five minutes; that he saw by his watch in the stairway of the hospital as he was leaving that it was 7:25 p. m. On cross-examination he stated that Rulia Singh looked "pretty pale" and coughed a great deal; that the reason why he entered defendant's room was because he heard him coughing and saw that he was a fellow countryman.

The defendant took the stand in his own behalf and testified that for ten days before he applied for admission to the hospital he had been suffering from influenza and had been treating himself with lemon and whisky without the care of a physician; that he arrived at the hospital about two in the afternoon and went "right to bed"; that Mrs. Miller gave him some medicine shortly after he arrived, and that Mr. Miller brought him supper; that he was shown to the toilet by a man whom he could not identify; that after supper—how long after he could not remember—Mrs. Miller gave him some medicine; that he slept all the time and had to be awakened to take his medicine; and that Basant Singh and Jewn Singh were in his room "from 7 to half past 7, or quarter to 7, somewhere there. I don't know for sure, but they know. * * * I guess it was 7 or a quarter after 7. I don't know any time. * * * I don't know how long after supper the time that Basant Singh and Jewn Singh left." On cross-examination he said that he was "very sick" the day he went to the hospital; that for eight or nine days preceding that time he had been ill and had not left his ranch; that he was out in his automobile the morning of the murder "seeing about some corn cutters"; that he did not know what time it was when he had his supper.

Sun Singh, who was examined by the prosecution in rebuttal, testified that he saw Jewn Singh in the town of Imperial at 5 p. m. on the day of the murder, and that from that time on they spent the evening and night together "in a colored man's hotel" in that town.

Sunder Singh, recalled in rebuttal by the prosecution, testified that at half past 6 on the evening of November 21, 1918, Basant Singh came to the witness' ranch from Holtville bringing some groceries which the witness had asked him to get that morning, and that he took supper and went home "about 7 o'clock, maybe a little over." According to Basant Singh's testimony, he was in the hospital at Holtville from 6 to 7:25 p. m.

Bertha Gonzales, who lived with her husband on the defendant's place and Alisa Comfort, cook on the same ranch, both testified that the defendant was sick for a period of a week or ten days preceding the day of the murder, during which time he did no work and dosed himself with lemon and whisky.

Hira Singh, defendant's partner, corroborated this testimony, and said that defendant told him about noon on the day of the shooting that was going to the hospital in Holtville.

Hockum Deen and Noor Mohammed, called for the prosecution, testified that they were in Holtville the afternoon of November 21, 1918, and that at half past 4 they saw Rulia Singh "standing and hiding" by a lamp post on the street near the bank.

Mrs. Albert Joe testified that on the day of the murder, while she was sitting in their automobile on the street in Holtville, waiting for her husband, Rulia Singh "passed two or three times, and I think it was about half past 4."

Dr. Stevens testified that the defendant came into his office about 2 o'clock that day; that he was accompanied by one T. D. Sherm, a well-dressed Hindu speaking good English. "He came in and said he wanted to go into the hospital and stay about a week. He said he just wanted to pick up, or something of that kind. * * * I took his pulse and temperature. * * * There was a normal pulse rate and a normal temperature. * * * There was nothing the mat-

ter with him that I could discover. I prescribed a simple tonic for him, just a simple tonic to be given every three hours." He stated further that he did not see the defendant again until midnight, at which time he was accompanied by Undersheriff Barker and Deputy Sheriff Ridgway. They found the defendant in bed with the covers over his head. This witness testified that there was a ladder on the east side of the hospital building, leaning against the roof thereof. County Physician T. O. Luckett testified that he examined the defendant in the county jail the day after the killing, and continued: "I examined his throat and found it normal. I took his temperature, and it was normal, and his pulse was normal, and I decided there was nothing wrong with him."

The defendant testified further that Albert Joe was not the cause of the separation; "I told Albert Joe myself to take her to visit; I think it was my wife's fault, and not Albert Joe's at all; I had no trouble whatever with him;" that when the deceased and Alejandrina came to take his wife away he was "cleaning the ditch in the river," and that he and the deceased were friendly and laughed together; that he did not drag his wife around by the hair; that when she left him she "kissed and hugged" him and told him to come and see her in two or three days at Albert Joe's house, and that he gave her $100 in cash; that on the occasion of his first visit to his wife in San Diego she told him, "I will be back as soon as the summer time will pass;" that he then gave her $65 more, all he had at the time; that about July 4th he learned that she was not coming back to live with him, when he saw her in San Diego the second time, "walking in the street with another man holding their arm in each other." The defendant denied that he ever told any one that Albert Joe was keeping his wife away from him, that he was going to kill Albert Joe, or that he owned a pistol, but said that he kept one belonging to his partner in the house.

[1] We think the foregoing summary of the testimony is sufficient upon which to determine whether or not, upon the question of the guilt or innocence of the defendant, his conviction can be upheld. One of the grounds stated in the motion for a new trial is that the verdict is contrary to the evidence. On appeal it is urged that the defendant was not identified by the deceased as the murderer, and that the alibi was clearly established. The evidence upon the three principal questions, the threats, the dying declarations, and the alibi, is involved throughout in conflict. As already shown, a number of witnesses testified to threats made by the defendant against the life of Albert Joe, and the defendant denied that he ever made such threats. Upon this evidence the jury could have found that the defendant threatened the life of Albert Joe, and on this question we must presume in favor of the verdict that the jury so resolved the evidence.

It must likewise be presumed that the jury not only were satisfied that the dying declarations were made in view of death, but that they represented the primary knowledge, and not the opinion of the deceased. There is an abundance of evidence to support the implied finding of the jury that Albert Joe from the beginning realized that he was mortally wounded. Indeed, as is hereafter shown, this is not disputed. The jury might well have concluded from the evidence, notwithstanding that it was a moonless night, that Albert Joe recognized the defendant at the time by the outline of his figure, the sound of his voice, or by some other circumstance or condition of which the men themselves had knowledge and the existence of which does not seem to be precluded by the record. Whether the dying declarations represented the primary knowledge of Albert Joe or merely his opinion as to the identity of his assassin was purely a question of fact for the jury to determine. "Where * * * want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within his knowledge." 21 Cyc. 989; State v. Arnold, 35 N. C. 184; State v. Williams, 67 N. C. 12; State v. Clemons, 51 Iowa, 274, 1 N. W. 546; Walker v. State, 39 Ark. 221. In the state of the evidence, we would be invading the province of the jury if we held that Albert Joe did not recognize the defendant from impressions received through his senses, and that in crying out to his wife, "Raoul is killing me!" he was not speaking from knowledge, but was voicing an opinion, based either on the threats of the defendant or on his expressed animosity and enmity.

Nor are we prepared to hold that the implied rejection by the jury of defendant's abibi is not amply supported by the evidence. It will be recalled that Delos M. Miller testified that the defendant might have left the hospital after 6 and then slipped back before 9 o'clock without having been seen by him. His wife stated that she saw the defendant at 7 and did not see him again until 9 o'clock. As we have seen, she admitted that at the preliminary examination she had stated that the defendant could have absented himself from the hospital between the hours of 6 and 9 o'clock. When confronted with Basant Singh and Jewn Singh, her testimony seems to indicate that she had seen both men in the defendant's room, and when asked "what time they came to see Neer Singh that evening," she replied, "I cannot give you any definite answer to that." Even if the jury found that this testimony was entitled to full credit, there would be, according to the husband, three,

and, according to the wife, two, hours in which the defendant might have made the round trip to the Albert Joe ranch and committed the murder. The evidence does not show the exact time the shot was fired. However, appellant's brief states that it was about 8 o'clock, and the jury may have found this to be correct. City Marshal C. L. Gillett testified that he received news of the tragedy by a telephone message from Gajan Singh about 10 or 15 minutes to 9. This would allow 45 or 50 minutes for Mrs. Albert Joe to accomplish all she testified she did following the shooting, which included getting word to the authorities. Can we hold, in the face of the foregoing testimony, that the jury would not be justified in finding, in accordance with the theory of the prosecution—asserted from the beginning—that the defendant went to the hospital for the purpose of laying a foundation for his alibi, that he slipped out, went to the Albert Joe ranch, committed the murder, and returned to the hospital without his having been missed? We think not. If the jury believed that Rulia Singh went to the hospital with this object in view, more convincing evidence of a deliberate and premeditated intention to commit murder it would be difficult to conceive. It is urged, however, that according to the testimony of Basant Singh and Jewn Singh they were in the defendant's room at 7:25 p. m. On this question of time, as his quoted testimony shows, the defendant was not as definite. But, assuming that there is agreement between the three as to the hour of 7:25 p. m., yet there was before the jury the counter testimony of Sun Singh and Sunder Singh as to the whereabouts of Basant Singh and Jewn Singh, respectively, on that evening, and in the presence of such a conflict in the evidence we must presume, in the light of the verdict, that it was resolved by the jury against the defendant.

Finally, on the sufficiency of the evidence, it may be mentioned that it is also objected by appellant that the testimony of the comparative size and shape of the footprints near the milk house was incomplete and unconvincing. According to the testimony, the shoes worn by the defendant were square-toed, and the footprints were of similar outline, but there was an apparent disparity in the sizes. It seems to us the objection was well-founded, but we are not inclined to believe that the jury considered the testimony in arriving at the verdict. And for that reason, as well as for the reasons hereinafter stated, we shall not discuss assignments of error Nos. 9 and 10 as to the rulings in the admission of this testimony.

[2, 3] The appellant relies for reversal upon a number of assignments of error. The first assignment is based upon those portions of the following instruction to the jury which we have italicized:

"You have the right, in considering whether or not you shall accept the declaration *as a correct statement*, to determine for yourselves whether the declarations were made under a sense of impending death, and fully convinced of that fact when making the declarations, and *you are at liberty to disregard* the declarations, or any of them, if you are not satisfied that they were made under a sense of impending death."

Section 1870 of the Code of Civil Procedure provides, in part:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 4. * * * In criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death."

The weight of authority in respect to the relative functions of the court and the jury touching the admission and determination of dying declarations is that the court alone shall pass on the admissibility of this character of evidence, and that the jury shall exclusively determine its probative value. 56 L. R. A. 434; 16 L. R. A. (N. S.) 660; 52 L. R. A. (N. S.) 152; 3 Encyc. Evid. 947. Whatever the law may be in other jurisdictions, it is well settled in this state that it is the function of the trial court primarily to pass upon the admissibility of the alleged dying declarations and of the jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine the credibility and weight to which they are entitled. If the jury is not convinced beyond a reasonable doubt that the declarant was in extremis and believed at the time that he was, they must, in arriving at their verdict, disregard such declarations. But if, on the other hand, the jury are satisfied beyond a reasonable doubt that the declarant acted under a sense of impending death, they must then determine what facts, if any, are established by his declarations and apply them accordingly. People v. Glenn, 10 Cal. 32; People v. Lem You, 97 Cal. 224, 32 Pac. 11; People v. Thomson, 145 Cal. 717, 79 Pac. 435; People v. Profumo, 23 Cal. App. 376, 138 Pac. 109; Greenleaf on Evidence, § 161.

[4] With respect to the use of the words in the instruction "as a correct statement," it is claimed in appellant's brief that—

"This instruction led the jury to the understanding * * * that, if they * * * found the deceased to have had a sense of impending death at the time of his declaration, he was making *a correct statement*."

We do not think that the phrase complained of was susceptible of the interpretation sought to be put upon it. The instruction was taken from People v. Thomson, 145 Cal. 717, 79 Pac. 435, touching the respective provinces of the court and the jury as to wheth-

er the dying declarations were made in view of approaching dissolution. The court said:

"They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was in extremis."

In our opinion, the jury must have understood from this instruction that in addition to being satisfied that the declarant told the truth they must also be convinced that he was in extremis at the time.

[5, 6] The appellant claims that the other alleged objectionable phrase in the instruction, "you are at liberty to disregard," is erroneous in that the jury were not instructed that they must disregard the declaration if they found it was not made under a sense of impending death. In support of this contention the appellant relies upon People v. Profumo, 23 Cal. App. 376, 138 Pac. 109. In that case the entire instruction on dying declarations was given to the jury in the exact language used by this court in People v. Thomson, supra. The District Court of Appeal held the instruction to be erroneous, but that it did not constitute a miscarriage of justice. The respondent contends that the instruction in People v. Profumo, supra, was not erroneous, but we do not deem it necessary to pass on that question, because the appellant, according to his brief—

"did not seriously contend that the deceased did not have a sense of impending death. This was shown by the circumstances—what the surgeons told the deceased and the use by the deceased of the word 'killed.'"

And, for another reason, any possible misunderstanding by the jury was removed by an instruction immediately following:

"*If you are satisfied beyond a reasonable doubt* that the declarations of Albert Joe * * * *were made by him under a sense of impending death*, then you should consider such statements and give them such weight and credit as you think they are entitled to under the circumstances of the case."

We quote from People v. Phillips, 30 Cal. App. 31, 157 Pac. 1003, 1005:

"Instructions are to be read in their entirety, and not by segregated and separate portions."

[7] The second assignment of error is that the trial court invaded the province of the jury in giving the following portion of instruction No. 5:

"Certain statements made by the deceased, Albert Joe, have been admitted in evidence *on the theory* that they were dying declarations."

The language we have italicized disposes of this objection. Moreover, this instruction was immediately followed by the one which we have considered under the first assignment of error.

[8] Assignment No. 3 is that the court erred in not determining by means of *preliminary proof* addressed to the court alone the question as to the admissibility of the numerous purported "dying declarations." This objection is without force for the reason that there was considerable foundation testimony, including the directions of the declarant to his brother, Gajan Singh, as to the adjustment of his wordly concerns, all indicating his settled conviction of pending dissolution. Encyc. Evid. 974; People v. Yokum, 118 Cal. 437, 50 Pac. 686; People v. Abbott, 4 Pac. 769.[1] And, as we have noted above, the appellant concedes that the dying declarations were made in view of death.

[9, 10] Assignments Nos. 4 and 5 are to the effect that the court erred in admitting, as a part of the case in chief, testimony having a tendency to anticipate and prejudice the alibi relied upon by Rulia Singh. We are of the opinion that this claim is without merit for several reasons. The testimony was clearly responsive to the theory of the people already referred to—that the defendant had fabricated an alibi—and hence the state was not required to defer its attack until evidence in support of the alibi was first introduced. But, apart from this, evidence of the whereabouts of Rulia Singh at the time of the murder was indispensable to the case of the prosecution in chief; and in meeting this burden testimony in support of the people's claim that the defendant entered the hospital as a part of his deadly scheme would be clearly admissible either as independent evidence of an incriminating nature or because it would have a tendency to corroborate the identification of the defendant by Albert Joe. Any competent evidence which tends to rebut the presumption of innocence is always admissible as a part of the prosecution's case in chief. In any event, even if it be conceded that the rulings complained of involved a departure from the proper order of proof, under the circumstances of this case the error would not be prejudicial.

[11] Assignment No. 6 is that—

"The court erred in admitting testimony of threats toward persons other than the deceased."

This objection has reference to threats already set forth, which apparently had a double import—an intention to kill Albert Joe, and thus, as a consequence, to cause mental suffering to defendant's own wife and her children, including Alejandrina, the wife of deceased. So far as the women are concerned the threats at most seemed to be another phase of the threats against Albert Joe, intended by the defendant principally, if not entirely, to effect a reconciliation with his wife. But whatever the actual state of the defendant's mind was toward the women it

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 66 Cal. xviii.

was so intermingled with his deadly animus toward Albert Joe—expressed on numerous occasions—that one could not be proved without establishing the other. In such a case evidence of such incidental or collateral threats will not be rejected. Appellant relies on 16 Corpus Juris, § 1041, which lays down the rule that—

"Threats are relevant to show intent and motive, provided they were directed against the person injured."

Clinton v. State, 56 Fla. 57, 47 South. 389, is there cited. In that case the defendant was being tried for arson. Testimony was admitted of threats by the defendant against the attorney for the prosecuting witness. The appellate court said:

"There is nothing in this testimony to show that" "the hostility against the attorney might also include the client."

The judgment was reversed, and we think properly so, for the reason that it did not appear that the client figured in the animus of the defendant, as was the situation of the women and the deceased in this case. At any rate, in the case at bar, in the light of the evidence of numerous threats to kill the deceased in which the women did not figure, the admission of the threats complained of would not, even if erroneous, constitute reversible error.

[12] Assignment No. 7 relates to the refusal of the court to strike out an answer claimed not to be responsive, but this calls for no special consideration other than that testimony to the same effect had already been admitted without objection.

Assignment No. 8 is to the effect that the testimony of the wife of the deceased touching his statements to her at the milk house was inadmissible as part of the res gestæ. But, inasmuch as the statements, as we have held, were admissible as dying declarations, it is immaterial whether or not they were a part of the res gestæ.

With regard to assignments Nos. 9, 10, 11, 12, 13, and 14, the appellant has set forth the questions, the objections, the rulings, the motions to strike out, and the answers, where any were given, but no reasons are assigned nor authorities cited in support of the claims of error, other than the bare statement that "the court erred." This court has, in numerous instances, declined to consider objections so presented. People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Cebulla, 137 Cal. 314, 70 Pac. 181; People v. Hadley, 175 Cal. 118, 165 Pac. 442. We have, nevertheless, examined these assignments, and find that there is no merit in any of them.

[13] The record shows, with respect to assignment No. 15, that Basant Singh, a witness for the defense, in answer to the question, "Did you go in to see him [referring to the defendant when he was in the hospital]?" said: "Yes, sir. It so happened that Jewn Singh had gone to see him * * * in his room, and then I went for Jewn Singh. I also asked him [Rulia Singh] how he was feeling and he said—" An objection was interposed at this juncture on the ground that any statement made by the defendant would be a self-serving declaration. The court did not err in sustaining this objection.

[14, 15] It may be explained in connection with assignment No. 16 that the wife of the deceased testified on cross-examination that she had "never told to anybody, except to said Seymour [the special prosecutor], the statements she gave in evidence as the dying declaration of her husband to her." The defendant later called City Marshal Gillett with the view, according to the defense, of establishing by him that, while Mrs. Albert Joe at the ranch on the night of the murder told him about the dying declarations, in quoting the deceased she did not include the statement testified to by her at the trial, "Now, you * * *, see what you got." The pertinent part of the question put to the city marshal was, "Will you state to the jury what your questions were and what answers were made by her, Mrs. Albert Joe?" The district attorney objected that the proper foundation had not been laid to permit such an impeachment. The objection was sustained. The following proceedings represent the only attempt to lay a foundation for impeachment:

"Q. Did you ever tell any person before you came on the witness stand to-day what your husband said about, 'Now, you * * *, see what you got?' A. No. Q. You didn't tell this statement at the preliminary hearing at Holtville, did you? A. No, sir. Q. Why, not? A. Because I didn't remember everything my husband told me. I am just remembering now."

The position of the appellant is that the statements of Mrs. Albert Joe constituted independent evidence which did not require any foundation proof. We cannot assent to this proposition. Considered as independent evidence, the statements were clearly hearsay, and, as such, incompetent and inadmissible. The only ground upon which the statements could be received was that they tended to impeach the testimony of Mrs. Albert Joe, and it is not claimed that any foundation was laid for such impeachment. It is the settled law in this state that, before the statements of a witness inconsistent "with his present testimony" may be shown, "the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them." Code Civ. Proc. § 2052; Birch v. Hale, 99 Cal. 299, 33 Pac. 1088; Rowe v. Hibernia Sav. & L. Soc., 134 Cal. 403, 66 Pac. 569; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; People v. Glover, 141 Cal. 233, 246, 74

Pac. 745; Mutter v. I X L Lime Co., 42 Pac. 1068;[2] Hinckley v. Krug, 4 Cal. Unrep. 211, 34 Pac. 118; People v. Slaughter, 33 Cal. App. 365, 165 Pac. 44; 7 Encyc. Evid. 96, 156. Apart from the lack of foundation, the question put to the impeaching witness called for the entire conversation, and under no theory whatever was the defense entitled to more than the variant statements.

[16] Assignment No. 17 was that the court erred in the ruling contained in the following quotation from the record:

"Q. Where did you meet Mr. Seymour [special prosecutor] before you went to the district attorney's office? A. I didn't see Mr. Seymour before; I just came from Hesperia. Q. Did he approach you first? Mr. Simon: Objected to as incompetent, irrelevant, and immaterial. The Court: I will sustain the objection."

This was an obviously proper ruling for the reason that the question did not show its materiality, nor does the record disclose that the question was reframed or any statement made to meet the defect. Where the question does not show on its face whether or not it is material, the questioner, in order to reserve an exception, must formally reframe the question so that its materiality is apparent. Snowball v. Snowball, 164 Cal. 476, 129 Pac. 784; 9 Encyc. Evid. 170. Upon the same reasoning assignment No. 19 is disposed of.

[17, 18] Assignment No. 18 has reference to the testimony of the wife of defendant that he kept a pistol at the head of his bed. It is conceded by respondent that "the evidence complained of was too remote, probably, to be material." With this we agree, and with the contention that it was not prejudicial, for the defendant admitted that he did so keep a pistol, but that it belonged to his partner, and this statement was apparently not questioned by the district attorney.

[19] The final contention of appellant is that the court erred in admitting the testimony of the wife of the defendant against her husband. This involves two questions: Was the wife a competent witness at all, and, if she was, were the objections to questions on the general ground that they were "incompetent, irrelevant, and immaterial" sufficient to raise the question of the competency of the witness under section 1322 of the Penal Code. That section reads:

"Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both. * * *"

The rule of the common law that the wife was absolutely incompetent to testify against her husband has been modified in this state so that either spouse may testify with the consent of the other. Section 1322, Pen. Code; section 1881, Code Civ. Proc. This consent may be express or implied. The general rule is thus stated in 40 Cyc. 2228:

"A spouse who is present in court when the other spouse is offered as a witness and testifies, and who does not object, is presumed to have consented * * *"—citing Benson v. Morgan, 50 Mich. 77, 14 N. W. 705.

In the case at bar the wife was called by the prosecution and sworn as a witness in the presence of her husband with his knowledge and apparent acquiescence.

[20-22] The first objection was made to the question, "Why did you stop living with Rulia Singh?" on the grounds of incompetency, irrelevancy, and immateriality. The witness had already testified that she was the wife of the defendant, that she had not lived with him since May, 1918, and that she knew the deceased in his lifetime. The same objection was repeatedly interposed to various questions subsequently put to the witness during her direct examination, but all the objections were addressed to the testimony and not to the competency of the witness. The appellant, however, claims that these objections were sufficient to present to the court the question of the competency of the wife to testify. With this we do not agree.

No cases in this jurisdiction are cited by appellant which establish any exception to the rule above quoted, but we are referred to State v. McGrath, 35 Or. 109, 57 Pac. 321. That case is clearly distinguishable on its facts. There the defendant was on trial for murder. He testified to the effect that the deceased had been criminally intimate with his (defendant's) wife. The appellate court held that it was error to admit the testimony of the wife, offered in rebuttal by the state, in reference to the matter, against his objections and protest, and that the defendant, by offering himself as a witness, could not be deemed to have consented to the examination of his wife. Appellant also cites the case of Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223. In that case the wife was the plaintiff in the action while her husband was neither a party thereto, nor, for all that appears, even present in court. Over a general objection of the defendant that the testimony was wholly incompetent, irrelevant, and immaterial, the wife was permitted to testify to certain communications made to her by her husband during marriage. The court states, and it appears the statement was not necessary to a decision of the case, since the wife's testimony was held incompetent as hearsay, that evidence as to communications between husband and wife, when offered by either spouse, is incompetent unless consent of the other spouse is shown, and concluded that the objection made was sufficient to enable the appellate court to consider the point of the wife's competency. In that case, the husband

[2] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 110 Cal. xvii.

not being a party to the action, and the wife not having been offered as a witness against him, no question of her general competency as a witness arose, the husband's consent could not be implied from a failure to object, and thus it was to be presumed he did not consent. Under such circumstances a general objection to the competency of the question was held sufficient. Appearing, as it does in the case at bar, that at no time during the trial did the appellant signify a revocation of his consent to his wife's testimony implied from his failure to object thereto, the question of her competency comes too late when raised for the first time on appeal. "The objection must have been made in the trial court when the witness was examined," where her incompetency was then known. 3 Corpus Juris, 828. It is well settled in this state that, if objections to the competency of witnesses are not made in the trial court, they will not be considered on appeal. Curiac v. Packard, 29 Cal. 194, 197; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7. If one spouse, a party to the action and present in court, relies upon the incompetency of the other to testify, the objection must be made at the time and on such grounds as to bring clearly before the court the question of the incompetency of the witness, or, if this is not done, the privilege will be deemed to have been waived.

Judgment and order affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

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HANSEN v. VALLEJO ELECTRIC LIGHT & POWER CO. (Sac. 2780.)

(Supreme Court of California. March 25, 1920. Rehearing Denied April 16, 1920.)

1. ELECTRICITY ⊜11 — STATUTE ALLOWING RECOVERY FOR REFUSAL TO FURNISH CURRENT PROVIDES A PENALTY AND NOT LIQUIDATED DAMAGES.

Civ. Code, § 629, repealed in 1915, which provided that, if a gas or electric light corporation for the space of ten days after application, etc., refuses to supply gas or current, it must pay to the applicant the sum of $50 as liquidated damages, and $5 for every day such refusal continues, provides a penalty despite use of the term "liquidated damages."

2. ELECTRICITY ⊜11—FOR REFUSAL TO SUPPLY CURRENT APPLICANT CANNOT RECOVER AMOUNT IN EXCESS OF STATUTORY PENALTY.

Where an electric company refused to supply current and became liable to an applicant for the penalty provided in Civ. Code, § 629, the applicant is restricted to the amount specified, notwithstanding his actual damages exceeded the penalty.

3. LIMITATION OF ACTIONS ⊜35(1) — ONE YEAR STATUTE APPLIES TO ACTION FOR REFUSAL OF ELECTRIC COMPANY TO SUPPLY CURRENT.

Where an electric company refused to supply current on application and became liable to the penalty prescribed by Civ. Code, § 629, in force, the one year period of limitation prescribed by Code Civ. Proc. § 340, subd. 1, was applicable, and penalties accruing more than a year before suit cannot be recovered.

4. ELECTRICITY ⊜11—DAILY PENALTY PRESCRIBED FOR FAILURE TO FURNISH CURRENT IS CONTINUING.

The daily penalty of $5 prescribed by Civ. Code, § 629, for failure of an electric company to furnish current on application is a continuing penalty, and, notwithstanding more than a year had elapsed since the first refusal, so that recovery of the $50 penalty was barred by Code Civ. Proc. § 340, subd. 1, daily penalties of $5 for a year prior to institution of suit may be recovered.

5. ACTION ⊜45(1)—SINGLE ACTION MAY BE MAINTAINED TO RECOVER NUMEROUS PENALTIES.

Where an electric light company by its failure to furnish current incurred daily penalties of $5 each under Civ. Code, § 629, the applicant may recover such penalties in a single action against the company.

6. CONSTITUTIONAL LAW ⊜48—PRESUMPTION OF VALIDITY OF LEGISLATIVE ACTION.

There is a well settled presumption in favor of the validity of legislative action.

7. CONSTITUTIONAL LAW ⊜48—NO PRESUMPTION OF INVALIDITY FOR DISCRIMINATION.

Where a statute imposing penalties on light and gas companies for failure to furnish gas and electricity was attacked as discriminatory on the ground that it was limited to corporations and did not include individuals or partnerships engaged in such business, it will not be assumed that there was any intention to discriminate against corporations in favor of individuals and partnerships.

8. EVIDENCE ⊜22(2) — COURT JUDICIALLY KNOWS THAT GAS AND ELECTRICITY IS SUPPLIED BY CORPORATIONS.

The courts will take judicial notice that the business of supplying a community with gas or electricity for light, etc., is practically always conducted by a corporation.

9. CONSTITUTIONAL LAW ⊜242—STATUTE IMPOSING PENALTIES ON ELECTRIC COMPANIES FOR FAILURE TO FURNISH CURRENT HELD NOT DISCRIMINATORY.

In view of Const. art. 4, § 33, declaring that the Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, etc., Civ. Code, § 629, requiring gas and electric companies to furnish gas and current on application, etc., and imposing a penalty for failure, is not invalid as discriminatory in violation of article 1, § 11, because omitting partnerships and individuals.

10. DISMISSAL AND NONSUIT ⊂=47—WHERE ONLY PART OF CLAIM IS BARRED NONSUIT IS IMPROPER.

Where only part of plaintiff's claim was barred, nonsuit should have been denied.

In Bank.

Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Action by C. F. Hansen against the Vallejo Electric & Power Company. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

Clarence E. Todd and Vincent Surr, both of San Francisco, for appellant.

Frank E. Powers, of San Francisco, for respondent.

ANGELLOTTI, C. J. This action was brought to recover from defendant the sum of $2,665 because of its failure to furnish to plaintiff electricity for use in his dwelling house in the city of Vallejo. Upon the close of plaintiff's case the court granted defendant's motion for a nonsuit, on the ground that the action was barred by the provisions of subdivision 1 of section 340, Code of Civil Procedure, and judgment was entered accordingly. This is an appeal from such judgment.

This action was commenced March 20, 1915. On the trial it was made to appear that the plaintiff on April 15, 1913, made demand upon defendant to furnish him with electricity for lighting his house, No. 221 Louisiana street, in Vallejo, which house was within 100 feet of a direct and primary wire of the company, and that defendant declined to do so unless plaintiff signed an application containing certain conditions which it was subsequently held by the Railroad Commission it had no right to impose, that plaintiff refused to sign this application, and that defendant to and including September 30, 1914, failed to comply with the demand.

Upon an examination of the record we are satisfied that in view of the pleadings this action must be held to be one solely for the statutory recovery allowed by section 629, Civil Code, and that no recovery whatever was sought other than such recovery as was authorized by the terms of that section.

[1, 2] Section 629, Civil Code, which was in force at all times mentioned in the complaint and until repealed in 1915 (Stats. 1915, p. 169), provided substantially that a gas or electric light corporation must supply gas or electricity to any building or premises distant not more than 100 feet from any main or direct or primary wire of the corporation, "upon the application in writing of the owner or occupant," and payment of all money due from him. It further provided:

"If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter."

We are satisfied that this provision must be held to impose a "penalty" for noncompliance, notwithstanding the use of the words "liquidated damages." It has heretofore consistently been accepted by this court and the District Courts of Appeal as so doing, without, however, any question having been raised to the contrary. See Capital Gas Co. v. Young, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463; Baker v. San Francisco, etc., Co., 141 Cal. 710, 75 Pac. 342; Thompson v. San Francisco, etc., Co., 18 Cal. App. 30, 121 Pac. 937; Id., 20 Cal. App. 142, 128 Pac. 347; Id., 34 Cal. App. 699, 168 Pac. 390. We can see no doubt of the correctness of this view. Unquestionably it provides for a recovery for a wrong or injury suffered without any reference whatever to the question of actual damage. The recovery is had even though it be conceded that there was no actual damage whatever. Likewise the recovery is limited to the amount specified, even though in a particular case it could be shown beyond question what the actual damage was and that such actual damage exceeded the statutory amounts many times over and ran to a very large amount. In County of Los Angeles v. Ballerino, 99 Cal. 593, 596, 32 Pac. 581, 34 Pac. 329, the statutory penalty referred to by subdivision 1 of section 340, Code of Civil Procedure, was declared to include "one which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained." The provision here clearly falls within this description. The use of the term "as liquidated damages" does not preclude such a view. The same words are used in section 589, Civil Code, with relation to the right of a stockholder of a mining corporation to recover a specified sum from the corporation in the event of the denial of certain rights, and this court construed the provision conferring such right of recovery as one imposing a penalty. See Symmes v. Sierra Nevada Mg. Co., 171 Cal. 427, 153 Pac. 710. The term "as liquidated damages" in the connection in which it is used and in view of the character of the imposition cannot fairly be construed as meaning or intended to mean anything other than a penalty or forfeiture. Certainly the provision may not fairly be construed as an attempt on the part of the Legislature to merely establish a rule as to the measure of actual damages in such cases, in view of the fact that the specified recovery is authorized without any reference whatever to the question of actual damage. Much reliance is placed by learned counsel for appellant

upon the fact that prior to the adoption of the Codes the statutes on this subject used the words "shall forfeit and pay" the designated sums, without the words "as liquidated damages," and that when the Codes were adopted in 1872 the section covering the matter was written in its present form providing that the corporation "must pay to the applicant" the designated sums "as liquidated damages." Just why the Code commissioners and the Legislature thus changed the phraseology we do not know, but we do not think the change altered the meaning or furnishes evidence of any intention to accomplish such an alteration as is claimed to have been effected thereby.

[3-5] As we have already noted, the nonsuit was granted on the ground that the action was barred by subdivision 1 of section 340, Code of Civil Procedure. By the terms of that provision, "an action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation," must be brought within one year from the time the right of action accrues. Plaintiff's demand for electricity having been made on April 15, 1913, a right of action based thereon accrued upon the lapsing of ten days thereafter without compliance with his demand, viz. on April 26, 1913, and this action was not commenced until March 20, 1915, nearly two years thereafter. It is practically conceded that the initial amount of $50 fixed by section 629, Civil Code, together with the $5 per diem for all days prior to March 20, 1914, are barred if this be an action for a penalty or forfeiture imposed by statute within the meaning of subdivision 1 of section 340, Code of Civil Procedure. But it is claimed by appellant that in any event the action is not barred as to the $5 per diem for the time beginning March 20, 1914, and ending September 30, 1914. We are satisfied that this claim must be upheld. The terms of the statute are such that it may not fairly be held otherwise than that while there is a continuous default a new and additional penalty is imposed thereby for each day's refusal or neglect so long as the default "continues in force," and that the cause of action as to each day accrues with the expiration of that day and is barred only upon the expiration of one year therefrom. We are not concerned here with any question of multiplicity of actions or with the question whether successive actions for accruing penalties based upon a single demand are allowable. That all the penalties in such a case may be regarded as one for the purpose of recovering them in one suit is well established, and we may assume that only one action is permissible in such a case. As to this there is some conflict in the authorities. But, as was said by the Supreme Court of Errors of Connecticut:

"The aggregated forfeitures may well be regarded as one, for the purpose of recovering them by one suit, when they could not be so regarded in applying the statute of limitations." See Wells v. Cooper, 57 Conn. 52, 17 Atl. 281.

In this aspect the case is not materially different from an action on an ordinary account for goods sold and delivered containing many items sold and delivered on different days. Where the language used is similar to that contained in our statute, the authorities to which we have been referred and those we have been able to find are practically unanimous in support of our view. See Udall Milling v. Atchison, etc., 82 Kan. 256, 108 Pac. 137; Wells v. Cooper, 57 Conn. 52, 17 Atl. 281; Atwood v. Lockwood, 76 Conn. 555, 57 Atl. 280; Town of Londonderry v. Arnold, 30 Vt. 401; Garrison v. Railroad, 150 N. C. 575, 586, 64 S. E. 578. The cases cited involve such provisions as "he shall forfeit five dollars * * * for every month of such neglect" (57 Conn. 52, 17 Atl. 281); "shall forfeit $1 per day for each car it fails to furnish" (82 Kan. 256, 108 Pac. 137); "shall forfeit * * * $20 for each month until he shall return such inventory" (76 Conn. 555, 57 Atl. 280); "shall forfeit and pay * * * a penalty of $5 for every 30 days he or she shall neglect to comply with such order of the selectmen" (30 Vt. 401); "forfeit and pay a penalty of $50 for each day it refuses to receive said freight" (150 N. C. 575, 64 S. E. 578). The only case cited by learned counsel for respondent in this connection is Jones v. Rochester, etc., Co., 168 N. Y. 65, 60 N. E. 1044, where a statute which is practically the same as ours was under consideration. The precise question presented and determined in that action was whether, a recovery having been had upon the penalties accrued up to a certain time, another action based on the original demand for penalties alleged to have accrued for a subsequent period could be maintained. It was held that but one action could be maintained based upon the original demand for gas. The learned court said:

"While the amount of the penalty would depend on the period during which the defendant's default should continue, still it was a single penalty for a default which was also single, though it might be continuous. The cause of action, being single, was indivisible, and but one recovery * * * could be had."

No question of the statute of limitations was involved in that case, and, as we have seen, the aggregated penalties may be considered as one for the purpose of recovery without being so regarded in applying the statute of limitations. The case cannot be considered as deciding the question we have here.

[6-9] It is claimed that section 629, Civil Code, was violative of section 11 of article 1 of our Constitution, which provides that "all laws of a general nature shall have a

uniform operation"; the theory being that it discriminated unlawfully between corporations furnishing gas or electric light and natural persons and copartnerships engaged in the same business. The section was one contained in the title of our Civil Code relative to corporations furnishing light for public use, title 15 of part 4 of division 1; part 4 of division 1 being the portion of the Civil Code devoted to the subject of corporations. In view of the subject-matter of this section, it really had no proper place in a part of the Civil Code devoted solely to corporations, but under the guidance of the Code commissioners to that place it found its way from the act of 1863 (St. 1863, p. 647), relative to gas companies and consumers of gas, when our Codes were framed in 1872, where it was when our Constitution of 1879 was adopted, and where, repealed and re-enacted with some changes to include electric light corporations, it remained until its final repeal in 1915. No good reason occurs to us why such an obligation should be imposed on corporations engaged in the business of supplying gas or electricity, with the penalty for default, that would not be equally applicable in the case of an individual or copartnership engaged in the same business. At the same time we do not feel warranted in holding it opposed to section 11 of article 1 of our Constitution. Of course, the well-settled rule is that the presumption is in favor of the validity of legislative action. And it is not to be assumed, for the purpose of nullifying the law, that there was any intention to discriminate against corporations engaged in this business to the advantage of natural persons or copartnerships engaged therein. County of San Luis Obispo v. Murphy, 162 Cal. 588, 591, 123 Pac. 808, Ann. Cas. 1913D, 712. We think it may fairly be said that it is a matter of common knowledge that the business referred to, that of supplying a community with gas or electricity for light, etc., is in this state practically always conducted by a corporation. Isolated cases of the conduct of such business by an individual, copartnership, or voluntary unincorporated association may exist in some small communities, but certainly they are extremely rare, and, as said on a somewhat similar objection in County of San Luis Obispo v. Murphy, supra, the Legislature may have reasonably concluded that they were so inappreciable and insignificant in number that the corporations composed "the entire class" of persons actually engaged in such business. The Constitution itself assumes this to be a proper classification, for it is therein provided as follows:

"The Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use." Section 33, art. 4, Const.

While, as suggested by learned counsel for defendant, this refers only to laws for the regulation and limitation of charges, a classification for that purpose must be based on the same principles as obtain with regard to such a provision as is here involved. In the face of this provision of the Constitution, which apparently was not brought to the attention of the District Court of Appeal in Thompson v. San Francisco, etc., Co., 34 Cal. App. 699, 168 Pac. 390, considered in connection with the other matters to which we have referred, we do not see how it can properly be held that section 629, Civil Code, was violative of section 11, art. 1, of the same Constitution.

[10] As a part of plaintiff's demand was not barred by subdivision 1 of section 340, Code of Civil Procedure, the motion for a nonsuit should not have been granted. Plaintiff made a prima facie case for the recovery of the $5 per diem penalties accruing within a year of the time of the commencement of the action.

The judgment is reversed, and the cause remanded for a new trial.

We concur: OLNEY, J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

46 Cal. App. 194

HUCHTING v. HUCHTING. (Civ. 3270.)

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1920.)

1. DIVORCE ⟸27(5)—SOCIAL STATUS OF PARTIES MATERIAL IN DETERMINING WHETHER ACTS CONSTITUTED CRUELTY.

In suit for divorce for cruelty, the trial court properly considered the social conditions of the parties and the probability of plaintiff's suffering from the acts complained of, as shown by her attitude upon the stand and the surrounding circumstances.

2. DIVORCE ⟸184(10) — FINDING AGAINST CRUELTY ON CONFLICTING EVIDENCE, NOT TO BE DISTURBED.

Where the evidence on the issue of cruelty was conflicting, and there was no evidence of bodily cruelty, but plaintiff wife relied on mental cruelty solely, a finding against her on such issue will not be disturbed.

3. DIVORCE ⟸27(7)—HUMILIATING CONDUCT BY WIFE ENTITLED HUSBAND TO DIVORCE FOR CRUELTY.

Husband *held* entitled to divorce for wife's cruelty in not conducting herself in a wifely manner, where such conduct hurt his feelings and caused him mental suffering, arising from humiliation in being cast off by her, although his charges of more serious misconduct were not substantiated.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Mabel E. Huchting against Arnold F. Huchting. From decree for defendant, plaintiff appeals. Affirmed.

Durelle F. Glidden, of San Diego, for appellant.

James E. Wadham, Leonard Wright, Wadham & Macomber, all of San Diego, for respondent.

NOURSE, J. Plaintiff instituted this suit for divorce against her husband on the ground of cruelty. The defendant cross-complained upon the same grounds. A decree was entered against the plaintiff upon her complaint and in favor of defendant upon his cross-complaint, and the custody of the two minor children of the parties was awarded to the plaintiff and defendant for alternate periods of six months each. Plaintiff appeals upon the grounds that the evidence was sufficient to support a decree in her favor upon her complaint, and that it was insufficient to support the decree in favor of the defendant. No objection is made to the award of the custody of the children or to the failure of the trial court to dispose of the community property of the respective parties.

The facts of the case generally are that plaintiff and defendant intermarried in 1908, she being of the age of 16 years and he of the age of 30 years. They took up their home on a farm in San Diego county, where he performed the ordinary duties of a farmer, and she performed the housework, taking care of her children and cooking for the family and farm hands. The specifications of cruelty in the complaint are that the defendant compelled her to perform unusually arduous duties in and about the farm; that he neglected and manifested little interest in the welfare of the children; that he continually chided and scolded her about her attending dances and parties with other young people of the neighborhood, and, not being interested in or associated with her in these functions, complained that she disturbed his sleep when she returned to the home late at night. There was also some evidence on behalf of the plaintiff to the effect that defendant made threats to end his life because of the differences in the family, but these, apparently were not taken seriously by the trial court. The specifications of cruelty relied upon by defendant in his cross-complaint are that the plaintiff spent too much of her time in attending dances and parties with her friends, and that she was unduly attentive to a young man who was in his employ, thereby causing gossip in the neighborhood, which, coming to his ears, caused him great mental suffering.

An examination of the entire record presents a case where, through the disparity of ages of the parties, the relations were uncongenial almost from the date of their marriage, and neither party being interested in the affairs of the other, both became intolerant, and magnified each little frivolity that occurred, so that when these were discussed with their relatives and friends they became offenses which eventually rendered it impossible for the two to live together as man and wife. The evidence produced at the trial is like that which is common to actions of this nature where the relatives and friends of one party line up solidly behind him and against the other, all being anxious to testify on behalf of the leader of the faction with which they have associated, with very little regard for the truth, so long as their testimony will assist the party with whom they have aligned. Thus, the members of the family, relatives, and friends of the plaintiff were positive in their conviction that she was a good and true wife and mother, and that all of the fault for the breach was attributable to the husband. And the family, relatives and friends of the husband took a like attitude when called to support his side of the case. It appears that in October, 1916, the plaintiff, with defendant's consent, went to Utah to visit her father, and that in January, 1917, while still there, addressed a letter to the defendant, telling him that she could no longer live with him. Notwithstanding this attitude on the part of the plaintiff, defendant testified that he was always willing to take her back to his home, and wrote her to that effect, but when she returned to San Diego county in February, 1917, he called upon her in the presence of her family, and informed her that he had seen an attorney and directed him to prepare a complaint for divorce against her, charging her with adultery, and urging her to go down to the city of San Diego and "straighten this out before it goes to court," so that he might have the custody of the children. Immediately following this the plaintiff sought legal advice, and instituted this proceeding. Thus, it appears that both had come to the conclusion that they had reached the parting of the ways, and had started a race to see which one could first get into court for the purpose of procuring a legal separation. The conversations of the parties, occurring immediately prior to the commencement of the action, as indicated by the evidence, show that they had no desire at that time to settle their petty squabbles and resume the marriage relation, but that their chief interest was in securing the custody of the two children. This attitude was evident throughout the trial, and the defendant seemed so anxious to obtain that result that he disregarded all limits to which a man might go to besmirch the character of their mother.

[1, 2] The trial court had all of the witnesses before it, and in an exhaustive review of the evidence found that the charges of cruelty made by the plaintiff were insufficient to support a decree of divorce upon her complaint. As there was no evidence of bodily

cruelty, but the plaintiff relied solely upon mental cruelty, the trial court properly took into consideration the social conditions of the parties and the probability of the plaintiff suffering mental cruelty from the acts complained of as shown by her attitude upon the stand and the surrounding circumstances. With this consideration, and in view of the conflicting evidence upon the issue, the findings of the trial court that the acts of the defendant did not constitute such cruelty as would warrant a decree in her favor cannot be disturbed. As said in Robinson v. Robinson, 159 Cal. 203, 204, 113 Pac. 155, 156:

"It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

[3] The same situation exists as to the attack upon the findings of the trial court regarding the acts of cruelty charged against the plaintiff. Though serious charges were made by the defendant against his wife and evidence was produced by him which would support another cause for divorce, all of which defendant failed to prove or corroborate, there was sufficient uncontradicted evidence to support the conclusion that the plaintiff had not conducted herself in a wifely manner, and that such conduct had hurt defendant's feelings and caused him mental suffering arising, no doubt, from humiliation in being cast off by his young wife, but sufficient to constitute what is known as cruelty.

For these reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 94

Ex parte GUTIERREZ et al. (Cr. 700.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1920.)

1. INFANTS ⟸16—PETITION AND FINDING IN JUVENILE COURT PROCEEDINGS HELD SUFFICIENT TO SUSTAIN COURT'S JURISDICTION.

A finding by the juvenile court that the allegation of the petition that minors had no parent or guardian capable of exercising proper parental control substantially meets the requirement of Juvenile Court Law, § 1, subd. 2, and section 9b, and is sufficient to show the jurisdiction of the juvenile court.

2. HABEAS CORPUS ⟸4, 30(1)—NOT FOR REVIEW OF ERRORS.

The writ of habeas corpus is not intended to perform the functions of a writ of error to review errors or irregularities of proceedings in court having jurisdiction of the person and the subject-matter.

3. HABEAS CORPUS ⟸30(1)—WILL NOT ISSUE WHERE COURT HAS JURISDICTION, THOUGH PLEADING IS DEMURRABLE.

Even if a petition is obviously demurrable for insufficient statement of facts, the question of its sufficiency will not be examined on habeas corpus, provided it appears that there is an attempted statement of facts which would confer jurisdiction.

4. HABEAS CORPUS ⟸92(1) — EVIDENCE IN PROCEEDINGS ATTACKED CANNOT BE REVIEWED.

In habeas corpus for discharge from custody of the juvenile court proceedings, which is in the nature of collateral attack on the jurisdiction of court, the sufficiency of the evidence in the juvenile court cannot be reviewed.

5. HABEAS CORPUS ⟸92(1)—POWER NOT ENLARGED IN ATTACK ON JUVENILE COURT PROCEEDINGS.

The general rules governing the power of a court on habeas corpus proceedings are not enlarged on writ to discharge from juvenile court commitment so as to authorize review of the evidence.

6. INFANTS ⟸16—COURTS HAVE LARGER DISCRETION IN DEALING WITH CHILDREN.

The courts have larger discretion in dealing with matters pertaining to children than in other cases, since the welfare of the child, as well as the rights of the parents, are to be considered, but that discretion should be exercised with a view to the established rule to recognize the rights of parents, in the absence of radical abuse, to bring up their children in their own way.

Application of Guadalupe Gutierrez and another for writ of habeas corpus. Writ discharged.

E. F. Du Fresne, of Manila, P. I., for petitioners.

E. S. Lovett, of San Diego, for respondent.

SLOANE, J. This application for a writ of habeas corpus for release of two infant children from the custody of the probation officer of San Diego county was made by the father of the minors. The infants, aged three years and one year, respectively, were committed to the custody of the probation office by an order of the juvenile court, in proceedings under the juvenile court law. St. 1915, p. 1225. The petition on which the commitment was made charged that the minors "have no parent or guardian capable of exercising proper parental control" and that they are within the provisions of subdivision 2 of section 1 of the act. The court found, in making the commitment, "that the allegations of fact contained in the petition are true."

The jurisdiction of the court is attacked for alleged insufficiency of the petition and findings.

Although the statement of facts upon which jurisdiction in this matter must rest is rather meager, we think it sufficient to confer jurisdiction.

[1] Subdivision 2 of section 1 of the juvenile court law provides that its terms apply to any person under the age of 21 years "who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control." Section 9b of the act provides that—

"No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian, unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person."

The finding of the court that the allegation of the petition that these minors had "no parent or guardian capable of exercising proper parental control" was true substantially meets the requirements of these provisions.

[2] The writ of habeas corpus is not intended to perform the functions of a writ of error for the purpose of reviewing mere errors or irregularities of proceedings of a court having jurisdiction of the person and subject-matter involved.

[3] The petition filed under the juvenile court act is a pleading filed in a court of record. And even where the petition is obviously open to demurrer for an insufficient statement of the facts, if it appears from the declarations that there is a purported or attempted statement of facts which would confer jurisdiction, the question as to such sufficiency of statement will not be examined into on habeas corpus. Matter of Application of Clifton, 26 Cal. App. 334, 146 Pac. 1064; Matter of Ruef, 150 Cal. 665, 89 Pac. 605; Matter of Todd, 186 Pac. 790.

[4] Neither can we question the sufficiency of the evidence to support the order of commitment in this proceeding. Application for a writ of habeas corpus to avoid a judgment of court is in the nature of a collateral attack upon the jurisdiction, and can only be maintained where the want of jurisdiction is shown; and in such a proceeding the sufficiency of the evidence cannot be reviewed. In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840; In re Jacobs, 175 Cal. 661, 166 Pac. 801; In re Leonardino, 9 Cal. App. 690, 100 Pac. 708; Matter of Todd, supra; Ex parte Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; Ex parte Clark, 110 Cal. 405, 42 Pac. 905.

The case of In re Brodie, 33 Cal. App. 751, 166 Pac. 605, cited by petitioner, in which the order of the juvenile court was reversed for insufficient findings, was on an appeal from the order. A writ of habeas corpus taken upon the same record was denied, in proceedings reported in the same volume at page 808. In the very recent case of Matter of Hunter, 188 Pac. 63, an application for habeas corpus arising from a juvenile court order on grounds of insufficiency of proceedings to give jurisdiction—though it must be admitted upon a more satisfactory record than appears here—the writ was denied, the court holding that—

"While said petition is somewhat defective in all its material allegations, and some of its averments are entirely without pertinent significance, yet we cannot say that it appears therein that the court had no jurisdiction to inquire into the question whether said minors should be committed to the custody of such probation officer."

The court in its opinion very pertinently adds that it is of course a very "serious matter to deprive parents of the care and companionship of their minor children." If, in the present instance, the contention of the petitioner that the evidence does not support the judgment of the court is well founded, he still has his remedy by appeal, under conditions that will permit of a review of error in that or any other particular attending the proceedings in the juvenile court.

[5] In the application of the general rules governing habeas corpus proceedings to juvenile court acts, we find no enlargement of the power of the courts on habeas corpus to go behind the record of the commitment to review the evidence.

[6] It may be said that even a larger discretion is recognized in the courts in dealing with matters pertaining to children than in other cases. The objection that the informal procedure of juvenile courts does not constitute due process of law, and hence that the parental rights to the child's custody cannot be taken away by order or commitment, has almost uniformly been overruled. The wider discretion here recognized arises from the fact that it is not alone the rights of the parent, but the welfare of the child, that are presented to the court for determination. It is well to bear in mind, however, that it has long been a salutary rule of the domestic life of this country to recognize the rights of parents, in the absence of radical abuses, to bring up their children in their own way. The family is the fundamental basis of civilized society, divinely instituted, and mere incidents of poverty, or ignorance, or inadequacy in high ideals or standards in the homes, should not be made to justify taking young children from their natural guardians to make them wards of the state, or to give them to other relatives better qualified, in the estimation of the courts, to bring them up.

The comments of the learned judge who made this order of commitment, as contained

in the record, indicate that he had these considerations clearly in mind, and we would not, in any event in this proceeding, be justified in calling in question the correctness of his conclusions from the evidence before him. We are therefore expressing no opinion on that point.

The writ is discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 92

Ex parte MYERS. (Cr. 701.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1920.)

EXECUTION ⊂417—JUDGMENT DEBTOR ABLE TO PAY MAY BE COMMITTED IN SUPPLEMENTARY PROCEEDINGS.

Under Code Civ. Proc. § 1219, court, having found on supplementary proceedings judgment debtor able to satisfy judgment, could order that he be committed to the custody of the sheriff until he shall have complied with the order to satisfy judgment.

In the matter of the application of B. Myers, also known as Boris Myers, for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Willedd Andrews, of Los Angeles, for petitioner.

F. S. Hutton, of Los Angeles, for respondent.

THOMAS, J. Petitioner here, claiming that he is "unlawfully imprisoned, detained, confined, and restrained of his liberty by the Sheriff of Los Angeles county," asks this court that a writ of habeas corpus may be granted, directed to said sheriff, restoring petitioner to his liberty, etc.

It is alleged that said imprisonment, etc., is illegal, in that "no complaint has been filed in the superior court of the state of California, in and for the county of Los Angeles, charging this petitioner with any criminal offense or crime," and that he "was ordered and committed into the custody of the sheriff of Los Angeles county * * * by the honorable Grant Jackson, judge of the superior court, * * * which commitment is dated February 6, 1920, * * * and is based on the following testimony of B. Myers, who was called as a witness on behalf of the plaintiff in the case of A. L. Gore, Plaintiff, v. B. Myers, Defendant." Here follows copy of transcript of the testimony referred to. The sheriff, in his return, showed, among other things that—

"Said B. Myers * * * was committed to my custody by virtue of a commitment issued by the honorable judge of the superior court of the county of Los Angeles, a copy of which is hereto annexed," etc.

From said order of commitment it appears that defendant therein, petitioner here, was before the lower court in supplementary proceedings, and the court found that he "had in his possession and under his control, $15,000 * * * in the form of Canadian war bonds, and sufficient to satisfy said judgment, and * * * out of which he is able to pay the judgment herein," and ordered that "said defendant forthwith pay to the clerk of this court so much * * * as is necessary to satisfy said judgment," and that he be committed to the custody of the sheriff until such time as he shall have complied with the order so made.

Counsel for petitioner has called our attention to, and relies upon, the case of Ex parte Overend, 122 Cal. 201, 54 Pac. 740, to support his contention here. The case is not in point. It was there held that because the court had itself put it beyond the power of the witness to comply with its order, by discharging the jury and discontinuing the trial at which petitioner was called as a witness, the petitioner in that case could not be indefinitely punished for contempt under section 1219 of the Code of Civil Procedure, while in the case at bar the court found that petitioner could perform, and therefore he was amenable to the order made, under the terms of the section above cited, nothing appearing to the contrary in the record before us.

Though the facts here differ materially from those in the Matter of Gutierrez, 188 Pac. 1004 (Crim. No. 700)—which was also an application for a writ of habeas corpus—opinion in which has this day been filed, the reasons there given for denying the writ are equally applicable here.

The writ is discharged and the prisoner remanded.

We concur: FINLAYSON, P. J.; SLOANE, J.

⊂For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 175

FRIEND & TERRY LUMBER CO. v. DEVINE et al. (Civ. 2063.)

(District Court of Appeal, Third District, California. Feb. 18, 1920.)

1. APPEAL AND ERROR ⟸757(1) — STATUTE DOES NOT RELIEVE PARTY OF PRINTING IN BRIEF MATERIAL PARTS OF RECORD.

Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, providing that no appeal shall be dismissed or decided adversely to any party for failure to print in his brief the portion of the record in support of his points, but that the court shall direct such party to print a supplement to his brief, does not relieve parties from the necessity of printing in their briefs or in a supplement appended thereto such portion of the record as they desire to call to the court's attention when the appeal is taken under section 953 et seq.

2. APPEAL AND ERROR ⟸757(1)—PARTY ONLY REQUIRED TO PRINT IN BRIEF MATERIAL PORTIONS OF RECORD.

Under Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, a party is not required to print in his brief portions of the record that are immaterial and have no bearing on the questions presented.

3. APPEAL AND ERROR ⟸766—PARTY MOVING TO REQUIRE SUPPLEMENT TO BRIEF MUST SHOW OMITTED EVIDENCE.

On a motion under Code Civ. Proc. § 953c as amended by St. 1919, p. 261, to require appellant to print and serve a supplement to his brief, setting forth additional evidence bearing on the contention that the evidence is insufficient to support the judgment, the court will not examine all the evidence to determine whether any material evidence has been omitted where the moving party fails to point out the evidence which he claims is material and has been omitted.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Friend & Terry Lumber Company against James H. Devine and another. From a judgment for plaintiff, the defendant named appeals. On motion to require appellant to print and serve a supplement to the opening brief. Motion denied.

See, also, 186 Pac. 187.

S. R. Hart, C. E. McLaughlin, and C. P. McLaughlin, all of Sacramento, for appellant.

Irving D. Gibson, of Sacramento, and Stanley Pedder, of Coalinga, for respondent.

NICOL, Presiding Judge pro tem. The appeal in this action is under the alternative method, and this is a motion by respondent for an order requiring the appellant to print and serve on respondent a supplement to the opening brief, in which shall be set forth in full all the record of the trial contained in the reporter's typewritten transcript on file in this court, and not printed in the said opening brief. The motion is made on the grounds that it appears from the opening brief that the only ground of appeal is the alleged insufficiency of the evidence to support the judgment, and that it appears from a comparison of the typewritten transcript on appeal that the appellant has failed to print in said opening brief all of the record of the evidence adduced at the trial.

The respondent claims that, when the appeal is on the ground of insufficiency of the evidence to support the judgment, the appellant is required by section 953c of the Code of Civil Procedure, as amended in 1919 (St. 1919, p. 261), to print in his brief, or in a supplement appended thereto, all the evidence contained in the transcript.

[1] With this contention of the respondent we are unable to agree. It is true that the amendment by the last Legislature to said section 953c of the Code of Civil Procedure does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the provisions of sections 953, 953a, 953b, and 953c of that Code. Eddy v. Stowe, 185 Pac. 1024. The said section as amended provides that no appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record, or any part thereof, in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party, and not printed in any former brief.

[2, 3] By this section a party is required to print in his brief the portions of the record in support of his points and is not required to print portions of the record that are immaterial and have no bearing on the questions presented. The section is clear and explicit as to the action to be taken by the court when a party fails to comply with its requirements. But on this motion the respondent has not called the attention of the court to any evidence that has been omitted from the appellant's brief that is material to any question therein discussed, and we are not in a position, without examination of the entire transcript, to say that the portions of the record printed in said brief are not full and complete as to the points argued. The court is not required on a motion of this kind to make such an examination when the moving party fails to point out the evidence which he claims is omitted from the brief and which is material to the questions discussed.

The motion is denied.

We concur: ELLISON, Judge pro tem.; BURNETT, J.

46 Cal. App. 110

NEWBY v. TIMES-MIRROR CO.

(Civ. 2080.)

(District Court of Appeal, Third District, California. Feb. 12, 1920.)

1. APPEAL AND ERROR ⟸1097(1)—PRINCIPLES ENUNCIATED ON PRIOR APPEAL LAW OF THE CASE ON SUBSEQUENT APPEAL.

Where the pleadings, issues and facts on subsequent trial are substantially the same as those at the first trial, the rules and principles enunciated and applied by appellate court on first appeal constitute the law of the case on subsequent appeal.

2. LIBEL AND SLANDER ⟸55 — DEFACEMENT OF RECORD TO PREVENT FRAUD HELD NO DEFENSE TO IMPUTATION OF HYPOCRISY AND HABITUAL ALTERATION OF PUBLIC RECORDS.

In attorney's action for libel for publication by defendant newspaper of cartoon and articles imputing hypocrisy and habitual alteration of public records, action of court in striking from answer allegations as a special defense of the facts and circumstances of transaction whereby plaintiff had on one occasion altered record to avoid perpetration of a fraud on his client was not error, such facts not constituting a defense to the publications imputing hypocrisy and habitual alteration of public records.

3. APPEAL AND ERROR ⟸1042(2)—STRIKING ALLEGATIONS FROM ANSWER HARMLESS, WHERE FACTS WERE INTRODUCED IN EVIDENCE.

Action of court in striking allegations from answer was harmless, where facts alleged were nevertheless introduced in evidence.

4. LIBEL AND SLANDER ⟸105(2)—EXCLUSION OF OTHER NEWS ARTICLES HELD PROPER.

In attorney's action against newspaper for damages from publication of cartoon and articles imputing hypocrisy and habitual alteration of public records published for political purposes, exclusion of a news article published by the defendant, reciting the facts relating to transaction whereby plaintiff had altered the judgment record without criminal intent to frustrate perpetration of a fraud on his client, *held* not error; such news article being entirely disconnected and for a different purpose from the cartoon and articles complained of.

5. LIBEL AND SLANDER ⟸111—NEWS ARTICLES OTHER THAN THOSE COMPLAINED OF HELD NOT ADMISSIBLE IN MITIGATION.

In attorney's action against newspaper for damages from publication of cartoon imputing hypocrisy and habitual alteration by plaintiff of public records, a news article other than those complained of, reciting the facts relating to transaction whereby defendant altered judgment record without criminal intent, for the purpose of frustrating the perpetration of a fraud on his client, *held* inadmissible for purpose of mitigating damages; the meaning of publications sued on being clear and unmistakable, and the publications being libelous per se.

6. LIBEL AND SLANDER ⟸111 — EVIDENCE ALIUNDE PUBLICATIONS SUED ON ADMISSIBLE IN MITIGATION WHERE SHOWING GOOD FAITH.

Evidence aliunde the publications sued on is admissible, as in mitigation of damages, only where it is manifest that such evidence can and will, or tend to, show that the defendant, in making the publications complained of, acted in good faith and with honesty of purpose, and not maliciously.

7. LIBEL AND SLANDER ⟸100(1), 105(2) — PORTION OF LIBELOUS PUBLICATIONS NOT PLEADED MAY BE SHOWN TO MODIFY WORDS SUED ON.

The defendant may show that the remainder of libel not set out in pleadings modifies the words sued on, or other passages qualifies them, but he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivalent or ambiguous.

8. LIBEL AND SLANDER ⟸104(3), 111—TEST AS TO ADMISSIBILITY OF OTHER PUBLICATIONS.

The test of admissibility of publications other than those complained of is whether such articles will or will not tend to show facts which should properly be considered as in mitigation of damages, or tend to show an absence of actual malice in publications complained of.

9. LIBEL AND SLANDER ⟸105(2) — OTHER PUBLICATION TO EXPLAIN THAT COMPLAINED OF ADMISSIBLE.

Where the meaning or sense of publications pleaded cannot be apprehended or understood without reference to some other publication on the same subject having reference to the plaintiff, such other publication may be received in evidence.

10. LIBEL AND SLANDER ⟸105(3)—EXTRINSIC TESTIMONY TO EXPLAIN PUBLICATION MAY BE ADMITTED.

Where the words published and complained of are not clear and unambiguous in meaning, or where the publication sued on is so connected with a previous or subsequent one, as that it is necessary to give the true meaning of publications complained of, or where it appears that true meaning of publications complained of may be in such language as to make it doubtful whether the true or intended meaning may be grasped or understood by the average person, testimony extrinsic to the publications sued on, tending to show their meaning, may be received for purpose of removing from the publication the sting of malice if the words themselves are upon their face defamatory and libelous.

11. WITNESSES ⟸270(2) — CROSS-EXAMINATION AS TO OTHER CARICATURES THAN ONE COMPLAINED OF HELD PROPER.

In action against newspaper for damages from publication of cartoon concerning plaintiff and others associated with him in a political campaign, where object of publication of cartoon was to injure plaintiff and his associates politically, cross-examination of the general manager of newspaper as to whether he entertained ill feeling against persons caricatured in such cartoon *held* pertinent and proper on issue of newspaper's real attitude toward plaintiff.

12. WITNESSES ⟸270(2) — CROSS-EXAMINATION AS TO LIBELING OF OTHERS THAN PLAINTIFF HELD PROPER.

In libel action against newspaper for damages from publication of defamatory cartoon,

cross-examination of general manager of defendant newspaper as to his attitude toward others caricatured in such cartoon would not have been proper for the purpose of showing that defendant had been guilty of libeling the other persons associated with plaintiff in the cartoon.

13. APPEAL AND ERROR ⊂=1170(7) — CROSS-EXAMINATION AS TO EXTRINSIC MATTERS HELD HARMLESS.

In action for libel against newspaper for damages from publications of cartoon imputing hypocrisy and habitual alteration of public records by plaintiff, cross-examination of defendant's general manager as to the attitude toward others associated with plaintiff in such cartoon, if error, was not ground for reversal under Const. art. 6, § 4½, where there was no showing by defendant rebutting the implication of malice resulting from such publications.

14. LIBEL AND SLANDER ⊂=9(3) — IMPUTING HYPOCRISY AND HABITUAL ALTERATION OF PUBLIC RECORDS LIBELOUS PER SE.

A newspaper publication, involving a cartoon and imputing hypocrisy and habitual alteration of records by plaintiff, an attorney at law, *held* libelous per se.

15. LIBEL AND SLANDER ⊂=5—PRESUMPTION OF MALICE FROM DEFAMATORY ARTICLE LIBELOUS PER SE CANNOT BE REBUTTED.

The presumption of malice from the publication of a defamatory article in and of itself cannot be rebutted.

16. LIBEL AND SLANDER ⊂=117, 119—SHAME AND INJURY TO FEELINGS AND LOSS OF REPUTATION CONSIDERED.

In assessing actual damages from defamatory publications imputing hypocrisy and habitual alteration of public records, the shame, mortification, and injury to feelings, etc., may be considered in addition to the loss of reputation.

17. LIBEL AND SLANDER ⊂=121(1) — $7,500 VERDICT FOR LIBEL HELD NOT EXCESSIVE.

In action by an attorney of good reputation for damages from publications imputing hypocrisy and habitual alteration of public records, verdict of $7,500, *held* not excessive.

18. APPEAL AND ERROR ⊂=1004(1) — LIBEL AND SLANDER ⊂=121(1) — VERDICT IN LIBEL ACTION NOT TO BE SET ASIDE AS EXCESSIVE IN ABSENCE OF PASSION OR PREJUDICE.

There is no scale nor definite standard by which the damages from defamatory publications can be ascertained, but the amount must be governed by circumstances of each particular case and the allowance by jury will not be set aside by the courts unless it clearly appears to have been arrived at through passion or prejudice.

19. LIBEL AND SLANDER ⊂=105(2)—EVIDENCE OF ABSENCE OF MALICE IN OTHER PUBLICATION HELD INADMISSIBLE.

In action for libel against newspaper for defamatory publications imputing hypocrisy and habitual alteration of public records published for political purposes, testimony of the reporter, who was not shown to have been responsible for publications complained of or to have had any authority to direct what publications should be made, that he had no malice in writing a news article of the facts and circumstances of transaction wherein plaintiff had without criminal intent and to frustrate perpetration of fraud on his client changed record, where such news article was separate and distinct from and for a different purpose from the publications complained of, *held* inadmissible.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Nathan Newby against the Times-Mirror Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

George J. Denis, Hunsaker & Britt, Leroy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for appellant.

Edwin A. Meserve and W. F. Palmer, both of Los Angeles, for respondent.

HART, J. The action is for damages for libel. Plaintiff had judgment, following the verdict of a jury, for $7,500, and defendant appeals from the judgment.

On a former trial of the action, judgment was in favor of defendant, which judgment was reversed by the Supreme Court. Newby v. Times-Mirror Co., 173 Cal. 387, 160 Pac. 233, Ann. Cas. 1917E, 186. From that decision we quote the following statements of the facts:

"The defendant is the publisher of the Los Angeles Times, a daily newspaper of large and general circulation, published in the city of Los Angeles. The alleged libels consists of articles published in that newspaper. * * *

"Nathan Newby, at the time of the publications, in September, October, and November, 1909, had been practicing law in Los Angeles for the preceding 14 years. He was a man of good character and reputation, and was a well-known lawyer in active practice and in good standing, being one of a firm of lawyers practicing as Valentine & Newby. Prior to July, 1909, one Blumer had obtained a judgment by default in the superior court of Los Angeles county against Felix Mayhew for the recovery of $8,750. An execution had been duly issued thereon to the sheriff of Los Angeles county. A motion by Mayhew to set aside the judgment was pending. Valentine & Newby were attorneys for the plaintiff in the judgment, and Percy R. Wilson was the attorney for Mayhew. On or about July 23, 1909, the parties agreed on a settlement whereby the plaintiff was to accept $5,000 in money in full satisfaction of the judgment. Mayhew procured a check on the National Bank of California for $5,000, payable to himself and duly certified by the cashier for that sum, and Newby, for the plaintiff, agreed to accept this check, properly indorsed, in lieu of the money, upon the settlement. Pursuant to this agreement, and by arrangement, on the following day, July 24, 1909, Newby, Mayhew, Wilson, and McCabe, a lawyer, also acting for Mayhew, went together to the office of the county clerk, in order that Mayhew might there deliver the check to New-

by, and Newby there enter satisfaction of the judgment and thereupon deliver to Wilson an order to the sheriff to release any property held by him under the execution. In the meantime the check had been duly indorsed by Mayhew to Valentine & Newby, and Mayhew, in collusion with McCabe, but without Wilson's knowledge, had surreptitiously prepared, ready for filing, a complaint in his own name against Blumer, the National Bank of California, Newby, and others, to enjoin payment of the check about to be delivered, together with a restraining order to the same effect ready for the signature of the judge on presentation. None of the other parties had any knowledge of the preparation or existence of these papers or of the design to enjoin the payment of the check after its delivery.

"At the clerk's office, which was in the courthouse, Ross, the judgment book clerk, produced the judgment book, and with a rubber stamp impressed on the margin of the entry of the judgment of Blumer v. Mayhew an entry of satisfaction thereof. Mayhew then delivered the $5,000 check to Newby, who thereupon signed the firm name, 'Valentine & Newby, Attorneys for Plaintiff,' to the entry of satisfaction, handed to Wilson the order to the sheriff for the release of property levied on, and passed to the deputy clerk $1 to pay the fee of 25 cents for the entry. The deputy then went back to the cash drawer for change, and Newby stood awaiting it. McCabe and Mayhew, saying that they supposed they were through, hurriedly left the room. Wilson also left the room with the order of release for the sheriff. While the deputy was getting the change and Newby was waiting for it, Mayhew and McCabe proceeded to the chambers of a judge of the superior court, presented to him the complaint and order for the injunction against payment of the check just delivered, and the judge signed the order and delivered it to them. All this occupied but two or three minutes. While Newby was still awaiting change, the injunction aforesaid, together with a summons in the injunction suit, which had been begun by the filing of the papers in that short space of time, were served upon him by some person other than McCabe or Mayhew.

"Quickly examining the papers served upon him, Newby perceived the gross fraud attempted, and at once called out to the clerk that he had been 'flimflammed' in the satisfaction of judgment, and that he desired immediately to mark it out, showing the deputy the said injunction order. The deputy thereupon turned to the entry of satisfaction, took a pen, and drew several canceling lines across it and wrote beneath it the words: 'Marked out at my request.' Newby then signed the name 'Valentine & Newby' under said words. He then left the room, intercepted Wilson before he had delivered the release to the sheriff, and told him of the injunction. Wilson expressed his indignation, and he and Newby then went together to the bank. There they found a person serving the injunction papers on the officers of the bank. Newby presented the check, the bank declined to pay it, and it never has been paid.

"All this occurred on Saturday. On the following Monday Wilson withdrew his name as attorney for Mayhew in the case of Blumer v. Mayhew, and Newby procured from the judge an order denying Mayhew's motion to vacate the judgment. Newby afterward began proceedings by motion for a formal order by the court setting aside the said entry of satisfaction. This motion came on for hearing on September 21, 1909. At that time an attorney in the interest of Mayhew called the matter to the attention of the defendant's city editor, who immediately detailed a reporter of that paper to get the facts and write up the 'story.' He proceeded to do so, and the article set forth in the first count of the complaint published in the Times on September 22, 1909, was the result. It states the facts substantially as above related, but added that Newby was accused of a felony in altering a public record, that the district attorney was considering the facts, and that Mayhew was willing to swear to a complaint charging Newby with such offense."

Before the retrial of the case, plaintiff filed an amendment complaint and omitted therefrom the article of September 22, 1909, above referred to.

In the first count of the amended complaint it is alleged:

"That the said defendant wickedly and maliciously, and with the intention and design to injure, disgrace, and defame this plaintiff, and to bring him into public discredit and obloquy, printed and published in said newspaper on the 4th day of October, 1909, of, and concerning this plaintiff, a certain cartoon, picture, or effigy which represented the plaintiff, with a pen or pencil in his right hand, with a book representing a public record, and marked on the back thereof 'Public Records,' and representing the plaintiff as saying, 'I'll change 'em;' that said cartoon also contained caricatures of other citizens of Los Angeles, most of them prominent in the good government organization, which had for its object the bettering of municipal conditions in the city of Los Angeles; that said cartoon, at the top thereof, had these words printed, 'And these are our leading reformers,' and at the bottom of said cartoon had the following quotation: 'All hypocrites are sinners, but, thank God, all sinners are not hypocrites.'"

A photographic copy of said cartoon followed the above allegation. It is then alleged:

"That by the foregoing false, malicious, and defamatory picture and publication, the defendant intended to convey the meaning, and the said picture was by the persons who observed the same as published in said paper understood and believed to convey the meaning, that the said plaintiff had changed public records and was in the habit of changing public records; that the plaintiff in his political activities was not sincere, but was a hypocrite; and that while posing as a reformer, plaintiff was, in fact, guilty of changing public records, and a criminal."

The second, third, fourth, and fifth counts of the amended complaint quote articles from issues of the Times on, respectively, October 5, October 29, November 16, and November 25, 1909, and repeat the allegation of the first count, above set out, as to the malicious intent with which each publication was made;

and in each of said counts the meaning intended and understood is alleged practically as in the first count. The following excerpts will show the general character of the articles:

"If it were not for court records and newspapers files and the like of that, there are some Los Angeles 'reformers' who would exude eau de cologne instead of the familiar stench that now accompanies them on their devious peregrinations." "There is a movement to stop gambling of all kinds in Los Angeles, through an initiative petition proposing an anti-gambling ordinance submitted by the arch-reformer Nathan Newby. Beginning with a desire to stop humble citizens from shaking dice for cigars, which Newby and others volubly and defiantly expressed to the council before it was found Newby had been tampering with the county records," etc. "Then Nathan Newby's anti-gambling initiative ordinance will have place in the question box. It aims to prevent smokers from joining in a friendly game of dice with the cigar store clerk with the cigars at stake. This so shocked Nathan that he forgot to alter any more public records." "A motion was made after the rendition of the judgment [in Blumer v. Mayhew] to set it aside, but about that time Nathan Newby, of the legal firm of Valentine & Newby, caused the judgment on the records in the office of the county clerk to be mutilated and the satisfaction of the judgment wiped out."

As to the contents of the amended answer, we adopt the following statements from appellant's opening brief:

"The defendant denied the libelous character of the publications, and as to some pleaded the truth of the facts stated in justification, and as to others, pleaded that they were privileged as being fair, full, and impartial reports of public and judicial proceedings, or fair comment and criticism upon matters of public interest.

"The defendant, as separate and further defenses to each count of the complaint, and in mitigation of damages, pleaded all the facts surrounding the alteration of the public record by plaintiff on the 24th day of July, 1909, and the further fact that the defendant, after having made a fair and reasonable investigation of the facts did, on the 22d day of September, 1909, without malice or ill will towards plaintiff, print the article of September 22, 1909 (setting the same forth in full), which article was alleged to have been a full, true, and correct account of the entire transaction; that the cartoon and subsequent articles appearing in the defendant's paper all referred to the acts and occurrences as set forth in full in the publication of September 22d, and that it was not the intention of the defendant in any of its subsequent publications to charge the plaintiff with the commission of any acts other than those set forth fully in the article of September 22d, and that the readers of defendant's paper so understood the cartoon and subsequent articles, and did not attribute to them any meaning or significance other than as set forth so completely, fairly, and fully in the article of September 22d."

It is then stated in appellant's brief:

"To such special and separate defenses plaintiff demurred, which demurrer was overruled. Nothwithstanding this, at the commencement of the trial, on plaintiff's motion and against defendant's objections, the said several separate defenses in mitigation of damages were stricken out by the court.

"During the trial the defendant endeavored, but was not permitted, to introduce in evidence the article of September 22, 1909, for the purpose of showing a lack of malice, and for the further purpose of explaining the subsequent articles and cartoon, as well as the understanding of the readers who saw and read the subsequent articles."

The first contention of appellant is that the court erred in striking from the answer said allegations and in refusing to admit evidence in support thereof.

[1] The pleadings and the issues presented and the facts of this case are essentially the same as those developed at the first trial hereof, except such evidence as might have been directly addressed to the first publication of the transaction whereby the plaintiff caused the record in the case of Blumer v. Mayhew to be changed, so far as was concerned the notation or entry satisfying the judgment therein. It follows that the rules and principles enunciated and applied in the decision of the case as presented on the former appeal bear directly upon the case as made at the second trial, of which the present appeal is the outgrowth, and that the decision on the previous appeal is therefore the law of the case. It is consequently conceived that it will clarify the discussion of the points presented by the present record and to be the orderly course before taking up for consideration the several contentions upon which the appellant relies for a reversal, to reproduce here the following extended excerpts from the opinion by Mr. Justice Shaw of the Supreme Court, filed in deciding the former appeal (see 173 Cal. 388, 392, 160 Pac. 233, 235 [Ann. Cas. 1917E, 186] et seq.):

"It would, perhaps, puzzle a person not familiar with the Penal Code to discover in the conduct of Mr. Newby, as detailed above, anything immoral or reprehensible, or other than a commendable zeal to protect his client against palpable fraud. But sections 113 and 114 of the Penal Code declare that it is a felony for any person to deface or alter a record or any part thereof kept officially in any public office. The marking out of the entry of satisfaction by drawing lines across it with a pen was done by the deputy clerk at the request of Newby, who is, consequently, equally responsible therefor with said deputy. It was defacement of a public record. It is clear from the facts stated that Newby was actuated solely by the praiseworthy purpose of frustrating the fraudulent acts of Mayhew in procuring the entry of satisfaction to be made without consideration, and that his intent was not in any wise criminal in character. It was but an irregular method of

effecting a righteous result. Nevertheless, so great is the care of the state that the public records shall remain unchanged, except when changed in an authorized manner, the statute is so drawn as to make even such laudable defacement a felony. The intent is immaterial. The act itself without intent other than that of doing it, constitutes the offense, regardless of the object. This has been expressly decided in this state, and is the general rule in respect to statutory offenses of that kind. People v. O'Brien, 96 Cal. 175, 31 Pac. 45; People v. Tomalty, 14 Cal. App. 229, 111 Pac. 513. Therefore, although the plaintiff was guilty of no moral wrong or bad intent in the matter, it is technically true that he was accused of the commission of a felony. The answer alleges as a defense to the first count that the several matters complained of therein as libels upon the plaintiff were and are true, setting forth the particular facts, which it is claimed establish the truth of that charge. In so far as the publications assert that the plaintiff was accused of the commission of a felony, confined as they all are to the act of crossing out the entry of satisfaction of the judgment in Blumer v. Mayhew, the defense of truth is established by the evidence, although the offense was entirely technical, was without moral guilt, and was intended to bring about justice.

"The truth of this part of the matter complained of, however, does not establish a defense to the other libelous publications concerning plaintiff. With reference to the cartoon or caricature of plaintiff and others with certain inscriptions upon it, published in the Times of October 4, 1909, the defendant in its answer alleged it was made in the midst of a strenuous political campaign, in which the plaintiff was identified with and prominent in the party opposed by the Times newspaper, and known as the Good Government League, or reformers; that cartoons were frequently published by or in behalf of the respective parties in the conduct of the campaign; that in carrying on its part of the campaign the Times published said cartoon as 'a merry and harmless pictorial allusion to the leaders of said reformers as a political class, and not as private individuals, and merely by way of facetious rejoinder to many political criticisms and censures' of the party supported by the Times, made by said reformers in public speeches and newspapers. These facts could only be considered in mitigation of damages. They do not constitute a defense. The case does not come within the rule as to privileged communications, as laid down in subdivision 3 of section 47 of the Civil Code. In Wilson v. Fitch, 41 Cal. 382, the court said: 'Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives.' Edwards v. San Jose, etc., Soc., 99 Cal. 438, 37 Am. St. Rep. 70, 34 Pac. 128; Gilman v. McClatchy, 111 Cal. 606, 614, 44 Pac. 241. The duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views. A publication concerning such person, if libelous in its nature, cannot be excused on the ground that the occasion is privileged, and can be justified only by pleading and proving that it is true. And the fact that the matter published tends to cause merriment, or is a 'facetious rejoinder' to adverse criticisms made by other persons, does not justify the wrong. It is libelous per se to falsely charge that a person is a hypocrite.'

"The answer does not allege that the imputation of hypocrisy to Newby, or the imputation that he was in the habit of altering public records, alleged to be the purport of said cartoon, were true, but denied that it was susceptible of that meaning. The court below, at the request of the plaintiff, instructed the jury that it should determine whether or not said cartoon would fairly represent to the ordinary reader that the plaintiff was a hypocrite and was in the habit of changing public records, and that if it was found to have that meaning the plaintiff would be entitled to recover on the second count, unless it was proved to be true that plaintiff was a hypocrite and was in the habit of changing public records. The verdict in favor of the defendant necessarily implies that the jury either found that the cartoon was not susceptible of the meaning imputed to it, or found that plaintiff was a hypocrite and was in the habit of changing public records. The plaintiff insists that the evidence does not support either of these findings, and this insufficiency is assigned as cause for a new trial.

"The instruction that the jury might find for the defendant if the imputation to Newby of hypocrisy and the habit of altering public records were proven was not properly within the issues, inasmuch as the answer does not aver the truth of these charges. As the plaintiff requested the instruction, he cannot complain that it was given, but he may make the point that the implied findings are not supported by the evidence.

"There was no evidence whatever to the effect that Newby was a hypocrite, or that he was in the habit of altering public records. The act of altering the entry in the case of Blumer v. Mayhew, when considered in the light of circumstances under which it was done, does not tend to show hypocrisy, or any sort of depravity in the character of Newby. It only shows that he was in error as to the lawful method of correcting the wrong attempted by Mayhew. Any finding that the charge of hypocrisy was true would be contrary to the evidence. It is therefore to be presumed that the jury did not find that charge to be true. The verdict can only be supported, so far as this count is concerned, on the theory that the jury concluded that the cartoon would not, to an ordinary reader, bear the meaning that the plaintiff was a hypocrite or was in the habit of changing public records.

"The evidence does not justify such conclusion. The heading to the cartoon, consisting of the phrase, 'And these are our leading "reformers,"' in itself implied that the persons pictured were not worthy to be called reformers, and were claiming a virtue they did not possess. The statement below, 'All hypocrites are sinners, but, thank God, all sinners are not hypocrites,' taken in connection with the admitted fact that these persons were generally known as 'reformers' in the pending political campaign, was nothing less than an indirect assertion that the persons whose pictures appeared above were both sinners and hypocrites, while their opponents might be sinners, but were not hypocrites. This meaning was also indicated by the

fact that the four persons, other than Newby, shown in the cartoon, were each portrayed as engaged in transactions either disreputable, dishonest, or ridiculous, and, further, by the sinister expression on the face of Newby as given in the cartoon. All these circumstances may be considered. Bettner v. Holt, 70 Cal. 274, 11 Pac. 713. Newby was not named in the cartoon, but it is practically conceded that the picture was sufficiently like him to be readily recognized by all who knew him. No person of ordinary intelligence could fail to perceive that the cartoon was intended to suggest that the plaintiff was a hypocrite posing as a reformer. The verdict on this point is therefore contrary to the evidence. The plaintiff was entitled to recover on this count regardless of the weakness of his case on other counts.

"We do not mean to intimate that the other publications set forth in the complaint do not, in effect, assert that the plaintiff was addicted to the changing of public records and impute to him a moral obliquity or depravity which was not established by his conduct in the case of Blumer v. Mayhew, and which was no part of his character, or that they do not also impute to him hypocrisy and insincerity. These are, for the most part, questions of fact as to which, upon another trial, the result may be different. Our conclusion with regard to the second count makes it unnecessary to consider them further upon this appeal."

[2, 3] It is only necessary to look to the foregoing language of the Supreme Court to find an answer to the contention that error was involved in the action of the court in striking from the answer the allegations thereof, introduced therein as a special defense, reciting the fact of the alteration of the record as described by the plaintiff and the facts and circumstances attending that transaction. It will be noted that the Supreme Court, in referring to the part of the answer setting forth those facts, said:

"The truth of this part of the matter complained of, however, does not establish a defense to the other libelous publications concerning plaintiff."

But if the facts of that transaction were proper to be pleaded and proved as in mitigation of damages, then the reply is that said facts were not only pleaded in the answer and allowed to remain therein, not, however, as a "further and separate answer and defense," but the defendant was allowed to prove them. The affidavit of plaintiff, prepared and filed in a proceeding instituted in the superior court for the purpose of obtaining a decree setting aside the entry of satisfaction of the judgment in Blumer v. Mayhew, and which fully and in detail recited the facts and circumstances characterizing the transaction eventuating in the changing of the record in said case, was introduced in evidence by the defendant as part of the testimony of the defendant's witness, Samuel G. Austin, who was the reporter of the defendant, and as such interviewed plaintiff at the time the record was changed in regard thereto and prepared for the defendant the article first published by it concerning said transaction. Certain letters anent the judgment in Blumer v. Mayhew, over the signature of the law firm of which the plaintiff was then a member, were at the same time also introduced in evidence. Thus it is plain that the defendant got before the jury and so obtained whatever benefit there was in the facts and circumstances attending the transaction culminating in the changing or alteration of the record by the plaintiff.

It is next contended that error prejudicing the rights of defendant was committed by the refusal of the court to allow in evidence, at the behest of the defendant, the first article published by the defendant (on September 22, 1909), concerning the fact of the alteration of the record. That article, as above shown, was pleaded in the original complaint as the basis for the first count thereof, and which the plaintiff therein declared was libelous as against him. As is also likewise shown, the complaint as amended upon the return of the cause by the Supreme Court for a retrial eliminated there from said article, so that it no longer remained as one of the causes of action relied on against the defendant. The article is in the record, it having been offered in evidence and marked for identification. The purpose which it is claimed the article would subserve as evidence for the defendant is stated above.

[4] It was not error to exclude the article. Aside from the consideration that said article referred to the same transaction as that referred to by the publications declared upon by plaintiff, and was, indeed, the first appearing in the defendant's newspaper announcing and giving the details of the fact of the alteration of the record by the plaintiff, it had in a legal sense no necessary, or in truth any connection with the cartoon and other publications concerning that transaction appearing subsequently in defendant's newspaper and complained of here. It could not, therefore, be of any service in explaining the reasons for the publication of the cartoon and subsequent articles, or in any way tend to show that the later articles and cartoon were published without malice against the plaintiff. It is manifest that the cartoon and the other publications counted on by the plaintiff were published not as a mere matter of news relative to the plaintiff's act in altering the record in the case mentioned. The news feature of that transaction had already been given by the defendant in its newspaper; and the later publications were occasioned by the plaintiff's political activities in a movement to which the defendant was confessedly opposed, and their obvious design was to destroy that movement as a political force in the political affairs of Los Angeles. It was therefore evidently the immediate purpose of the

publications complained of to degrade and belittle the plaintiff and his associates in the movement in the estimation of the local public, and thus interpose, if it could be done, an effectual handicap to the avowed purposes of the local political organization of which they were the prime promoters and through the medium of which the plaintiff and his associates, as they pretended, were attempting to accomplish certain reforms in the affairs of the city government of Los Angeles. On the other hand, the excluded article merely involved a recital as a matter of news, which was obviously of interest to the public, of the facts relative to the alteration of the record and the explanations of the plaintiff and others of the matters leading up to the changing of the record. There was absolutely nothing on the face of said article indicating in the slightest degree that it was published with the design of defaming or injuring the personal character of the plaintiff or of impairing his standing in the community either as a citizen or as a member of the legal profession. In fact, the portion of the article giving the plaintiff's version of how the record came to be altered was under the subhead, "A Clear Explanation," and gave, without in any manner questioning, either directly or by innuendo, the honesty of the plaintiff's statement of the facts of the transaction and the facts which he appeared to think justified his act, the full story of the affair as detailed by him. In brief, the article was one the publication of which is within the legitimate rights of the defendant as the publisher of a newspaper whose primary purpose is to chronicle and give to its patrons the current events and news, particularly those events or matters, such as the one which constituted the subject-matter of the article here, affecting the public interests and which the public are concerned with and entitled to know about. But, while this is all true, the purpose of the publication of said article and the evident purpose for which the cartoon and subsequent articles complained of were published were, as above declared, entirely disconnected, and it follows that, as before stated, the first or excluded news article could throw no light upon the question whether the cartoon and the subsequent publications concerning the plaintiff and based upon his act in causing the record to be altered, were published with or without malice or with or without a design by the defendant thereby to defame and destroy the reputation or the standing of the plaintiff in the community in which he resided and carried on his professional activities.

[5] Nor was the article of September 22, 1909, admissible, as is the contention, upon the theory that it would tend to show, as in mitigation of damages, that the publications complained of bore "a restricted meaning" and that it was in the sense of such meaning that all, "or a large portion of defendant's readers, understood to attach to the publications sued on." The meaning of the publications sued on seems to be clear and unmistakable. They are in ordinary language, easily and readily to be understood by the average person who might peruse them. They could have no "restricted meaning," if by that expression it is meant that they bore any other meaning than that the plaintiff was a hypocrite, and had habitually practiced and perpetrated the crime of altering public records. No one reading the articles and inspecting the cartoon with its accompanying words, which form the basis of this action by plaintiff, could but conclude that, if said articles and cartoon spoke the truth, then the plaintiff was a hypocrite and a criminal. Indeed, so unquestionably clear is the meaning of those publications that the Supreme Court, as has been shown, in the opinion on the former appeal, characterized them as libelous per se—that is, libelous in and of themselves, or upon their face, and further said, as will be observed from the above excerpt from its opinion:

> "Newby was not named in the cartoon, but it is practically conceded that the picture was sufficiently like him to be readily recognized by all who knew him. No person of ordinary intelligence could fail to perceive that the cartoon was intended to suggest that the plaintiff was a hypocrite, posing as a reformer."

The publications upon which the charge of libel is here based speak for themselves. No extrinsic evidence was or is necessary to explain their meaning or the motive prompting them. The excluded article could neither have furnished an explanation which would have disclosed a different meaning to the language of the publications or to the cartoon sued on from that which their language and the representations contained in the cartoon naturally and plainly imply, nor have disclosed or tended to show that the latter publications were made without malice or were justified. It, in brief, was inadmissible as evidence for any purpose.

[6, 7] The rule is that evidence aliunde the publication sued on is admissible, as in mitigation of damages, only where it is manifest that such evidence can and will show or tend to show that the defendant, in making the publication complained of, acted in good faith and with honesty of purpose, and not maliciously. The defendant may show, if he can, that the remainder of the libel not set out in the pleadings modifies the words sued on, or other passages in the same publication qualify them. "But he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivocal or ambiguous." Newell on Slander and Libel (2d Ed.) § 78. See, also, Wilson v. Pitch, 41 Cal. 363; Preston v. Frey, 91

Cal. 107, 110, 27 Pac. 533; Davis v. Hearst, 160 Cal. 143, 182, 116 Pac. 530.

[8] Of course, there can be discerned no distinction in principle between the disallowance as evidence of subsequent articles and of publications as evidence made previously to the publication sued on. The test of the admissibility or nonadmissibility of publications other than those complained of is whether such articles will or will not tend to show facts which should properly be considered as in mitigation of damages, or tend to show an absence of actual malice in the publication complained of.

There are some cases cited by appellant which it conceives justifies it in challenging the soundness of the ruling excluding as evidence the article in question. They are: Bettner v. Holt, 70 Cal. 270, 11 Pac. 713; Van Vactor v. Walkup, 46 Cal. 124; Rocky Mountain Printing Co. v. Fridborn, 46 Colo. 440, 104 Pac. 956, 24 L. R. A. (N. S.) 891; Gould v. Weed, 12 Wend. (N. Y.) 12; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Young v. Gilbert, 93 Ill. 595; Scripps v. Foster, 41 Mich. 742, 3 N. W. 216; McLean v. Caverne, 175 Ill. App. 273.

[9] It would subserve no useful purpose to enter herein upon an examination and such analysis of the decisions in the cases named as will readily show that they are to be distinguished from the present case upon their facts. Referring to them generally, however, it is to be remarked that it cannot be doubted that, as the cases named properly hold, where the meaning or sense of the publication pleaded and so complained of by the plaintiff cannot be apprehended or understood without reference to some other publication upon the same subject, and, having reference to the plaintiff, it is competent and proper to receive the latter publication in evidence. For instance, in the case of Rocky Mountain Printing Co. v. Fridborn, 46 Colo. 440, 104 Pac. 956, 24 L. R. A. (N. S.) 891, supra, the words relied upon as defamatory and libelous, and which were published under the heading, "Miss Fridborn a Mother," were: "Florence Fridborn, the girl who was assaulted by an unknown man in North Denver last New Year's Eve, became a mother yesterday." As showing that said item was published without malice and entirely from a news motive, the defendant pleaded the facts of a previous criminal assault upon the plaintiff and the killing of her brother at the same time by an unknown man at a "lonely spot" to which plaintiff, then aged 16 years, and her brother, then a little over 21 years, had repaired for the purpose of skating, and which facts had at the time of the occurrence been published in all newspapers of Denver, including the appellant's newspaper, the Rocky Mountain News. The trial court, upon motion, struck from the answer all those facts. That the publication made the basis of the plaintiff's cause of action in that case was libelous per se is an unquestioned proposition, since, from its face, and unexplained, the necessary implication was that the plaintiff, being an unmarried woman and having given birth to a child, had been guilty of fornication, and was therefore unchaste. But, inasmuch as the publication involved a statement of the direct result of a previous diabolical assault by a male upon the plaintiff, of the facts and circumstances of which assault the defendant had, as a matter of news, and legitimately as the publisher of a newspaper, made publication, it was eminently proper, and the Supreme Court of Colorado so held, that the matters stricken from defendant's pleading, involving the previous publication by it of the assault and the circumstances attending it, should have been allowed to remain, subject to be proved, if not as a defense, certainly to cut off any ground for the just infliction of punitive damages.

[10] And in any case of libel, where the words published and complained of are not clear and unambiguous in meaning, or where the publication sued on is so connected with a previous or subsequent one as that it is necessary to read them together to get the true meaning of the publication complained of, or where it appears that the true meaning of the latter may be in such language as to make it doubtful whether the true or intended meaning thereof may be grasped or understood by the average person, testimony extrinsic to the publication sued on, tending to show what its words mean or were intended to mean, may be received, and this for the purpose of removing from the publication the sting of malice if the words themselves are, upon their face, defamatory and libelous.

The other cases cited by appellant above named are likewise to be differentiated from this. In some of the cases certain portions only of the publication complained of were relied upon as the foundation for the cause of action pleaded, but it was held therein, and very properly so, that the defendant was entitled to have in evidence the entire article or publication upon the theory that, when the publication is considered in its entirety, the conclusion may be justified that there is either an entire absence of malice in the act of publishing the article or there appeared in the portions omitted from the complaint certain facts which might tend justly to minimize even compensatory or actual damages.

Counsel for the plaintiff, over objection by defendant, was permitted to ask Gen. Otis, president and general manager of the defendant at the time the publications complained of were made, whether he entertained ill feeling against the several persons caricatured and included in the cartoon other than the plaintiff, and this ruling is assigned as prejudicial error. The witness, in response to

questions on that line of cross-examination, stated that some of the persons included in the cartoon he was not personally acquainted with, that as to one of them he could say that he was unfriendly with, and that as to another he was politically not friendly with. Personally, he was not acquainted with plaintiff, he declared.

[11, 12] We are not prepared to say that the cross-examination thus challenged was not pertinent and proper. The object of the attack involved in the cartoon and the articles complained of was to destroy the force of a political organization of which the parties caricatured and included in the cartoon were the leading promoters, and to which the defendant appears to have launched a relentless opposition, and, in prosecuting such opposition with any hope of success the defendant seems to have conceived that the first and important requisite was to attack and so destroy the personal reputation of the individuals constituting the subjects of the cartoon. If the cause to crystallize which the persons referred to in the cartoon was for a bad purpose, or one not calculated to be the instrument for promoting the public welfare, or the parties prosecuting it were doing so to consummate some sinister personal purpose, which latter proposition seems to be the imputation against them as implied from the publications complained of, then the banding together of those persons for that purpose was, according to the fair and reasonable import of said publications, no less than a criminal conspiracy, or at least one whose ultimate mission was to perpetrate a political wrong of some sort upon the city and the county of Los Angeles. Hence, it would seem that, if for such reasons, the defendant's general manager, who controlled the policies of the defendant, entertained ill feeling, politically, against any of the parties associated by the defendant with the plaintiff in a cause which it opposed because either the purposes of the cause or those of its promoters were inimical to the best interests of the public, such ill feeling, if shown, would afford some inference that he entertained a like feeling, toward the plaintiff. It might be somewhat of a remote inference, but this goes only to the question of its evidentiary value, the determination of which was, of course, with the jury. Manifestly, the testimony sought to be elicited by the cross-examination would not be proper for the purpose only of showing that the defendant had been guilty of libeling the other parties associated with plaintiff in the cartoon, and, as we have shown, this was not its purpose, although, incidentally, it might have tended to show that to be the fact. The cases cited by appellant, therefore, are not applicable to the discussion. They are: Cochran v. Butterfield, 18 N. H. 115, 45 Am. Dec. 363; Stowell v. Beagle, 57 Ill. 97; York v. Pease, 2 Gray (Mass.) 282. In those cases proof was offered and received or rejected whose effect would be to show either that the defendant had previously and in different articles published libels on other persons than the plaintiff, or that the defendant had previously had a personal difficulty with the plaintiff's father. The courts in those cases very properly held that such testimony would not tend to prove that defendant had maliciously made the publication complained of; that is, with malice against the plaintiff. But here the plaintiff is grouped in the same cartoon with others who are characterized either as dishonest or as prosecuting an usurious money-lending business, or as having been in a drunken condition while in the performance of some public function, whether official or otherwise, is not made clear, and the group is ironically referred to therein as "our leading reformers," of whom it is also said therein, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," and, as above stated, it is fair to infer therefrom that the same motive or the feeling actuating the publication of the cartoon and the words employed tending to interpret its meaning or purport cannot well be held to have been intended to be confined or limited in their application to any single one of the group, but that it must have been at the bottom of the publication as to all referred to therein.

[13-15] But, if we felt compelled to hold with appellant that the cross-examination was legally improper, we would still be of the opinion, in view of the record when considered as a whole, that the ruling permitting it was not productive of a miscarriage of justice. Const. art. 6, § 4½. As before declared, the publication involving the cartoon was libelous per se, and there was no showing by the appellant rebutting the implication of malice resulting from or attending such publication. Indeed, the presumption of malice from the publication of a defamatory article in and of itself libelous or actionable per se cannot be rebutted, and it is therefore the more correct to say that there was no showing by the defendant tending to mitigate damages—that is, a showing that there was in fact no express or actual malice.

In the present connection, we may consider the claim that the verdict is, under the evidence, excessive, and that but for the testimony brought out by the cross-examination of defendant's president and general manager, a verdict for a much less sum than that thus awarded would probably have been the result of the jury's deliberations. But we cannot perceive how it can consistently be held by this court that the damages awarded are, under the evidence, excessive.

It has been held:

"If the article is libelous per se, we see no reason why the law should not declare that upon its introduction in evidence a prima facie case of malice in fact is established, for, even though it be presumed malice, it is malice in fact, and has all the dignity and gravity of express or actual malice, proven aliunde. We conclude that presumed malice is equally a question of fact with actual malice, and upon being established equally forms the foundation for the recovery of exemplary damages." Childers v. Mercury P. & P. Co., 105 Cal. 284, 289, 38 Pac. 903, 904 (45 Am. St. Rep. 40); Civ. Code, § 3294.

In this case, as stated, there is no showing that the defendant had justification or excuse for publishing the plaintiff to the world as a hypocrite and a man who was in the habit of unauthorizedly altering public records, a crime under the laws of the state, and there is therefore no proof disclosing an absence of actual malice in the publications complained of; hence the malice implied or presumed from said publications because of their inherent defamatory and libelous character stands in the record as malice in fact.

[16] But, to the complaint against the size of the verdict, there is still another answer, to wit: That among the elements of actual damages which may be considered and made in part the bases of the actual detriment suffered by the plaintiff from the publications is not only the loss of reputation, but also the shame, the mortification, and injury to feelings, etc., and of these elements it has been said:

"While special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof; and to the amount that the jury estimates will fairly compensate plaintiff for the jury done. Wilson v. Fitch, 41 Cal. 386." Childers v. Mercury P. & P. Co., supra, 105 Cal. 289, 38 Pac. 903, 45 Am. St. Rep. 40.

[17, 18] The court in this case clearly instructed the jury as to the measure of damages in such a case, and also stated the elements which they were to consider in determining the damages which would compensate the plaintiff for the injury or damage he had suffered from the publication, and we do not see our way clear to declare, as a matter of law, that the award of the jury ($7,500), viewed even as involving only the allowance of compensatory damages, represents anything more than fair and reasonable compensation for the injury actually sustained. There is no scale or definite standard by which such wrongs as the one here complained of can be accurately measured and determined, and they must therefore be judged and appreciated by the view taken of them as they are made to appear by the circumstances of each particular case by fair-minded and impartial men, and the question of the amount of damages which would represent just compensation in this class of cases hardly admits of any other test than the intelligence of a jury, governed by a sense of justice; and, unless it clearly appears that the amount of damages allowed could only have been arrived at through passion or prejudice, it does not rest with the courts to set the verdict aside. If the verdict is to be construed as implying, as the jury were apparently warranted from the record before them in finding, that the publications declared upon were prompted by actual malice, then, obviously, the verdict may well be said to demonstrate on the part of the jury very liberal consideration of the defendant.

It is lastly contended that there was prejudicial error in the ruling disallowing the witness Austin to testify whether he, having as a reporter of the defendant written the article of September 22, 1909, had any malice against the plaintiff at the time of or in writing said article, or "if he at that time, or at any other time, had received any instructions from his superior officers in the defendant corporation to villify or persecute or libel, or do anything unfriendly to Mr. Newby."

[19] The ruling was not erroneous. As above shown, said article merely involved a recital or statement of the facts and circumstances leading up to and immediately attending the act of changing the record of the entry of the satisfaction of the judgment in the Blumer-Mayhew Case as they were admitted by the plaintiff to have occurred. There is no claim by the plaintiff that said article was published with malice, or that there was anything untrue in its statement of the facts of the transaction to which it related. It was, as before stated, nothing more nor less than a news article, giving the unexaggerated, uncolored statements of the parties to each side of the controversy arising out of a transaction, the truth of which, so far as was concerned the act itself of altering the record, was not disputed, but was admitted by plaintiff. The case of Brown v. Title Co., 151 Mass. 127, 23 N. E. 733, does not support the position of appellant upon the point under consideration. There the president and the vice president and general manager of the defendant were allowed to testify, over objection by plaintiff, that neither they nor any other officer or employé of defendant had any hatred or ill will or malicious intention towards the plaintiff in the publication of the alleged libel, and the court, on review, held that that testimony was competent and proper for the purpose of showing an absence of ill will or malice against plaintiff in the publication. There can be no just criticism of that ruling. The case here is different. A reporter of a newspaper, having no other connection therewith, is a mere employé, with no power or authority over the policies of the paper. He, as a rule, in the discharge

of his duties as a reporter, must follow the established policies of the newspaper with which he is thus connected, and has nothing to do with the character of the publications made by the newspaper. And in the very case cited by appellant and above referred to (Brown v. Title Co., 151 Mass. 127, at page 129, 23 N. E. 733), it is said:

"If either witness [that is, either the president or the vice president and general manager of the defendant in that case] had nothing to do with the publication, his evidence would be immaterial; if it was claimed that either one made or authorized the publication, his evidence would be material."

And to the above we may add that the burden was upon the defendant to show that the witnesses named made or authorized the publication. So it is true in this case. No question was asked of the witness Austin the object of which was to show, nor was there otherwise any testimony showing or tending to show, that he (Austin) authorized or was in any way responsible for the publications complained of, or had any authority to control the policy of the defendant, or direct what publications should or should not be made by the defendant.

No other points are made.

In accordance with the views herein set forth, the judgment appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 168

RECTOR v. LEWIS et al. (Civ. 3165.)

(District Court of Appeal, Second District, Division 2, California. Feb. 17, 1920.)

CROPS ⟸2—EJECTMENT ⟸132—CROPS HARVESTED WHILE WRONGDOER WAS IN POSSESSION HELD NOT RECOVERABLE AS DAMAGES.

Where possession of land is taken unlawfully, but not under circumstances justifying exemplary damages, the owner cannot recover as damages for the use and occupation of the land during the time of its unlawful detention the gross value of the crop raised thereon by the trespasser, but his damages are confined to the rental value of the land; for, although crops growing on the land when its possession is recovered by the owner go with the land to the owner, harvested crops belong to the trespasser.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by J. L. Rector against Wellington J. Lewis and another. From a judgment for defendants on their cross-complaint, plaintiff appeals. Reversed.

N. B. Bachtell, of Lancaster, and Robert L. Hubbard, of Los Angeles, for appellant.

George L. Sanders, of Los Angeles, for respondents.

SLOANE, J. The parties to this action had entered into a contract for the exchange of lands. Plaintiff brought suit to enforce the execution of a deed to the premises which defendants had contracted to convey, and of which plaintiff was in possession. Defendants answered and filed their cross-complaint for a rescission of the contract and for recovery of possession of the land and certain personal property that went with it, as covered by the contract, together with damages for waste, the value of crops raised and harvested by plaintiff, and the rental value of the land.

The trial court, by an interlocutory judgment, denied plaintiff the relief sought under his complaint, and gave judgment for defendants on their cross-complaint, decreeing the rescission of the contract for exchange of properties, and awarding the return of possession, with damages to defendants, to be determined on an acccounting and on further hearing in the suit. On an appeal to the Supreme Court (172 Cal. 1, 155 Pac. 75) the interlocutory judgment was affirmed, and the case remanded for the taking of further testimony as to damages. This appeal is by plaintiff from final judgment for defendants for damages arising from conversion of certain personal property and the use and occupation of defendants' premises.

The principal point of appellant's contention is upon a finding of the court that plaintiff had converted to his own use 144½ tons of hay, of the value of $2,890, the personal property of and belonging to defendants, and grown on said real property. It is contended that this finding is not supported by the evidence. The evidence discloses, accepting defendants' version of it, that there was on the premises, when plaintiff took possession, 11 tons of hay belonging to defendants; that plaintiff, during his possession, raised and harvested 180 tons, making a total of 191 tons; and that 46½ tons had been turned over to defendants, leaving 144½ tons unaccounted for, upon which the court fixed a valuation of $20 per ton, and gave judgment for defendants for that amount.

The legal question presented is whether defendants can recover as damages for the use and occupation of their land during the time it was unlawfully detained by the plaintiff the gross value of the crop raised thereon by plaintiff. It is insisted by appellant that in no event could the recovery be for more than the value after deducting the cost of growing and harvesting the crop, and that the true measure of damages is not the crops grown on the land, but the rental value of

the premises. The trial court found that the plaintiff obtained possession of defendants' land "by seizing and taking it from defendants' possession, against their consent." We are not advised as to whether the evidence supports such finding; but, at the most, it obtains no support from defendants pleadings. The cross-complaint contains the only reference to plaintiff's possession of the premises, as follows:

"* * * The possession of which Los Angeles County property these defendants had surrendered to plaintiff on his promise in said contract of January 11, 1912, contained that he would complete the terms and conditions of said contract."

It thus appears that possession was surrendered by defendants in pursuance of the contract afterwards rescinded. In any event, even under the findings of the court, the possession, though unlawful, was not taken forcibly or under such conditions of malice and oppression as would justify punitive damages, and the recovery must therefore be limited to compensatory damages.

Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093, and Avakian v. Noble, 121 Cal. 216, 53 Pac. 559, have been called to our attention as decisions laying down the rule of punitive damages. In the former case the punitive damages were not upheld as against the defendants; and in both cases the actions for damages were upon facts showing a willful, fraudulent, and forcible taking of property in the nature of chattels from lands in the actual possession of the plaintiffs. The rule applicable to crops grown and harvested upon land by a trespasser, or one in unlawful possession, not under circumstances to justify exemplary damages, would seem to be that, if the possession is recovered by the owner, he takes the growing crops with the land, but that crops harvested are the property of the one in unlawful possession, and the owner's remedy is to recover the rental value of his land. 12 Cyc. 977; Johnston v. Fish, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53; Sutherland on Damages, vol. 4, § 1023; Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Churchill v. Ackerman, 22 Wash. 231, 60 Pac. 406; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462. In Page v. Fowler, supra, where the defendant, in wrongful and unlawful possession of plaintiff's land, raised crops which were severed from the realty before judgment for possession in favor of plaintiff was given, the court says:

"But no case has been cited in which this principle, right of recovery for mesne profits and waste, has been held to make the owner of the land out of possession, under such circumstances, the owner of the crops grown and actually harvested by the defendant. The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops; for, as was well said in the case of Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710, the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land."

No brief has been filed in behalf of respondents on this appeal; and, although we have examined the transcript, and, to some extent, the bill of exceptions, we have largely assumed the correctness of the undisputed statement of the case by appellant as a basis for our conclusions. We are of the opinion that the allowance to cross-complainants of the gross market value of the hay harvested from the premises was erroneous. There is also an allowance of $25 for a wagon reach, under the findings, which under the evidence, was valued at $2.50. In view of these errors it is unnecessary to pass upon other minor points raised on the appeal.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 171

BUTLER v. SOLANO LAND CO. (Civ. 3254.)

(District Court of Appeal, First District, Division 2, California. Feb. 18, 1920.)

1. CORPORATIONS ⊂=519(1)—PLAINTIFF SUING ON CONTRACT EXECUTED BY PRESIDENT MUST PROVE AUTHORITY OF PRESIDENT OR ESTOPPEL OF CORPORATION.

In broker's suit for commission against corporation on written contract executed by its president, alleged to have been executed in excess of his authority, plaintiff, in order to recover, was required to prove that president was expressly authorized to execute contract, or that it was an act fairly within the implied powers incidental to his office, or that the corporation was estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise.

2. TRIAL ⊂=165—PRESUMPTIONS FOR PLAINTIFF ON MOTION FOR NONSUIT.

All presumptions are in favor of plaintiff on a motion for nonsuit.

3. CORPORATIONS ⊂=432(12) — STATEMENT OF PRESIDENT TO BROKER HELD INSUFFICIENT TO GIVE PRESIDENT IMPLIED AUTHORITY TO EXECUTE BROKERAGE CONTRACT.

Statement by president of corporation that he was tired of paying interest on mortgage since death of his partner, and that "of course it is all left up to me," *held* insufficient to show that president had implied authority to execute written brokerage contract, under Civ. Code, § 1624, subd. 6, and Code Civ. Proc. § 1973, subd. 6, employing broker to sell the land.

4. CORPORATIONS ⟸404(2)—PRESIDENT WITHOUT POWER BY VIRTUE OF OFFICE TO ALIENATE CORPORATE PROPERTY.

The president of a corporation has no power by virtue of his office to alienate its property, which can only be done by the board of directors.

5. CORPORATIONS ⟸399(1) — IMPLIED AUTHORITY OF PRESIDENT MUST ARISE OUT OF DUTIES INTRUSTED OR ACQUIESCED IN.

Implied authority of the president of a corporation must arise out of the duties and responsibilities actually intrusted to him by the corporation or the duties assumed by him and acquiesced in by the corporation, and not upon his statements regarding such duties and responsibilities.

6. CORPORATIONS ⟸426(10) — CORPORATION, HAVING ACCEPTED BENEFIT OF CONTRACT EXECUTED BY PRESIDENT, CANNOT DENY PRESIDENT'S AUTHORITY.

Corporation, having entered into contract produced by broker, is estopped from denying the authority of its president to execute brokerage contract, having accepted the benefits of such contract.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Harold W. Butler against the Solano Land Company. Judgment of nonsuit, and plaintiff appeals. Reversed, with instructions.

Melvin E. Van Dine and Oliver Dibble, both of San Francisco, for appellant.

C. W. Durbrow, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him upon a motion for nonsuit. The action was for $8,457, alleged to be due plaintiff as commission for selling land of the defendant. Defendant answered, admitting a verbal contract with the plaintiff, but asserting that such contract was conditioned upon the full performance by the purchaser of his contract to purchase the land, and that the purchaser produced had performed none of the conditions of his contract, and further alleged that no written contract was ever entered into between the plaintiff and defendant, or between the plaintiff and any one authorized to act for the defendant. The plaintiff submitted his case upon his own testimony solely, and introduced in evidence a document reading as follows:

"San Francisco, Cal., April 12, 1917.

"This is to certify that H. W. Butler is entitled to 5 per cent. commission on sale made by him of what is known as the Barnhart tract, estimated to be 5,638 acres, at $30 an acre.

"Payment of this commission to be arranged between Mr. H. W. Butler and Mr. E. A. Bunker, president of the Solano Land Company.

"Solano Land Company,

"E. A. Bunker, President."

[1] As the plaintiff must recover, if at all, upon a written contract (Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6), the only question presented upon this appeal is whether or not the corporation is bound by the above-quoted writing. The record contains no proof of express authority of the president to make this contract; there is no seal affixed to the document to make it prima facie proof against the corporation. It was incumbent upon the plaintiff to prove either that the officer executing the instrument was expressly authorized to execute the same, or that it was an act fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract, or otherwise. There is no contention that the first of these requirements was met, and the argument of the appellant upon the second point is that, because the plaintiff stated in his testimony that the president of the defendant corporation, Mr. Bunker, told him in a conversation, "I have been paying out interest on the mortgage for a number of years since the death of my partner, and I am getting tired of it, and of course it is all left up to me," this establishes sufficiently broad general powers in the president to raise a presumption upon a motion for a nonsuit that he was authorized to execute the contract introduced in evidence.

[2-5] While it is true that all presumptions are in favor of the plaintiff upon a motion for a nonsuit, we do not think this testimony was sufficient to clothe the officer in question with implied authority. The president of a corporation has no power, by virtue of his office, to alienate its property. This can only be done by the board of directors. Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494. Did he then, in this particular case, by reason of all the circumstances in evidence, have implied authority? Apart from the fact that we are of the opinion that the above-quoted statement made by him does not indicate authority broad enough to carry with it such implied authority, even though such statement be taken as evidence against the corporation, there is the further fact that the implied authority must arise out of the duties and responsibilities actually intrusted to him by the corporation, or the duties assumed by him and acquiesced in by the corporation, and not upon his statements regarding such duties and responsi-

bilities. This is not a suit against an agent for breach of warranty of authority, and the representations of the agent are not of importance here.

[6] There remains for our consideration the remaining question of whether sufficient facts appear to raise an estoppel against the corporation upon a motion for nonsuit. The defendant did not present its case, and we have before us, upon the consideration of this motion, as before stated, merely the pleadings and testimony of the plaintiff, together with the writing signed by Mr. Bunker which appears herein. But it does appear, by the pleadings, and it is not denied, that the corporation did accept the purchaser produced by the plaintiff and entered into a contract with him for the purchase and sale of the real estate in question. The contract entered into between said purchaser and the corporation is set out as an exhibit to the complaint. This contract is signed by the president and secretary of the corporation on its behalf, and the corporate seal is affixed. It appears, therefore, that the corporation took the fruits of the work of the plaintiff. It accepted the benefit of the contract made by its president, purporting to be made on behalf of the corporation, and it is now estopped to deny his authority to execute the contract. Of course, the evidence of the defendant is not before us, and perhaps it may be able to prove that the contract between the plaintiff and the defendant, in accordance with which the purchaser was accepted, was a different one than that to which plaintiff has testified, and that its terms were as alleged in the answer. But before us now we have no such proof, and upon consideration of the motion for a nonsuit, with all presumptions in favor of the plaintiff, and upon the record before us, there appears to be sufficient evidence of estoppel to put the defendant to his proof. Indeed, in one of the cases cited to us by the respondent (Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 108, 89 Pac. 981, 982) the situation presented here is considered, for it is said that in that case "the doctrine of estoppel does not apply, because the corporation has not availed itself of any benefit in any way or manner by reason of the alleged contract." From the record before us, it appears that the corporation has availed itself of the benefits of the contract, the execution of which it seeks to deny. Under such circumstances the nonsuit order was improper.

The judgment is reversed, with instructions to the trial court to reopen the case and allow the defendant to put in its defense.

We concur: BRITTAIN, J.; NOURSE, J.

46 Cal. App. 335

LAPIQUE v. WALSH. (Civ. 2528.)

(District Court of Appeal, Second District, Division 2, California. Feb. 25, 1920. Hearing Denied by Supreme Court April 20, 1920.)

APPEAL AND ERROR ⟸612(3) — TRANSCRIPT CERTIFIED BY TRIAL JUDGE, BUT INCLUDING AN ORDER VACATING THE CERTIFICATE, HELD NOT PROPERLY AUTHENTICATED.

A transcript on appeal, certified by the trial judge, but bearing on its face an order over the judge's signature dated on the day following the certification, vacating and setting aside the certificate on the ground that it was inadvertently signed after an order refusing to sign the same, is not properly authenticated.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by John Lapique against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased, to set aside a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

John Lapique, of Orange, in pro. per.

H. L. Dunnigan, of Los Angeles, for respondent.

SLOANE, J. We are always anxious to get an appreciative understanding of appellants' troubles, whether real or imaginary; but it must be confessed that in this case we have studied the record on appeal—if such it may be termed—in vain to find any connected legal history of the transactions involved. The appeal is taken on the alternative plan, and the purported transcript contains motions, decrees, orders, and affidavits in indiscriminate order, some of them entitled in the principal case, some in other presumably related matters, and some not entitled in any action or proceeding. The notice of appeal is directed to a "minute order made and entered after final judgment, denying plaintiff's motion by reason of collusion and want of jurisdiction on the 18th day of January, 1917." The only order we find in the record meeting any of the characteristics of the notice of appeal—and that only by correspondence of the dates—is an order of January 18, 1917, wherein it is "ordered that the motion to set aside stipulation and judgment be and the same is hereby denied." This order apparently relates to proceedings on a notice of motion to vacate and set aside a judgment of the trial court, and a stipulation of counsel upon which the judgment was based; but we are unable to find either the judgment or stipulation in the transcript.

From data contained in affidavits of appellant contained in the transcript, from statements in his brief, and from decisions of the Supreme Court, cited by appellant, in

former appeals growing out of the same case, we gather that originally one De Leonis, appellant's predecessor in interest, brought action against one Etchepare, for whose estate the respondent herein is administrator, to procure reconveyance of certain real property which had been deeded by De Leonis to Etchepare, and to recover certain moneys claimed to be due from Etchepare on an accounting as agent; and that it was found and decreed therein—and such decree affirmed by the Supreme Court (De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813)—that the deed was a mortgage, and that Etchepare held it as security for the sum of $2,444.09 due him from the plaintiff. There was another appeal before the Supreme Court in the same case, taken by the plaintiff (De Leonis v. Walsh, 145 Cal. 200, 78 Pac. 637), in which the plaintiff De Leonis took exceptions to the amount of credits allowed the Etchepare estate. In this appeal a new trial was granted; and it was on this new trial to ascertain the state of the account between De Leonis and Etchepare, constituting the lien for which the mortgage was held, that the attorneys for all parties entered into a stipulation that the deed, which had been held to have been executed as a mortgage, should be vacated and set aside, and that plaintiff De Leonis recover the sum of $4,834 from the Etchepare estate. It nowhere appears that counsel were without authority to enter into a stipulation for such a judgment; and neither does it appear why the appellant here, as successor in interest of De Leonis, is dissatisfied with the final result. The deed, which had been held valid to the extent of a mortgage security against De Leonis, was entirely wiped out; and, instead of a claim for $2,444.09, or any other sum, against the plaintiff, there was a judgment for $4,834 for the plaintiff against the Etchepare estate. We point out these conclusions merely to show appellant that the court has endeavored to reach an understanding of the merits of his claim.

However, the record is entirely insufficient to support any of the contentions attempted to be raised on this appeal. It would be about as difficult to point out why it is insufficient as to specify why the filing of Webster's Unabridged Dictionary would not be a sufficient pleading of the Declaration of Independence.

Furthermore, the transcript, which was, on the 27th day of December, 1917, certified by the trial judge, bears on its face an order, over the judge's signature, and dated the following day, vacating and setting aside the certificate, on the ground that it was inadvertently signed after an order refusing to sign the same. Such transcript, therefore, as is presented is not properly authenticated.

It may be said, in extenuation of this record, that appellant prosecutes the appeal in propria persona, and is himself not a lawyer. It is proverbially indiscreet for even one learned in the law to be his own lawyer. It is obviously an impossible condition for a layman, particularly in the intricacies of preparing a record on appeal.

The order appealed from stands affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 237

HIMOVITZ et al. v. SILVERMAN.

(Civ. 2710.)

(District Court of Appeal, Second District, Division 1, California. Feb. 20, 1920. Hearing Denied by Supreme Court, April 15, 1920.)

1. SALES ⊂⊃52(7)—EVIDENCE HELD TO SUSTAIN FINDING AGAINST FRAUD IN OBTAINING DEFENDANT'S SIGNATURE TO SALES CONTRACT.

In an action for breach of a written contract to deliver 200 tons of scrap iron at a specified price, wherein defendant contended that the amount was 85 tons only, and that he had been imposed upon because of his ignorance and inability to understand English, evidence *held* to support a finding that defendant's signature had not been fraudulently obtained.

2. APPEAL AND ERROR ⊂⊃1010(1)—FINDINGS SUPPORTED BY EVIDENCE CONCLUSIVE.

A conclusion of the trial judge upon a question of fact is conclusive upon an appellate court, where any evidence is exhibited by the record which furnishes substantial support to the finding.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Morris Himovitz and William Himovitz, doing business under the firm name and style of the Bakersfield Junk Company, against S. Silverman for breach of contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.
E. A. Klein, of Bakersfield, for respondents.

JAMES, J. Appeal by the defendant from a judgment entered in favor of the plaintiffs for damages. The action was to recover for the breach of a written contract whereby defendant agreed to deliver to the plaintiffs a certain quantity of scrap iron. The contract as it was reduced to writing was expressed in the following terms:

"May 12, 1917, sold to Bakersfield Junk Company, by S. Silverman, 150 tons of scrap oil well iron at the price of $14.00 per ton f. o. b. Mariposa, Cal. All boilers must be cut not longer than that four feet long and two feet wide. Also fifty (50) tons of cast iron at $17.00 per ton f. o. b. Mariposa, Cal.

"Received in advance ($1,000.00) one thousand dollars, balance to be paid when all goods are delivered. No less than one carload a week to be delivered; cars should contain 25 tons each. [Signed] S. Silverman."

In addition to a denial of the allegations of the complaint, defendant alleged that his signature to the contract was obtained through plaintiffs' fraud, in that defendant could not read or write the English language, and that it was not understood that any specific quantity of scrap iron should be delivered by the defendant to the plaintiffs, but only a lot of iron then in the possession of defendant, the quantity of which was not accurately ascertained. Defendant did deliver 85 tons of iron, and it was his claim that that included the whole of the quantity intended to be sold. The contract, it will be observed, is specific as to the number of tons sold, and it contains no ambiguous term which would make proper any oral testimony as to what the intent of the parties was; hence the sole question presented turned upon the assertion on the part of the defendant that the plaintiffs had taken advantage of his ignorance and his lack of understanding of English, and so fraudulently obtained his signature to a contract which did not express the understanding or intent of the parties.

[1, 2] The court found the facts against the defendant and this finding is fully supported by substantial evidence. One of the witnesses who testified had been called in by the two parties to reduce the agreement to writing. He stated that plaintiffs and defendant took some time to agree upon what the contract should be, and that then he wrote down what they told him and put it in typewriting. He testified further that, after typewriting the contract, he read it to the parties, and that "both of them" said that it was all right. He testified that plaintiffs and defendant spent about an hour in talking over the terms of the contract, and that they argued between themselves about the tonnage to be specified, and that they finally reached an agreement; that he then prepared the document and read it over to them, as stated. It having appeared that there was direct and substantial evidence in opposition to the claim of the defendant that fraud had been practiced upon him, there is presented a condition which requires that the judgment of the court upon that matter be confirmed. We need only reiterate the invariable and established rule that the conclusion of the trial judge upon a question of fact is conclusive upon an appellate court, where any evidence is exhibited by the record which furnishes substantial support to the finding.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 198

FITZHUGH v. UNIVERSITY REALTY CO.
(Civ. 3259.)

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1920.)

1. CONTRACTS ⟸16—PLACE OF CONTRACTING IS WHERE CONTRACT WAS CONSUMMATED.

The time and place for the consummation of a contract is when and where the last act necessary for its validity has been performed.

2. CORPORATIONS ⟸503(1)—VENUE OF ACTION TO RECOVER PURCHASE MONEY IN COUNTY WHERE CONTRACT RESCINDED.

Under Const. art. 12, § 16, venue of purchaser's action against corporation to recover part payment on land contract was in county where defendant had its office, at which place defendant was served with plaintiff's notice of rescission.

3. FRAUD ⟸31 — REMEDIES OF DEFRAUDED PURCHASER STATED.

Purchaser, upon discovering fraud, could either affirm the contract and sue in tort for damages from the fraud or disaffirm and recover what he had paid on the contract.

4. VENUE ⟸78—ORDER GRANTING CHANGE RES JUDICATA AS TO RIGHT TO BRING ANOTHER ACTION ON SAME FACTS IN SAME COUNTY.

As an order granting change of venue has all the characteristics of a final judgment and is appealable, plaintiff is estopped by such order from bringing another action upon the same facts in the county from which the first action has been transferred, after a dismissal of the first action.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by William M. Fitzhugh against the University Realty Company. From order denying defendant's motion for change of venue, it appeals. Reversed.

Frederick Schneider, of Palo Alto, for appellant.

Chas. S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran, of San Francisco, of counsel), for respondent.

LANGDON, P. J. [1] This is an action to recover $5,000 paid upon a contract of purchase of real property, which contract was afterward rescinded by the plaintiff because of alleged fraudulent representations made to him by the defendants, as agents for the owner of the land contracted to be purchased by him. The owner of the land consented to the rescission of the contract, and plaintiff then sued the University Realty Company to recover from it the initial payment which he had made on the land, a part of which, under the terms of the contract was to be retained by defendant as commission in the event a sale was not consummated in accord-

ance with the conditions of the contract. The action was commenced in the city and county of San Francisco against the defendant corporation, which is a resident of the county of Santa Clara. After the service of summons upon defendant, it filed an affidavit of merits and demanded a trial in the county of Santa Clara. From the order denying a change of venue, this appeal is taken. As appears from the affidavits, the plaintiff contracted to buy certain real property owned by Peter and Laura E. Faber and situated at San Mateo. The sale was negotiated by Norwood B. Smith, the president of the University Realty Company. The contract, which is set out in the affidavits, acknowledged the receipt of $5,000 on account of the purchase price of the property, and contained the provision that the "deposit is received subject to the approval of the owner." It is alleged in the affidavit of plaintiff that the negotiations leading to the making of the contract and the alleged false representations took place in San Francisco, and that the contract was signed by him and by the University Realty Company at San Francisco. It is alleged in defendant's affidavit, however, and not contradicted, that the approval of the sale of the property, signed by the Fabers, was executed at Runnymede, San Mateo county, Cal. It appears from the face of the contract itself that it was not binding until such approval was indorsed thereon. The time and place for the consummation of a contract is when and where the last act necessary for its validity has been performed. Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 170, 133 Pac. 978. It therefore appears upon the face of the affidavits that the contract was consummated at San Mateo county. The contract, according to its terms, was to be performed at the office of the defendant in Santa Clara county. It appears from the plaintiff's affidavit that he had rescinded the contract as between plaintiff and the defendant and as between plaintiff and Peter and Laura Faber. It further appears that the notice of rescission was served upon the defendant at its office in Palo Alto, Santa Clara county. The above facts stand uncontradicted in the affidavits.

[2, 3] The respondent seeks to uphold the action of the trial court by arguing that this is not an action which depends upon a rescission of the contract, or upon the contract in any way. It is asserted that a rescission of the contract was unnecessary for the maintenance of this action. The contract itself shows, and the affidavits of both parties agree, that the $5,000 was paid as a part payment upon a contract for the purchase of real estate. Upon discovering the fraud, the plaintiff had one of two remedies open to him: Either to affirm the contract and sue in tort for damages suffered by reason of the fraudulent misrepresentations, in which action he would not necessarily be limited in his recovery to the $5,000 initial payment; or, second to disaffirm the contract and recover what he had paid thereunder. Hammond v. Ocean Shore Dev. Co., supra, 22 Cal. App. 171, 133 Pac. 978. Obviously he has chosen to do the latter. This choice gives rise to a quasi contractual right. It does not sound in tort and arise upon the commission of the tort. It is true, as the respondent contends, that the action is not brought upon the original contract between the parties, and therefore the facts regarding the place where the original contract was consummated and the location of its subject-matter, etc., are not vital here, and we mention them merely in passing to indicate how the controversy arose. The right upon the part of the plaintiff to sue for money had and received grows out of a quasi contract between the plaintiff and defendant whereby, by a legal fiction, the defendant promised to pay to the plaintiff the amount for which he sues. The nature of the action is discussed in Hammond v. Ocean Shore Dev. Co., supra, and in numerous other cases in this and other states. Suffice it to say here that the original contract between the plaintiff and defendant was not void because of fraudulent representations. It was merely voidable at the election of the plaintiff. Until disaffirmed by the plaintiff, it was a valid and existing obligation against him, and the payment he has made was one called for by this contract. He has decided to disaffirm and demand a repayment of money under the contract by reason of alleged fraudulent representations. Upon making such demand the law creates an obligation upon the part of the defendant to repay the amount received, and introduces the fiction of a promise by said defendant to repay, and thereby builds up a quasi contract between the parties which is the basis of this action. That quasi contract went into effect instantaneously upon the service of the notice of rescission, and at the place where such notice was served, Santa Clara county, and upon this contract created by the law the plaintiff had the right to bring an action in general assumpsit for money had and received. Hammond v. Ocean Shore Dev. Co., supra. This he has done.

Section 16, art. 12, of the Constitution provides that a corporation may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated. The quasi contract sued upon here was created by the law at Palo Alto upon the service of the notice of rescission. In the absence of other agreement, it will be assumed that it was to be performed where it was made. The liability arose in Palo Alto, and the principal place of business of the corporation defendant is sit-

uated in said place. It would appear, therefore, that there is no authority for the maintenance of this action in the city and county of San Francisco, and that the order must be reversed.

[4] While we have discussed this matter on the merits, it would appear that this is unnecessary for a decision of the question involved. The affidavit of the respondent states that another action upon these same facts and between the same parties was filed in the superior court of San Francisco prior to the commencement of this action; that a motion for a change of place of trial was thereupon made by the defendant and appellant, and said motion was granted, and an order made transferring said cause to Santa Clara county; that respondent was not represented at the hearing of said motion, and later moved the court to set aside its said order, which the court refused to do. Respondent thereupon dismissed said action and caused said dismissal to be entered upon the register of actions of the clerk of the court in and for the county of Santa Clara, and upon the dismissal thereof filed the present action involving the same parties and the same questions of law and fact. It has been recently held in the case of Karst v. Seller, 188 Pac. 298, that as an order of the court granting a motion for change of venue has all the characteristics of a final judgment, and an appeal would lie from such an order, the plaintiff is estopped by such order from bringing another action upon the same facts in the county from which said first action had been transferred, after a dismissal of said first action. It is true that the facts in Karst v. Seller, supra, appear to be somewhat different from the facts in the case at bar. If, however, the facts in the two cases are sufficiently unlike to make this rule inapplicable here, it still remains true that upon the merits of the motion the transfer should have been made.

The order denying the motion for a change of place of trial from San Francisco to the county of Santa Clara is reversed.

We concur: NOURSE, J.; BRITTAIN, J.

46 Cal. App. 220

DOMINGUEZ et al. v. PENDOIA.

(Civ. 3280.)

(District Court of Appeal, First District, Division 2, California. Feb. 20, 1920. Hearing Denied by Supreme Court April 15, 1920.)

1. MASTER AND SERVANT ⊂⊃375(2)—INJURIES TO EMPLOYÉ WHILE TRANSPORTED TO WORK BY MASTER ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where employé was killed by being thrown from an automobile furnished by the master to transport the employés to the place of work, his injuries arose out of and in the course of employment within the Workmen's Compensation Act.

2. CONSTITUTIONAL LAW ⊂⊃56—JURY ⊂⊃31 (1)—MASTER AND SERVANT ⊂⊃347—COMPENSATION ACT NOT INVALID AS DEPRIVING COURTS OF JURISDICTION AND PARTIES OF RIGHT TO JURY.

Under Const. art. 20, § 17½, providing that no constitutional provision shall limit the Legislature's authority to confer on a commission power to carry out legislation for the welfare of employés, and section 21 as adopted in 1911, authorizing provision for settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers, the Workmen's Compensation Act is not unconstitutional either as depriving parties of their right to trial by jury, guaranteed by article 1, § 7, or as depriving courts of their jurisdiction.

3. MASTER AND SERVANT ⊂⊃398—FAILURE TO GIVE NOTICE UNDER COMPENSATION ACT DOES NOT GIVE COURT JURISDICTION.

Though the failure to give notice of accident required by Workmen's Compensation Act, § 15, may deprive the Industrial Accident Commission of jurisdiction, such failure does not give the court jurisdiction of an action for damages.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Mary Dominguez and others against A. L. Pendoia. From an order sustaining demurrer to the complaint without leave to amend, plaintiffs appeal. Affirmed.

B. F. Thomas, of Santa Barbara, for appellants.

Carroll S. Bucher, of Salt Lake City, Utah, for respondent.

A. E. Graupner, of San Francisco, amicus curiæ on behalf of Industrial Accident Commission.

LANGDON, P. J. This is an appeal from an order sustaining a demurrer to a complaint, without leave to amend. The action was brought by the widow and minor children of Alfredo Dominguez, deceased, to recover damages for the death of said deceased, alleged to have been caused by the negligence of the defendant. The complaint alleged that on the 4th day of February, 1918, the deceased was in the employ of the defendant, who was constructing a water reservoir for the city of Santa Barbara; that the defendant furnished transportation to his employés engaged in working on said reservoir to and from their homes in said city to said reservoir by means of a truck automobile driven by an employé of the said defendant, which automobile had not any means by which one riding on said automobile, when driven rapidly over rough roads or roads having short turns, could prevent himself from being

thrown from said automobile; that on the morning of the accident, while the deceased with other employés of the defendant was being transported in defendant's automobile from Santa Barbara to said reservoir to engage in work for the defendant on the reservoir, the driver of the automobile, willfully, negligently, and without proper care, drove said automobile at the rate of about 25 miles an hour around a very short and dangerous turn in the road to said reservoir, and the deceased and two other employés of the defendant were thrown from the automobile with great force and violence, whereby the deceased was instantly killed.

The defendant urged as ground of demurrer that the superior court of Santa Barbara, in which court the complaint was filed, was without jurisdiction of the said action, and that the Industrial Accident Commission of the state of California had sole and exclusive jurisdiction of the same.

[1] The first question to be disposed of upon the appeal is: Do the facts stated in the complaint bring the action within the provisions of the Workmen's Compensation, Insurance and Safety Act of this state (St. 1917, p. 831), so as to give the Industrial Accident Commission jurisdiction? We are of the opinion that they do. Where transportation is furnished by an employer, as an incident of the employment, to convey an employé to and from the place of employment, an injury suffered by the employé going or coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and is in the course of the employment within the meaning of the compensation act. In re Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554; Bradbury's Workmen's Compensation (3d Ed.) pp. 480–484, and cases there cited; Judson Mfg. Co. v. Industrial Acc. Com., 184 Pac. 1; Starr Piano Co. v. Industrial Accident Commission, 184 Pac. 860.

It is true the case of Ocean Accident & Guarantee Corp. v. Industrial Accident Commission, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, which was based upon the English decisions, contains the statement that an employé going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at his place of employment and proceeds to use some instrumentality provided by means of which he immediately places himself in a position to perform his tasks. But nowhere in that decision is the legal situation discussed which is presented when an employé, as a part of his contract of employment, is proceeding to his work in a conveyance furnished by his employer and driven by the employer's agent. The appellant argues that the ownership of the conveyance can have no bearing upon the question involved, and in this we disagree with counsel. The logical difference between a situation where the employé is proceeding to work in a conveyance or by a means used by the general public, and where he is proceeding to work by means of an instrumentality furnished to him as an employé, by his employer, is indicated in one of the English cases discussed in the Ocean Accident Case, supra (Leach v. Oakley Street & Co., 4 B. W. C. C. 91). In the quotation from this English case which is inserted in the Ocean Accident decision, it is indicated that, in order to recover under the Workmen's Compensation Act, it is necessary for the employé to have suffered his injury, not because of a danger to which he was exposed as a member of the general public, but by reason of a danger to which he was exposed as an employé in his particular employment. And it seems to us that this is not only the logical dividing line, but it is the dividing line contemplated by the very purpose of the compensation laws in their effort to place upon an industry the burdens of injuries directly due to the hazard incidental to the industry. In the present case, if deceased had been riding upon a public conveyance, although he was on his way to his work, he would have been subject to the same dangers as any other member of the general public, and if he suffered an accident it would be as a member of the general public and due to a risk which he, in common with other members of the public, ran. But when he enters a vehicle provided by his employer for the purpose of conducting him to the place of his employment, he enters that vehicle, not as a member of the public, but as an employé of the defendant. In other words, the danger to which plaintiffs' decedent was exposed in riding in this automobile, alleged to have been unprotected, and without guards or rails, and driven by a negligent driver, was a danger to which he was exposed, not as a member of the public, but because, and only because, he was an employé of the defendant. This danger was an incident to his employment; it arose out of his employment, and was within the scope thereof.

The Workmen's Compensation, Insurance and Safety Act gives the Industrial Accident Commission exclusive jurisdiction of actions arising out of injuries under the circumstances presented here, and the superior court of the county of Santa Barbara was without jurisdiction.

Appellant seeks to avoid the force of these facts by attacking the constitutionality of the Workmen's Compensation, Insurance and Safety Act. It is asserted that the act is unconstitutional because it divests an injured employé, or the representatives of a deceased employé, of the right of trial by jury in violation of section 7, art. 1, of the Constitution of this state; that the act is also unconsti-

tutional because it deprives the superior courts of this state of the jurisdiction conferred upon them by section 5, art. 6, of the Constitution.

[2] While these precise points were not urged, apparently, in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, the court in that case commented upon the objection raised in other states that similar acts were unconstitutional because they deprived both employer and employé of the right to trial by jury, saying that this objection had no application to the law in this state, "for although our Constitution has always contained a provision securing the right of trial by jury (article 1, § 7), the Legislature is, as we have already pointed out, expressly authorized by section 21 of article 20 to provide for the settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers. This section, adopted in 1911, worked a repeal pro tanto, of any conflicting provision which may have been in force theretofore." The language above quoted, in connection with the language of sections 17½ and 21 of article 20 of the Constitution of California, is a complete answer to both contentions of the appellant upon this question.

[3] We may very briefly dispose of the only other point raised by the appellant, which is that as section 15 of the Workmen's Compensation Act provides that no claim to recover compensation under the act shall be maintained unless within 30 days after the occurrence of the injury notice in writing shall be served upon the employer, etc., and, as the complaint in this case does not allege that such notice was served, it does not appear that the Industrial Accident Commission had jurisdiction. Appellant argues that if, by reason of the omission of notice, the Industrial Accident Commission had no jurisdiction, then the superior court would acquire jurisdiction. In the first place, the requirement of written notice contained in section 15 is not absolute, and facts may appear which would make the written notice unnecessary to the jurisdiction of the Industrial Accident Commission under the express language of the section. But be that as it may, it is certain that even though the appellant had by her omissions forfeited her rights before the Industrial Accident Commission, that in itself could not confer jurisdiction upon another tribunal. Under the Workmen's Compensation Act, the Industrial Accident Commission is vested with exclusive jurisdiction of actions such as the one here under consideration, and no neglect or failure upon the part of the employé or his dependents to comply with any provisions of the act can vest the superior court with jurisdiction.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

46 Cal. App. 234

EILERS MUSIC CO. v. MATHE et al.

(Civ. 2680.)

(District Court of Appeal, Second District, Division 1, California. Feb. 20, 1920.)

1. APPEAL AND ERROR ⊂⊃757(3) — BRIEF MUST STATE MATERIAL PORTIONS OF THE EVIDENCE.

A brief complaining of insufficiency of evidence to sustain findings is manifestly incomplete, where it shows on its face that material parts of the evidence are omitted.

2. PLEADING ⊂⊃381(3) — DEFENDANT'S EVIDENCE OF WANT OF CONSIDERATION OF BILL OF SALE INTRODUCED BY PLAINTIFF HELD ADMISSIBLE, THOUGH NOT PLEADED.

In action to recover personal property, where the complaint did not refer to bills of sale, which were introduced by plaintiff at the trial to aid in establishing proof of its title and right of possession, defendant's evidence of want of consideration for the bills of sale was admissible, although defendant did not plead such want of consideration; defendant not being required to plead as to items of evidence offered by plaintiff in support of the ultimate facts pleaded in its complaint.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Eilers Music Company against J. J. Mathe and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank Bryant, of Los Angeles, for appellant.

Bertin A. Weyl and Clarence E. Fleming, both of Los Angeles, for respondents.

CONREY, P. J. Action to recover possession of personal property alleged to be unlawfully withheld from plaintiff by the defendants. Judgment in favor of defendants, from which the plaintiff appeals.

We first call attention to two statements in the brief for appellant which should not have been made, as they are wholly unjustified by the record. These statements are: That the defendant Mathe by his answer pleaded a general denial as his only defense, and that the findings are insufficient to support the judgment, because they consist wholly of conclusions of law and make no finding of fact. There is thus imposed upon the court a useless labor, whereby it is ascertained that the complaint is in the usual form of actions of this class; that the defendant filed a verified answer, specifically denying in due form each and every allegation of the complaint; and that the findings of fact respond in detail to every issue raised by the pleadings.

The only other points suggested in support of the appeal are: That the findings are "wholly unsupported by the proofs," that the

court erred in admitting evidence tending to show failure of consideration for the execution of two bills of sale, and that the court erred in admitting evidence of another transaction between the parties not referred to in the pleadings.

[1] Under the claim that the findings are unsupported by the evidence, no specification is made of any particular in which the evidence is insufficient to support any fact found. The evidence to which our attention has been directed in the briefs for appellant is manifestly incomplete, in that on its face it shows that important parts of the evidence are omitted. We conclude that the evidence is sufficient in every particular.

[2] Taken together, the two bills of sale included the property of which plaintiff sued to recover possession. They were executed by defendant J. J. Mathe on January 26, 1916, and purported to transfer the property to F. W. Schubert. Indorsed on each document there was an assignment by Schubert, dated January 29, 1916, transferring to plaintiff all of his interest in the property described in the bills. They were introduced in evidence by the plaintiff to aid in establishing proof of plaintiff's title and right of possession. Schubert was an employé of the plaintiff. The evidence introduced by defendants, which appellant claims was erroneously received, was offered for the purpose of proving that the bills of sale were really obtained by Schubert on behalf of the plaintiff, and that their execution was procured without any consideration therefor.

Appellant contends that this evidence should have been rejected, for the reason that defendants' answer did not set out the facts showing a failure of consideration for said bills of sale. The authorities cited are decisions in cases where the plaintiff's cause of action was founded upon a written instrument, the execution whereof was alleged by the plaintiff. In such cases it was held that it was the duty of the defendant to plead want of consideration, if he desired to make that defense. But in the case at bar the complaint did not refer to any bills of sale, and did not warn the defendants that such bills of sale were relied upon as a part of the plaintiff's cause of action. It is clear that under such circumstances, and where the defendants were not called upon to give attention to the bills of sale until they were offered in evidence, the defendants had neither the opportunity nor the duty to defend against them, except as items of evidence offered by the plaintiff in support of the ultimate facts pleaded in its complaint.

The evidence of "another transaction," referred to in the last point suggested by appellant, was evidence connected with said bills of sale, and was a part of the evidence appropriately offered for the purpose of showing that they were executed without consideration. We find no error in the ruling of the court thereon.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 203

NEW YORK LIFE INS. CO. v. DUNN et al.

(Civ. 3240.)

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1920.)

INSURANCE ⊂=587—CHANGE OF BENEFICIARY CANNOT BE ATTACKED FOR UNDUE INFLUENCE.

The beneficiary named in an insurance policy which authorizes insured to change the beneficiary cannot, in the absence of a contract with insured or any special equities depriving him of the right to make such change, attack his change of beneficiary for undue influence on the part of the new beneficiary.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit of interpleader by the New York Life Insurance Company against Lilian S. Dunn, May Cline Smith, and another, in which each of the defendants named filed cross-complaints. From a judgment in favor of cross-complainant Smith, cross-complainant Dunn appeals. Affirmed.

A. G. Allen and Elvon C. Musick, both of Pasadena (Theo. Church, of Los Angeles, of counsel), for appellant.

W. W. Webster and Leonard L. Riccardi, both of Pasadena, and W. N. Goodwin and Goodwin & Morgrage, all of Los Angeles, for respondent Smith.

Meserve & Meserve, of Los Angeles, for plaintiff.

A. I. McCormick, of Los Angeles, for defendant Georgie June Dunn.

WASTE, P. J. The plaintiff, New York Life Insurance Company, brought this action in interpleader to compel the defendants to litigate among themselves their various claims to the proceeds of an insurance policy upon the life of John T. Dunn. Judgment was in favor of cross-complainant and respondent, May Cline Smith. Lilian S. Dunn, also a cross-complainant, appeals.

It appears that John T. Dunn, on December 13, 1906, took out a life insurance policy in the New York Life Insurance Company in the sum of $10,000, naming Lilian S. Dunn, his wife, beneficiary thereunder. Under the terms of the policy Dunn had the right to change the beneficiary named therein. During his lifetime, on or about the 24th day of March, 1916, Dunn requested the insurance

company to change the beneficiary named in said policy, and directed that May Cline Smith be named therein to the extent of $6,500, and Georgie June Dunn, his daughter, to the extent of $3,500, which changes were made.

Dunn died on the 26th day of October, 1916. Thereupon Lilian S. Dunn, the wife, notified the insurance company that she was still the beneficiary named in the policy. She claimed there had been no legal or valid change therein, and that she was entitled to the proceeds of the insurance. May Cline Smith and Georgie June Dunn also demanded of the company the payment to them of the respective amounts already noted. The insurance company then commenced this action in interpleader.

Lilian S. Dunn filed her cross-complaint. She did not plead any contract with her deceased husband, or any special equities which would deprive him of the right to make a commutation of beneficiary in the insurance policy, but stood upon the ground that she might contest because the change was procured by fraud and undue influence. In that behalf she alleged the marriage of herself and Dunn; that up to the time of his death she continued to be his lawful wife, and that the policy of insurance was taken out as a protection and source of provision for her in the event of the death of her husband and for her and such children as might be born to her and her husband; that May Cline Smith, by craftiness, flattery, coaxing, and other overt and sly ways, and means on the part of said May Cline Smith toward John T. Dunn, caused him to neglect his wife and daughter to the extent that said May Cline Smith became the mistress of said John T. Dunn; that she exercised her influence unduly over him to such a degree that about the middle of March, 1916, he was not capable of acting freely and voluntarily; that at that time and because thereof he attempted to cause the beneficiary named in said policy to be changed; that said act was exercised and induced by the fraud and undue influence of said May Cline Smith while she and Dunn were living together in adulterous relationship.

May Cline Smith filed her answer, denying the allegations of the cross-complaint, and prayed that the court decree that she was entitled to $6,500 because of such policy and the assignment.

At the trial it was admitted by the cross-complainant, Lilian S. Dunn, that her husband was of sound mind at the time of executing the change of beneficiary. She then attempted to introduce evidence upon the issues of fraud and undue influence. The defendant and cross-complainant, May Cline Smith, objected to this testimony upon the ground that, inasmuch as the decedent had the right to change the beneficiary named in the policy, and there not being any contract between the claimant and the decedent, or any special equities depriving the decedent of the right to make such change, any testimony tending to support the allegations of the complaint was inadmissible. The court sustained the objection and subsequently dismissed the cross-complaint. Its action in this regard is the object of attack upon this appeal.

The ruling of the lower court was correct. The precise question we are here considering was the basis of the discussion in Hoeft v. Supreme Lodge, Knights of Honor, 113 Cal. 91, 96, 45 Pac. 185, 33 L. R. A. 174. The court there decided that under the state of facts pleaded by the cross-complainant in the case at bar, and upon which she elected to stand, no cause of action existed in her favor; she having no vested right in the premises, but, at most, only the mere expectancy of an incompleted gift, revocable at the will of the insured. Waring v. Wilcox, 8 Cal. App. 317, 96 Pac. 910, New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 Pac. 1033, and Supreme Council Am. Legion of Honor v. Gehrenbeck, 124 Cal. 43, 56 Pac. 640, are decisions holding to the same effect. Without further citation of authority, suffice it to say that these cases decide every point worthy of consideration in the present appeal.

The judgment is affirmed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

46 Cal. App. 217.

VISSCHER et al. v. DIXON et al.

(Civ. 3046.)

(District Court of Appeal, Second District, Division 2, California. Feb. 19, 1920. Hearing Denied by Supreme Court, April 15, 1920.)

1. APPEAL AND ERROR ⟸110—APPEAL FROM ORDER DENYING NEW TRIAL DISMISSED.

Since an order denying a new trial no longer is appealable, an appeal therefrom must be dismissed.

2. APPEAL AND ERROR ⟸1011(1)—FINDINGS ON CONFLICTING EVIDENCE CONCLUSIVE.

Findings of fact of a trial court upon conflicting evidence are conclusive on appeal.

3. CORPORATIONS ⟸80(11)—FINDING OF NO FALSE REPRESENTATIONS AS TO FINANCIAL CONDITION ON SALE OF STOCK SUSTAINED.

In an action to rescind a contract whereby plaintiffs purchased corporate stock, evidence *held* sufficient to sustain a finding that defendants did not make false representations concerning the financial condition of the corporation.

4. APPEAL AND ERROR ⊂⊃1072—DENIAL OF NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE HARMLESS IN VIEW OF DETERMINATION.

Where trial court found there were no representations concerning the financial condition of a corporation in an action to rescind a sale of corporate stock for fraud, there was no error in denying a motion for a new trial based on the ground of newly discovered evidence, to the effect that items in the books of the corporation were correct, defendants having surprised plaintiffs on the trial by testifying that certain items of indebtedness appearing in the books were incorrect, after admitting in their answer that the books were correct.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Wilhelmine E. Visscher and another against E. M. Dixon and others. From judgment for defendants and an order denying plaintiffs' motion for new trial, plaintiffs appeal. Appeal from order dismissed, and judgment affirmed.

Frederick Gros and C. E. McDowell, both of Los Angeles, for appellants.

W. S. Bicksler, Bicksler, Smith & Parke, and Arthur G. Baker, all of Los Angeles, for respondents.

FINLAYSON, P. J. [1] Plaintiffs sued to rescind a contract whereby they had purchased 924 shares of the capital stock of the Brinks Express Company, a corporation. The asserted right to rescind is based upon alleged fraudulent representations. Judgment passed for defendants. Plaintiffs moved for a new trial, which was denied. Thereafter plaintiffs appealed from the judgment and likewise from the order denying their motion for a new trial. Since the order denying a new trial no longer is appealable, the appeal therefrom must be dismissed.

The Brinks Express Company owns a number of auto vehicles, which it uses in the freighting business. It likewise hauls mail for the government, for which it is paid $15,000 per year. Plaintiffs, Wilhelmine E. Visscher and Hugo K. Visscher, are, respectively, mother and son. It was the mother's money that bought the stock. The son represented her in all her dealings with defendants and the corporation. The defendants Henry H. Dixon and E. M. Dixon are husband and wife. About December 1, 1913, Mrs. Dixon bought the 924 shares from former stockholders for $10,000. At the time when plaintiffs bought the stock, 921 shares stood in Mrs. Dixon's name, 2 shares in her husband's name, and 1 share in the name of defendant Whittier. About February 26, 1914, Mrs. Visscher put $5,000 into the business of the company, by loaning that sum to the corporation, and receiving from it its promissory note for that amount, due on or before February 26, 1915, indorsed by Whittier as an accommodation indorser, and further secured by a chattel mortgage. As additional consideration for this loan, Mrs. Visscher's son, Hugo, was elected a director and vice president and employed as assistant manager in charge of the automobile drivers and the machine shop, at a salary of $100 per month. He continued thus connected with the corporation until April 23, 1914, when, according to the minutes of that date, he was discharged for incompetency and inattention to business. During the time Hugo was in the company's employ, and thereafter until he and his mother purchased the stock on June 19, 1914, he often spoke to others of buying Mrs. Dixon's stock in order that he and his mother might thereby acquire the control of the company, and upon several occasions evinced a lively inclination to succeed Mrs. Dixon in the management of the business and the ownership of her controlling interest. About June 12, 1914, Hugo went to the office of Mr. Amend, Mrs. Dixon's personal attorney, for the purpose of settling a claim against the company for wages claimed to be due him. The interview that took place on that occasion between Hugo Visscher and Mr. Amend led to the negotiations that eventuated in plaintiffs' purchase of the 924 shares on June 19, 1914, for $5,000, payable as hereinafter stated, and the release of defendant Whittier from all liability as an indorser on the note that the company had given Mrs. Visscher on February 26th next preceding. Pursuant to this sale Mrs. Dixon transferred to plaintiffs the 921 shares that stood in her name, the 2 shares that stood in her husband's name, and the 1 share that stood in Whittier's name. In consideration thereof plaintiffs agreed to and they did pay Mrs. Dixon $50, by giving a check for that amount, and likewise executed to Mrs. Dixon two promissory notes, payable to her order, one for $200 and the other for $4,750. At the same time Mrs. Visscher released and discharged Whittier from all liability as an indorser on the note for $5,000 that the company had given her on February 26, 1914, as evidence of its indebtedness for the $5,000 that she had loaned the company on that date. The only persons who participated in any of the conversations that preceded the consummation of plaintiff's purchase of the stock were Hugo Visscher, representing himself and mother, Mrs. Dixon, representing herself and codefendants, and Mrs. Dixon's attorney, Mr. Amend. Neither Mr. Dixon nor Whittier took any part in the negotiations.

The complaint alleges that, to induce plaintiffs to make the agreement of June 19, 1914, whereby they purchased the 924 shares for $5,000 and released Whittier as an indorser on the company's notes, the defendants, through defendant E. M. Dixon and her

attorney Amend, represented: (1) That, at the date of the purchase of the stock, the Brinks Express Company was not indebted in a sum to exceed $11,295; (2) that the gross income of the company for the month of April, 1914, was $3,749.37, and for the month of May, $3,846.37; and (3) that in each of the months of April and May the company had made a net profit of between $600 and $700, and that the business for those two months represented about the average monthly business of the company. Other alleged misrepresentations are set forth in the complaint, but as they were not pressed at the trial we have not deemed it necessary specifically to refer to them. It is alleged that the particular representations above specified were false in that: (1) At the date of the sale of the 924 shares to plaintiffs, the company was indebted in a sum in excess of $18,473; (2) that the gross income for the months of April and May, 1914, did not exceed $2,642.77, and $2,739.67, respectively; and (3) that during the months of April and May the business of the company was prosecuted without any profit whatever. Hugo Visscher testified that immediately after he and his mother purchased the stock he caused an examination of the books of the corporation to be made, that the books showed the indebtedness of the company to be at least $18,473, and the income for the months of April and May to be $2,642.77 and $2,739.67, respectively, and that the corporation was not making any profits.

The court found that defendants did not make any of the alleged representations, and likewise found against the falsity of each and every representation. Indeed, the findings of the court were wholly against plaintiffs on all the controverted matters, and were equally comprehensive upon the question of defendants' good faith and fair dealing.

[2, 3] Appellants earnestly argue that the evidence does not support the court's findings. It is the province of an appellate court to decide questions of law. Findings of the trial court upon conflicting evidence are conclusive here. Though appellants avow full acquiescence in the well-established rule that an appellate court has not the right to disturb a finding if there is any substantial evidence to support it, their argument, nevertheless, is but a thinly veiled effort to induce this court to substitute its inferences of fact for those drawn by the trial court. This we may not do. That there was ample evidence to support the finding that defendants did not make any of the representations alleged in the complaint, is, we think, clearly shown by the record, as a few excerpts will suffice to establish.

Mrs. Dixon describes as follows her connection with the negotiations that preceded the consummation of the sale of the stock:

"I made no arrangement about the purchase at all. I did not talk with Mr. Visscher from the time I told him to leave [referring to the date of his discharge on April 23, 1914] until he came to the office to look the books over. I did not make any statements to him as to the condition of the company with reference to his purchase prior to that time, except what was talked over when he was there working. I never instructed anybody to deliver to him any message. Mr. Amend was my personal attorney. * * * I did not instruct Mr. Amend to tell Mr. Visscher anything about the business. Mr. Visscher came down June 18, 1914, the day before he purchased. Mr. Amend and I were also there, all the time. There was no one else in the upstairs office. Mr. Amend and Mr. Visscher came into the office and spoke to me. 'Good morning,' Mr. Amend says, 'Mrs. Dixon, Mr. Visscher would like to look over the books and see what he wants to know.' I said: 'Very well; the books are here. What is it you wanted to know, Mr. Visscher?' And he said: 'Oh, I understand the business, you know, Mrs. Dixon, but I wanted to know what was the April charges and the May charges [meaning, as we understand the witness, the amount charged to customers for hauling done for them during the months of April and May]?' And I said: 'All right, I will get them for you.' I went into the bookkeepers' room and brought out the charges and turned the book leaf—turned the last leaf over, and in the books the last leaf of the full month's charges were there, the total amount for the month, to post into the ledger. Those charges consisted of duplicates turned over to customers. I showed him the amount to copy it off on a bit of paper he had in his pocket. I let him copy it from the books himself. * * * He had a chair at my desk and was taking it off; I was standing up beside Mr. Amend, by his side. * * * He took that amount, and he said, 'Now, I want to know the cash.' I opened the cashbook and pointed to the revenue column and said, 'There, you know, is the amount for the month.' * * * I says, 'Now, don't you want to know about the accounts?' And he said: 'No; I guess I know all about the accounts.' And that was all that was said. * * * When he came to the June charges, I had only written them up as far as about the 11th, because I was so swamped with work I hadn't gotten down to date with them, and he said, 'That is a small amount for June.' I said, 'Yes; it is, but remember, this is only for about eight or nine days, and you have still the government check to count on [referring to the sum paid by the government at the end of each month for hauling mail].' There was no remark made about the government check for April or May, and he asked for no other information about the business or concerning the books that day, or at any other time before he purchased. I offered to show him the books, or anything he wanted to know. He was not there more than 10 to 15 minutes. * * * I made no statement as to the value of the stock. * * * Nothing was said at the time about the indebtedness of the company at all."

The witness also testified that she did not represent that the gross income of the corporation for the month of April was $3,749; that she did not represent that the gross in-

come for the month of May was $3,846.37; that she did not make any statement other than what she already had testified to; that she did not make any statement that the business for the months of April and May netted it a profit of between $600 and $700, or that that was the average business of the company for each month.

Mr. Amend, in describing his connection with the transaction, testified as follows:

"I told Mr. Visscher that Mrs. Dixon was a business woman, but that I didn't think she was a good woman to run a business of that kind, because she was too impulsive, and she might offend a great many customers on that account. I told him at that time [referring to the conversation which took place between the witness and Hugo Visscher in the former's office on June 18, 1914] if the company had proper management I thought the business was able to pay $500–$700 a month. I never told him the profit for April and May had been $700 for each month, or any statement similar to that, except in the general conversation as I have just testified. I don't know whether the company was making money or not. * * * I made no statement to Mr. Visscher regarding the expense account or the income of the company or regarding the accounts due. He did not ask me what the monthly income was, or anything about the income. At his last visit to my office regarding the purchase of the interest he obtained on the 19th of June, we went to the Brinks Express Company. Mr. Visscher and I came into the office, and I told Mrs. Dixon Mr. Visscher came down to look over the books. Mr. Visscher said that he wanted to know what the accounts receivable or the income for May was, and Mrs. Dixon said, "All right,' and she went over and got the book. She got the book and laid it on the table. Mr. Visscher copied them out of the book. We were only there from 10 to 12 minutes. Mr. Visscher went over the items in the back of the book, and he asked Mrs. Dixon if the items for June had been entered up, and she turned and showed him where the items for June were entered, and he remarked that the revenue for June had fallen off over May and April, and she said that the government account had not been entered on that item, and he said, 'Oh, well, that just brings it up to all the other months.' It was not discussed whether the government account had been added in the April and May figures. He got these figures from a book. I did not know what kind of a book it was. I think it came out in part of the conversation whether he wanted to look at all the books, and he said, 'No,' he wanted to know what the revenue was for May and April. The books were in the safe, and the safe door was open. He did not ask for any other information in my presence. I was in their presence all the time he was there."

The testimony of Mrs. Dixon and Mr. Amend amounts, substantially, to this: No representations of any kind were made by either to Hugo Visscher; he wanted to see the books; his request was complied with; he was shown such books and documents as he asked for; he asked only for an inspection of the books, and was given only that for which he asked—the books.

Plaintiffs make no claim that the books were false, or that they did not correctly show all the debit and credit items. Indeed, plaintiffs say that it was from the books themselves, when examined by an expert bookkeeper, that they were able to, and, shortly after they took possession, did, discover the true situation with respect to the company's financial condition. It was upon the books that plaintiffs relied to prove the falsity of the alleged representations.

We think that, from evidence adduced by defendants, the trial court was warranted in inferring that Hugo Visscher, a young man just out of college, densely ignorant of bookkeeping, but possessed of abundant self-confidence, cherished the belief that, unaided and uninformed by others, he could form his own judgment of the actual or potential value of the business from an inspection of the books, coupled with such general knowledge of the business as he already possessed from his previous connection with the company, and that he rushed in with the impetuosity of youth only to discover later that his business acumen did not measure up to his own self-appraisement.

[4] Finally, it is contended that the court erred in not granting plaintiffs' motion for a new trial on the ground of newly discovered evidence. At the trial plaintiffs sought to prove the actual indebtedness of the corporation from the company's books. Plaintiffs entered upon the trial believing that the books contained full and correct entries of all debit and credit items. Mrs. Dixon testified that at the date of the sale of the stock to plaintiffs the company's indebtedness was not as great as the books showed—that certain items that appeared in the books as debts of the company were incorrect—that they were not lawful charges against the company. Appellants claim that this testimony took them by surprise, for the reason that defendants, in their answer, had admitted the books to be correct. On their motion for a new trial plaintiffs filed the affidavits of certain persons for the purpose of showing that the items of indebtedness in question were lawful charges against the company. Even so, we see no reversible error in the refusal to grant the new trial. The court had found that defendants did not make the representations which plaintiffs claim were the inducements to purchase the stock. This finding, as we have seen, is supported by evidence sufficient to preclude a reversal upon the ground of insufficiency of the evidence. If the alleged representations were not made, it matters not what the actual indebtedness of the company may have been.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

We concur: SLOANE, J.; THOMAS, J.

46 Cal. App. 191

FISHER v. EXCHANGE NAT. BANK OF LONG BEACH. (Civ. 2079.)

(District Court of Appeal, Third District, California. Feb. 19, 1920.)

PLEDGES ⊂=31(4) — AGREEMENT THAT ALL PLEDGED PROPERTY BE SOLD WHEN ANY DEBT IS DUE HELD TO WAIVE STATUTE AUTHORIZING.

Under Civ. Code, § 3268, authorizing the waiver of statutory benefits if not against public policy, parties to a pledge may waive the provision of section 3000 authorizing sale of part of pledged property to pay part of debt then due, and where the pledged agreement expressly authorized sale of all if any liability was unpaid, such sale was not a conversion, though the greater part of debt secured by the pledge had not become due.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Walter H. Fisher against the Exchange National Bank of Long Beach. Judgment for defendant, and plaintiff appeals. Affirmed.

Oliver O. Clark, George M. Pierson, and Claud B. Andrews, all of Los Angeles, for appellant.

Eugene C. Campbell, of Long Beach, for respondent.

BURNETT, J. The action was to recover damages for the alleged conversion of oil stock, and the appeal is from a judgment of nonsuit in favor of defendant. On March 16, 1914, plaintiff borrowed $7,700 from defendant, and executed his promissory note therefor, payable 90 days after date, with interest at the rate of 8 per cent. per annum, payable quarterly. To secure the payment of said liability, plaintiff pledged 100 shares of oil stock and executed a contract of pledge, which is a part of said promissory note. The material portions of said contract of pledge are as follows:

"I hereby deposit with said bank as collateral security for the payment of this or any other liability or liabilities of mine to said bank, due or to become due, or that may be hereafter contracted, the following property, viz.: 95 shares United Petr. Co., 5 shares Union Oil Co., * * * with this condition, viz., * * * and on the nonperformance of this promise, or on the nonpayment of any liability or liabilities above mentioned to said bank, its president or cashier * * * is and are hereby given full power and authority to sell the whole or any part of the above-named securities * * * at public or private sale, at any time or times hereafter, without any demand or advertisement or notice, such demand, advertisement, and notice being hereby expressly waived, * * * and, after deducting all legal or other costs or expenses for collection, sale, or delivery, may apply the residue of the proceeds of such collection, sale or sales, to pay any or either or all of said liabilities as said Exchange National Bank of Long Beach * * * shall deem proper, returning the overplus to the undersigned; and the undersigned agrees to pay the holder thereof any deficiency upon demand. The maker and indorsers of this note hereby waive demand, presentment for payment, protest, and notice of protest."

On January 26, 1916, defendant collected a dividend of $150 on said stock, which it credited on the principal of said note, thereby reducing the principal to $7,550. Only a small part of the interest was paid, and from time to time as said interest accrued plaintiff gave to defendant promissory notes to cover it. The first one, payable on demand, was given on August 19, 1914. The second, payable on March 16, after date, was given on March 5, 1915; the third, payable on demand, was given on July 8, 1915; the fourth, payable on demand, was given on October 6, 1915; the fifth, payable on demand, was given on December 6, 1915; the sixth, payable 90 days after date, was given on May 9, 1916. On August 7, 1916, plaintiff executed a new note dated June 16, 1916, payable 90 days after date, for $7,550. This last note was given as a renewal of the former note for $7,700, and defendant indorsed on said original note of March 16, 1914, the following words:

"Paid August 7, 1916, Exchange National Bank of Long Beach, California."

On August 22, 1916, defendant sold the said 100 shares of stock at $85 a share, and received therefor $8,498.10. A contract of pledge identical with that made on March 16, 1914, is contained in each of said six interest notes as well as in the last note of $7,750. None of these contracts of pledge was ever rescinded or modified, and the shares of stock pledged thereunder remained in the possession of the defendant bank from March 16, 1914, until sold by it on August 22, 1916.

It is not disputed that the said six interest notes were past due on August 22, 1916, when said sale of the stock was made. But it was expressly agreed between the parties that, if a single liability was unpaid, the pledgee might sell the whole or any part of said securities. The condition therefore existed upon the happening of which the sale of a portion or of the whole of the stock was authorized, and we do not see how it can be held that, by compliance with the terms of the contract, respondent violated said contract, and therefore converted the stock; there being no contention that the sale was not fairly conducted or that the proceeds were not applied as provided in said agreement. If the contract between the parties did not authorize the course that was pursued, then we must admit our inability to comprehend the simple language which they seem to have adopted to express their intention.

Appellant attaches importance to section 3000 of the Civil Code, providing:

"When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed."

The contention is that thereby the defendant was limited to the right to sell only what was sufficient to pay the debts that had matured; that is, the amount represented by the notes for the interest. But it was competent for the parties by their contract to waive this limitation. The statute provides the rule that would apply in case there was no agreement to the contrary, but there is nothing in the law to preclude parties from agreeing that, where property is pledged to secure the payment of several obligations, it may be sold to satisfy all of them, although only a portion has matured. In fact, section 3268 of the Civil Code provides that parties may waive the benefit of any statute in reference to their rights and obligations "unless such waiver would be against public policy." We may add that no contention is made that the present case comes within said exception.

Certain decisions are cited by appellant, but, as we read them, they involve a different situation and require no specific attention.

The judgment is affirmed.

We concur: ELLISON, Judge pro tem.; HART, J.

46 Cal. App. 178

MAYBORNE v. CITIZENS' TRUST & SAVINGS BANK. (Civ. 2110.)

(District Court of Appeal, Third District, California. Feb. 19, 1920.)

1. WORK AND LABOR ⟸4(1)—SERVICES PRESUMED NOT TO BE RENDERED GRATUITOUSLY.

When services are rendered by one person from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth, but this presumption may be rebutted by proof of a special agreement to pay therefor a particular amount, or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party benefited.

2. WORK AND LABOR ⟸7(1) — PRESUMPTION OF INTENT TO PAY NOT REBUTTED BECAUSE PLAINTIFF WAS MEMBER OF HOUSEHOLD.

The fact that one suing for services rendered a deceased performed such services as a member of the household does not destroy the presumption that it was intended that deceased should pay therefor, but only strengthens or diminishes an implication that the services were acts of gratuitous kindness, according to the degree of the relationship.

3. EXECUTORS AND ADMINISTRATORS ⟸221(5) —EVIDENCE HELD TO SUSTAIN FINDING THAT SERVICES BY MEMBER OF THE HOUSEHOLD WERE TO BE PAID FOR.

In an action against a decedent's estate to recover for services rendered by one largely treated as a member of the household, evidence *held* sufficient to sustain finding that the services were performed in the expectation of both parties that plaintiff would be rewarded in a pecuniary manner.

4. WILLS ⟸114—TYPEWRITTEN INSTRUMENT MUST BE WITNESSED.

An instrument intended as a testamentary disposition of property cannot be probated where the body of it is typewritten and it is not witnessed.

5. EXECUTORS AND ADMINISTRATORS ⟸221(3) —INSTRUMENT INSUFFICIENT AS WILL ADMISSIBLE AS RECOGNITION OF VALUE OF SERVICES RENDERED DECEASED.

An instrument intended as a will, but insufficient, was admissible, in an action by the intended beneficiary against the estate of deceased to recover for services rendered during his lifetime, as a recognition by deceased of the value of the services of plaintiff and as a declaration of his purpose and intention to pay her for the same.

6. EXECUTORS AND ADMINISTRATORS ⟸221(5) —INSTRUMENT INTENDED AS WILL RAISED NO PRESUMPTION OF PRIOR INTENT TO PAY FOR SERVICES.

An instrument executed many years after personal services began, but insufficient on account of its form as a will, could not give rise to any presumption that there was a purpose at the beginning of rendition of services to pay therefor, but, where the instrument stated that the property attempted to be devised was in recognition of services rendered, tended to strengthen an inference arising from other facts and circumstances of the existence of such purpose, or at least to rebut any inference or presumption that the parties contemplated that the services should be gratuitous.

7. WORK AND LABOR ⟸1 — THAT PAYMENT WOULD BE EQUITABLE CONSIDERED IN DETERMINING INTENT TO PAY.

In an action against the estate of a deceased person to obtain value of services rendered, it was proper for the trial court, in determination of intention of parties, to weigh the circumstance that it would be just and equitable for plaintiff to be rewarded for her services.

8. LIMITATION OF ACTIONS ⟸50(2)—STATUTE DOES NOT RUN AGAINST ACTION FOR SERVICES UNDER CONTRACT FOR INDEFINITE TIME.

Where a contract to pay for services, express or implied, is for an indefinite time, and no time for payment is specified, the statute of limitations does not begin to run until the services end.

9. FRAUDS, STATUTE OF ⊂⊃44(3) — NOT APPLICABLE TO CONTRACTS FOR SERVICES FOR INDEFINITE TIME.

Civ. Code, § 1624, subd. 1, which requires an agreement that by its terms is not to be performed within a year to be evidenced by writing, does not apply to contracts, either express or implied, for the rendition of services for an indefinite time, payment to be made at the termination of relationship.

10. FRAUDS, STATUTE OF ⊂⊃138(4)—QUANTUM MERUIT FOR SERVICES RENDERED DECEASED NOT AFFECTED BY STATUTE.

Civ. Code, § 1624, subd. 7, requiring a writing for the validity of an agreement "which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property," does not apply to an action against the estate of a deceased to recover upon a quantum meruit for services rendered deceased during his lifetime.

11. FRAUDS, STATUTE OF ⊂⊃122—INEFFECTIVE AS TO AGREEMENTS MADE PRIOR TO ENACTMENT.

Civ. Code, § 1624, subd. 7, requiring writing for the validity of an agreement "which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will," has no application to a contract entered into prior to 1905, when such section was first incorporated into the statute.

Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by Etta Irene Mayborne against the Citizens' Trust & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred Wright, of Los Angeles, for appellant.

Goodwin & Morgrage, of Los Angeles, for respondent.

BURNETT, J. There is no substantial conflict between the parties as to the facts of the case, but in our statement we shall resolve whatever minor differences there may be, as far as justified by the record, in favor of respondent. The appeal is from a judgment in favor of plaintiff on a claim against the estate of C. P. Dutton, rejected by his administrator, for the reasonable value of personal services rendered the decedent over a period of more than 20 years, terminating in his death in 1915. Mr. Dutton was formerly a prominent well-to-do resident of the city of Aurora, Ill. In 1873 he married a woman 15 years his junior and three sons were born of the marriage. In 1894, after some years of estrangement, he and his wife finally separated, and after the separation, at the invitation of Mr. Mayborne, an old friend and acquaintance, Mr. Dutton took up his residence in the Mayborne home in Geneva, Ill., a town some nine miles distant from Aurora. The family consisted of Mr. and Mrs. Mayborne, Miss Grace Mayborne, an elder sister, more or less of an invalid, and Miss Etta Mayborne, the plaintiff. Due to the age of her parents and the sickness of her sister, plaintiff was the housekeeper and had general charge of the affairs of the home. The situation was agreeable and satisfactory to Mr. Dutton, and he soon came to be treated as a member of the family. All of his wants were supplied and he entertained his old friends at his new home as though it were his own residence. Changes took place in the family. Mr. Mayborne died, later Mrs. Mayborne, and an elderly uncle was given a home until he, too, passed away. Mr. Dutton, however, remained, asking and receiving increasing care and attention. Mr. Dutton and the two Mayborne sisters began going to California, spending several winter months in each year in Los Angeles. Finally, in 1905, Mr. Dutton erected a house, known as "Redwood Lodge," at Hollywood, near Los Angeles, which served as their California home, and finally became their permanent residence. He died in May, 1915. At many times and to many persons, after becoming a member of the Mayborne family, Mr. Dutton expressed the greatest satisfaction with and the highest appreciation of the care, attention, and services he received from plaintiff, and several times expressed his intention of remunerating plaintiff for her services to him. There is no doubt that the closest friendship existed between plaintiff and Mr. Dutton, and they were received by their mutual acquaintances upon a plane of social equality, but no improper relations existed between them, plaintiff acting in the capacity of housekeeper and nurse for him. After his death an instrument purporting to be a will was found among his papers by which he expressly recognized his obligations to plaintiff and attempted to devise to her all his estate in California. The instrument, however, was ineffective as a will. The claim of plaintiff having been rejected, an action was brought, and the court found:

"That for 20 years continuously prior to and including May 26, 1915, plaintiff, at the special instance and request of C. P. Dutton, rendered constant service to said C. P. Dutton in maintaining a home for him; in caring for him and administering to his comfort therein; in looking after and caring for his clothes and linen; and in supervising and performing all of the duties of conducting, managing, and carrying on a home for said C. P. Dutton; that all of said services were rendered during all of said time by plaintiff, with the understanding and agreement between plaintiff and said C. P. Dutton that he would compensate her for said services in money or property to the amount of the reasonable value of said services upon the termination of said services at or before his death; that said services were not terminated before the death of said C. P. Dutton."

It is further found that said Dutton did not compensate plaintiff to any extent for said services, and that the reasonable value for them is $18,000.

The only serious contention by appellant is that the evidence is insufficient to support that portion of the findings to the effect that the services were performed with the understanding and agreement that plaintiff was to be compensated therefor. It is not disputed that plaintiff served the decedent as claimed by her. Indeed, there is no conflict in the evidence as to that, and the allegation of the complaint in that respect was not denied in the answer. The position of appellant is that there is no evidence of an express agreement for compensation, and that there is no rational ground for the inference that it was the understanding and expectation of the parties that plaintiff should be paid for her services. It may be admitted that there is no direct evidence of any such express agreement, but it is the contention of respondent that from the evidence the trial court was warranted in concluding that the parties contemplated and understood that she was to be paid the reasonable value of her services, and that such understanding was sufficient to impose a legal liability therefor.

[1-3] Appellant does not dispute the general rule, as stated in Moulin v. Columbet, 22 Cal. 509, that, when services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth."

It is, though, justly contended that this is a mere presumption and "liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby." Appellant goes further in the claim that this case is an exception to the general rule in that plaintiff performed the services as a member of the household, and therefore could not claim the advantage of said presumption or implication of law. Decisions are cited to the effect that under such circumstances the presumption is, rather, that the services are gratuitous, and that the burden is upon the claimant to overcome this presumption. We need not review these various decisions, as we find a sufficient guide for our purpose in the declarations of the Supreme Court in Crane v. Derrick, 157 Cal. 667, 109 Pac. 31, as follows:

"It has been said many times that the question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished. See 21 Am. & Eng. Ency. of Law (2d Ed.) p. 1061; Murdock v. Murdock, 7 Cal. 513; Friermuth v. Friermuth, 46 Cal. 42, 45. In the consideration of such circumstances, the degree of the relationship may strengthen or diminish the implication that the services are acts of gratuitous kindness and affection according to its proximity or remoteness. 1 Beach on Law of Contracts, § 653. Our own decisions support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made. Murdock v. Murdock, 7 Cal. 513; Friermuth v. Friermuth, 46 Cal. 42. And it is emphatically declared in Murdock v. Murdock that it is the expectations of the parties existing while the relation continued that is to control, and that no circumstance occurring afterwards can convert that into an implied contract, that was not so before."

Under this test the claimant is not required to prove any express contract, but it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties. Even assuming that said presumption in the instance of a family applies to this case by reason of the fact that plaintiff was treated largely as a member of the household, yet we are satisfied that a careful reading of the testimony would convince any disinterested mind that it is not an irrational conclusion that said services were performed in the expectation of both parties that Miss Mayborne would be rewarded in a pecuniary manner. We are required, of course, to go no further than to say that such conclusion of the trial court is not unreasonable, although, we may believe that a finding the other way would be amply supported. Moreover, under the peculiar circumstances herein, although in a limited sense the parties lived together as a family, the industry, fidelity, and self-denial of plaintiff in the services she performed would indicate quite an unusual and extraordinary person if she had no expectation of such reward and reason to believe that it would be realized. The more rational inference would seem to be the other way, if we take into view the ordinary tests and motives of human conduct. Mr. Dutton's wants were thoughtfully supplied, he was carefully nursed in illness, and, as he grew old and feeble, he received increasing care and attention. Since there is no claim of any meretricious or improper relations between the parties, why should any one suppose that she would so deport herself without expectation of substantial compensation?

And as to Mr. Dutton, would it not be do-

ing rather an injustice to his memory to assume or to infer that he, an elderly man of means and somewhat infirm, would willingly be the mendicant recipient of such solicitous and laborious attention from a young woman to whom he was not related by blood or consanguinity? The cases wherein such services are presumed to be gratuitous rest upon some natural or conventional obligation of mutual care and consideration, and the present instance hardly belongs to that class. Plaintiff was under no legal or moral duty to render services to Dutton. In contemplation of law they were strangers to each other, and as between such the law says that beneficial services rendered and accepted must be paid for. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; Estate of Rohrer, 160 Cal. 574, 117 Pac. 672, Ann. Cas. 1913A, 479.

In the Estate of Rohrer, the plaintiff who was the niece of decedent through marriage, presented a claim for services rendered in nursing the deceased for a period of 19 months prior to his death. The Supreme Court, through Mr. Justice Melvin, said:

"There was no such relationship between Mr. Rohrer and Mrs. Follmer as would raise any presumption that the services were gratuitous. The facts that she was the wife of Mr. Rohrer's nephew and that she and her husband resided in Mr. Rohrer's home do not raise any presumption that she nursed the sick man without expectation of reward."

In this connection it is well to remember that when Miss Mayborne began to serve Mr. Dutton, and for some time thereafter, it is fair to assume that there was no such intimacy as developed in subsequent years. It is to this earlier period that we must look for evidence of an understanding as to remuneration, and upon the most liberal construction in favor of appellant it cannot be held that in consequence of the character of their relations at that time the presumption would be that the services were gratuitous.

Many witnesses testified as to the daily life and conduct of these parties and as to the nature of the services performed by plaintiff; and, to indicate and illustrate its general scope and intent, we quote the testimony of Clara B. Wells, who resided in the Mayborne family as a roomer and boarder from 1898 to 1905, as follows:

"Miss Mayborne did everything about the house. She would contribute to Mr. Dutton's board and to his care. She did everything about him—his personal affairs. I was with her much of the time. We were very companionable and I had a chance to be with her much. She did everything such as taking care of his linen, packing, and unpacking, and much of the time Mr. Dutton was not well and she took care of him. He was never strong, and when he was well and went to business she always called for him—went to the train with him in the morning and called for him in the evening. It was a long mile, I should say, from the Mayborne home to the train. She conducted the house and was at its head, and when he had no cook she did the cooking and dishwashing and harnessed the horse and looked after the hay for him. It was Miss Mayborne's house. I should say it was the house which her father and mother lived in before their death. I think Miss Mayborne was born in the house. During that time I had many conversations with Mr. Dutton. I had conversations with him relative to the time that he had gone to this home, and he told me that he came there during the lifetime of Miss Mayborne's father. I think he was associated with her father in the law. They were friends, or they were together much, and seemed to live at her home during the lifetime of her father and mother. The father and mother were not living when I went there, and I never met them. He continued from the time that I met him there and during the seven years that I was there to remain in that house. Mr. Dutton told me that he went to Miss Mayborne's house almost a physical wreck. He had been slightly injured in the Civil War, and he came out of the Civil War not very robust, and I think he was suffering from either acute or nervous indigestion. I saw, during my stay there, that he was troubled with vertigo and acute attacks of indigestion. I don't know that he spoke of it often, but he was free in his expression that he was quite a wreck when he went to Miss Mayborne's home, and it was almost entirely due to her care and comfort that he was kept alive. He confided in me that it was his regret that he hadn't an incontestable provision for Miss Mayborne in the way of annuity for life insurance of some nature, and at the time he spoke of it I said, 'Why don't you, now?' He said, 'Well, the trouble is I am too old; I have passed my sixty-first birthday,' and that at the age of 61 the insurance companies wouldn't take him, or that the price was prohibitive. I don't recall, but what he said he was past 61 and couldn't arrange for straight life insurance which would be incontestable. He was driving in the country, and he was in a reflective mood, and finally he said, 'I will make it all right, because I own several farms,' and then he spoke of some stock he owned at that time. At that time he was interested in National Biscuit. This conversation was in Illinois, but having failed in making the definite provision for her it would all be arranged because he had some interest in farms, and he also owned some stock in the National Biscuit and Westinghouse, I think, and he spoke of some other interests which I don't recall. He said he wanted an incontestable provision because he knew the money he left to Miss Mayborne, his heirs would contest it, even if it was a shoestring. This was in autumn, probably nearer 1905 than 1900."

Describing a later conversation held with Mr. Dutton, the witness said:

"I had another conversation with him with reference to the services or compensation that had been made or would be made. This was about the year following my first conversation. I should say now it would be about 12 or 13 years ago and that it took place at Ottawa, Ill. Q. What did Mr. Dutton say in that conversation, Mrs. Wells? * * * Mr. Dutton spoke about some farms he had lately acquired in Kane county and spoke about his holdings in

farm lands in Kane county, and also spoke about some National Biscuit stock and some Diamond Match stock, which, together with the farming interests and the Diamond Match and National Biscuit stock, would go to Miss Mayborne as compensation for the care she had given to him. Q. Was anything said in that conversation by Mr. Dutton with reference to whether or not he had expressed his intention to Miss Mayborne? * * * Yes; he said that Etta would be well provided for, and that it was necessary she know how she stood, because in all probability she would have to take care of Grace. I don't recall that he said in so many words that he had said this to Miss Etta Mayborne. No; he didn't speak of any definite conversation he had with Miss Mayborne, but he spoke about having made the arrangement."

Still later Mr. Dutton again spoke of these matters:

"On one of our summer visits to Evergreen Lawn on Sunday afternoon Mr. Dutton described the home they were planning; in fact, it was then building here in California. He said it was Etta's. That was in the summer of the year the house out there was built. It was the summer they were building the bungalita. They called it Redwood Lodge."

The facts and circumstances detailed by this and other witnesses were as strongly indicative of an understanding that plaintiff should be rewarded as was the showing of an understanding that the earnings of the wife were to be her separate property in the case of Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272, to which we may refer for an interesting discussion of a kindred subject.

[4] This view is strengthened by a consideration of the abortive will of the deceased. Of course, he intended it to be effective as a testamentary disposition of the property therein mentioned, but the body of it was typewritten, and it was not witnessed.

Therefore it could not be probated, but it was signed by Dutton and was in the following form:

"Redwood Lodge, Hollywood, California, May 21st, 1915. In case of death, I give to Etta Irene Mayborne, all real estate and personal property, of which I may die seized, found in the state of California. Also all shares of stock in my name, in the American Chicle Company, and in the Westinghouse Air Brake Company. This I give to Etta Irene Mayborne, for care and faithful services rendered."

[5, 6] Said instrument, while insufficient as a will, was clearly admissible as a recognition by Dutton of the value of the services of plaintiff and a declaration of his purpose and intention to reward her for the same. The significance of such evidence is indicated in the Rohrer decision, supra. Coming, as it does, many years after the services began, said instrument does not, of course, give rise to any presumption that the same purpose existed in the beginning, but it tends to strengthen the inference from other facts and circumstances of the existence of such purpose, or at least to rebut any inference or presumption that the parties contemplated that the services should be gratuitous.

[7] We may add that it was entirely proper for the trial court in the determination of the intention of the parties to weigh the circumstance that it would be just and equitable for plaintiff to be rewarded for her services. The average person is supposed to be influenced by such considerations, and it would be natural to suppose that Mr. Dutton was not insensible to their controlling force and would entertain a corresponding purpose to reward Miss Mayborne.

In this connection we may call attention to the following additional authorities cited by respondent: Gall v. Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Clark v. Gruber, 74 W. Va. 533, 82 S. E. 338; Morrissey v. Faucett, 28 Wash. 52, 68 Pac. 352; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Heffron v. Brown, 155 Ill. 322, 40 N. E. 583; Briggs v. Estate of Briggs, 46 Vt. 571; Wainwright Trust Co. v. Kinder (Ind. App.) 120 N. E. 419.

In the last of these the claimant was an adult child living with her father, and the court, in affirming a judgment in her favor, held that, while there was a prima facie presumption that the services were not to be paid for, it was also held that the intention to pay and expectation of compensation, raising an implied contract, could be inferred from the circumstances and conduct of the parties, and that it was not necessary to show, either directly or through others, any communication by parent to child. In the discussion of the facts the court declares that attention may be given to the justice or injustice of the claim, for the purpose of determining what was the intention of the parties in relation to the question of compensation for the services in controversy—citing 9 Cyc. 242, 243.

That is a recent decision, and in the character of the services performed quite similar to the case at bar, although the evidence herein in favor of the claimant is stronger than it was in that.

In the Briggs Case, supra, the Supreme Court of Vermont said:

"In all the cases in which it has been held that the law will not imply a promise to pay for valuable services rendered with the knowledge of the recipient such a relation has existed between the parties before the rendering of the services that the defendant was not bound to pay for the services. This relation is usually that of parent and child. When the child arrives at majority, but remains with or returns to the parent, or when the parent goes to live with the child, the law presumes the parties have retained or returned to the relation that once existed between them, and will not presume that they thereby assumed the relation of debtor and creditor, unless it is shown that

they mutually understood that they came together with their relation changed from what it formerly had been to that of debtor and creditor."

In the Ellis Case the Supreme Court of Wisconsin held that, by reason of the fact that the claimant was a stepdaughter, it was incumbent upon her to show that she was to be remunerated for her services. The court said:

"To meet this obligation she proved the express parol agreement for compensation. True, such agreement is void as a contract for the reasons stated, and hence cannot be enforced specifically, nor constitute the basis of an action for damages."

The said agreement, it may be stated, was in part for the devise of land, and therefore void under the statute of that state. The court, however, held that said agreement was admissible to rebut the presumption that Mrs. Ellis rendered the services in question gratuitously.

The other cases are in harmony with these, nor do we find the cases cited by appellant to be inconsistent with the views herein expressed when the peculiar facts of each are considered.

[8] We think there is no merit in the contention that the claim is barred by the statute of limitations. The services were continuous for a period of 20 years, and it is a fair inference that it was the intention or expectation that they should be rewarded when terminated. They did not cease until the death of Mr. Dutton. The case falls clearly within the rule announced in Krumb v. Campbell, 102 Cal. 370, 36 Pac. 664; Hagan v. McNary, 170 Cal. 141, 148 Pac. 937, L. R. A. 1915E, 562; Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007; Clark v. Gruber, supra; Morrissey v. Faucett, supra. They are all to the effect that, where the contract is for an indefinite time, and no time for payment is specified, the statute does not begin to run until the services end. Of course, the same rule applies to an express contract and to one implied by law.

There is also force in the claim of respondent that said will contains a "direct, distinct, unqualified, and unconditional admission of the debt" sufficient to meet the requirements of the decisions in this state, and thus to take the case without the statute of limitations, but we do not deem it necessary to decide this point.

[9] We think there is no more merit in the contention that the contract herein was invalid by reason of subdivision 1 of section 1624, Civil Code, which requires "an agreement that by its terms is not to be performed within a year from the making thereof" to be evidenced by a writing "subscribed by the party to be charged." This rule does not apply to contracts, either express or implied, for the rendition of services for an indefinite period of time and payment to be made at the termination of the relationship. Dougherty v. Rosenburg, 62 Cal. 32; Kutz v. Fleisher, 67 Cal. 93, 7 Pac. 195; Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667. To fall within the condemnation of the statute the contract must be such as to be incapable of performance within one year. Manifestly we have no such situation here.

Indeed, the proper view of this case, as we understand it, is that the services were performed without any express agreement as to compensation, but with the expectation and understanding that at some time in the future, probably on the death of Mr. Dutton, the plaintiff would be paid the reasonable value of her services.

[10, 11] Nor do we think that subdivision 7 of said section, requiring a writing for the validity of an agreement "which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will," applies to a case like this for recovery upon a quantum meruit. Hagan v. McNary, supra; Wallace v. Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222. Besides, said section was first incorporated into the statutes in 1905 and it would not control in a case originating before said date. Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929.

Certain objections were made to the admissibility of evidence, and they are briefly referred to in the written argument of appellant, but we do not understand counsel to contend that the rulings are sufficiently grave to justify a reversal of the judgment. At any rate, we have examined them and find therein no prejudicial error.

As we must view the record, we cannot escape the conclusion that the claim of respondent was just and reasonable and established by legal evidence to the extent that an appellate tribunal is not warranted in interfering with the judgment of the lower court.

The judgment is affirmed.

We concur: ELLISON, Judge pro tem.; HART, J.

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181 Cal. 722

MONTEZUMA IMPROVEMENT CO. v. SIMMERLY et al. (S. F. 8522.)

(Supreme Court of California. Dec. 19, 1919. Rehearing Denied Jan. 15, 1920.)

1. Animals ⊂=49—Common-law rule as to running at large in force.

The Estray Act of 1915 gave every county in the state the common-law rule, and all the countries, except the six expressly named, have been excepted from the operation of the so-called Fence Law of 1850, the Estray Act of 1851, and the successors of those statutes, notwithstanding the new Trespassing Act of 1907, which declared it unlawful for any person in possession of any animal to permit it to enter upon the lands of another in all cases where such land is planted with growing crops and is at the time entirely inclosed by a substantial fence, and an owner of cattle is required to keep his animals from his neighbors' lands, fenced or unfenced.

2. Injunction ⊂=48 — Repeatedly permitting cattle to run at large restrained.

One raising stock on a large tract of land in Mendocino county may restrain others occupying a large neighboring ranch and raising large numbers of cattle and hogs from permit-

ting their stock from entering upon his unfenced lands, where the repeated trespassing of cattle and hogs, if permitted to continue, will compel the bringing of numerous suits, etc.

In Bank.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Montezuma Improvement Company against John Simmerly and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Charles Kasch, of Ukiah (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Robert Duncan and W. S. Van Dyke, Jr., both of Ukiah, for respondents.

MELVIN, J. Plaintiff and appellant owned unfenced lands in Mendocino county. Plaintiff sought by this suit to obtain damages for trespass upon his land of animals owned by defendants, and also prayed for an injunction to prevent further incursions of defendants' cattle. A general demurrer to the complaint was sustained, and the plaintiff appeals from the judgment which followed.

Two questions are presented. The first is whether or not the common-law rule requiring the owner of cattle to keep his animals from his neighbors' lands, fenced or unfenced, is in operation in Mendocino county. The other relates to the sufficiency of the complaint to state a proper case for injunctive relief.

[1] It is now settled law in California that the common-law rule applies in those counties which have been excepted from the operation of the so-called Fence Law of 1850 (Stats. of 1850, p. 131), the Estray Act of 1851 (Stats. 1851, p. 299), and the successors of those statutes, notwithstanding the new Trespassing Act of 1907 (Stats. 1907, p. 999), which declares it unlawful for any person in possession of any animal to permit it to enter upon the lands of another "in all cases where such land is planted to growing crops," etc., and "is at the time entirely enclosed by a substantial fence or other inclosure." Actions similar to the one at bar commenced in the counties of Colusa and Los Angeles have been sanctioned by the District Court of Appeal and this court has approved the judgments. Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307; Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224. The case of Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329, applied the common-law rule to Santa Clara county because of a special act concerning estrays found running at large upon lands in that county, whether said land was fenced or unfenced.

It is true that by a dictum in Blevins v. Mullally, supra, the learned court declared that its members were "not impressed with the suggestion" that the estray law of 1901 (St. 1901, p. 603) or the amendment of 1909 (St. 1909, p. 1079) had the effect of reviving the common-law rule as to trespassing animals in California. But this language was not necessary to the decision, as the conclusion reached by the court rested upon the statute of 1877–78 (St. 1877–78, p. 176), as interpreted in the light of earlier decisions. Moreover, the language just quoted does not apply to the act of 1915, for reasons which we shall discuss.

Appellant insists that under these authorities the Estray Act of 1915 gave to every county in the state the common-law rule, except the six counties expressly named. That act (Stats. 1915, p. 636) was, in terms, an amendment to the act of 1901 relating to estrays. It gave to the owner, or to the person entitled to possession of land, the right to take up estray domestic animals found upon his premises and to have a lien upon such animals for the expenses incurred in keeping them, provided, however, that in six counties, namely, Trinity, Shasta, Del Norte, Siskiyou, Lassen and Modoc, this right was extended only to the possessors of premises "entirely enclosed with a good and substantial fence." Two methods of giving notice of the taking up of such animals are provided in the statute. One is by filing a prescribed written statement with the recorder or poundkeeper, and, in certain cases, by publishing said statement in a newspaper. The other which applies only to cases in which the finder knows the owner or person having charge of the animal or animals, requires the statement to be served upon the owner or custodian. In this particular the act differs essentially from the act of 1901 and its predecessors, which either applied only to "estrays," properly speaking (that is, animals without known owners), or to estrays and trespassing animals with known owners, treating all alike and providing for no special notice to known owners. By the tenth section of the statute it is provided that:

"Nothing herein contained shall be held, deemed or construed to repeal an act, entitled 'An act concerning lawful fences, and animals trespassing upon premises lawfully inclosed,' passed March 30, 1850, nor to repeal an act, entitled 'An act concerning lawful fences in the counties of San Bernardino, Colusa, Shasta, Tehama and Placer,' approved April 18, 1859, in so far as the provisions of said acts, and each thereof, apply to or affect the counties of Trinity, Shasta, Del Norte, Siskiyou, Modoc and Lassen, but as to said counties, and each thereof, said acts are hereby expressly continued in force, it being hereby determined that the present conditions prevailing in said counties last named are such as to justify and demand the continued application of said statutes to said counties."

Appellant's argument is as follows: Hahn v. Garratt, supra, construed a statute that merely gave to the owner of unfenced land the same remedy against trespassing animals

of known ownership that had theretofore been given only against estrays of unknown ownership. The court construed this as abolishing the fence law and establishing the common-law rule in Santa Clara county. That case, and its construction of the law, has been followed in the two other cases cited supra. Those authorities represent the settled law upon the subject, in which the Legislature has long acquiesced, and the statute of 1915, to which we have referred, was passed in view of such legislative sanction. Estate of Carraghar, 183 Pac. 161. And say counsel:

"In the instant case we have much more than the mere silent acquiescence by the legislative department. In the so-called estray law of 1915, just as in the statute construed in Hahn v. Garratt, supra, without express repeal of fence laws, or express approval of the common-law rule, the identical remedy formerly given the owner of unfenced lands only against estrays of unknown ownership was given against trespassing animals of known ownership; but, showing conclusively, demonstrating absolutely, that the Legislature knew and assented to the rule laid down in Hahn v. Garratt, supra, it took the pains to expressly retain the fence laws, and give the remedy only to owners of fenced lands in six certain counties where it found conditions to justify the distinction. Now, it is of no interest to us whether or not the Legislature made a mistake in referring to the wrong statute as a fence law which it desired to remain applicable to those six counties. We are only interested in knowing what it did in the rest of the state, and the exception clauses in the statute showed what it was trying to do therein, and show that it was expecting and intending that the court should apply the rule of Hahn v. Garratt, supra, to the statute, so far as all the counties of the state were concerned, other than the excepted six."

Respondents insist that there never has been any common-law rule in this state with reference to trespassing animals because the Lawful Fence Act of March 30, 1850 (Stats. 1850–53, p. 793), preceded the adoption of the common law as the rule of decision in California unless inconsistent with statutes. Stats. 1850–53, p. 186. This contention is answered by the cases cited above adversely to the contention of respondents.

Our attention is called by counsel for respondents to the fact that the statute of 1901 and the amending statute of 1915 both fail to prescribe any damages which may be collected for injury done by animals, but merely provide for a certain scale of payment to the taker of trespassing animals. On the contrary, we are told that such acts as that of March 23, 1907 (Stats. 1907, p. 999), providing for the recovery of damages where animals break into inclosures planted to growing crops, are of an entirely different class. But, granting this classification to be sound, we do not see how it prevents one victim of this sort of trespass from seeking to enjoin recurrences thereof while extending that remedy to the other.

Appellant also calls attention to the fact that the act of 1850, specified in the tenth section of the act of 1915, as quoted above in this opinion, was repealed by the act of April 27, 1855, which defined lawful fences in greater detail than the earlier statute (Stats. 1855, p. 154), and that on March 31, 1855, an act was passed substantially identical with the act of March 30, 1850, providing for the recovery of damages for trespassing animals only when the lands were inclosed by a lawful fence (Stats. 1855, p. 70). It is argued that this statute, never having been in terms repealed or kept in effect only in certain counties, is still in existence, and inhibits the application of the common-law rule to Mendocino county. Indeed, say counsel, the act of 1915 contains no repealing language whatever. In answer to both of these arguments we are constrained to hold that the statute of 1915 which we have been considering does, by the very force of its terms, in view of the cited authorities, repeal all "fence laws" in the counties of this state, including Mendocino county, except in the six counties specified.

[2] The complaint states a proper case for injunction. According to the averments, plaintiff is raising stock on a large tract of land. Defendants, who are occupying also a large neighboring ranch, are raising large numbers of cattle and hogs. There are elaborate allegations not only with reference to the repeated trespasses of the stock of defendants, but plaintiff avers, among other things:

"That plaintiff has repeatedly driven the stock of defendants from its said real property, and has repeatedly requested of defendants that they properly care for their stock and keep the same from trespassing upon the lands of plaintiff, but all to no avail, and defendants, despite the remonstrances of plaintiff and despite the fact that plaintiff has repeatedly driven said stock from its aforesaid land, continue to allow and cause, and threaten to continue to allow and cause said cattle and stock and hogs to enter upon said premises described herein, and thereby tramp, tear up, and injure the soil, and destroy the feed growing and grown upon said premises, and injure the same for the growing grasses in the future; that the repeated trespasses of the cattle and hogs of said defendants, if permitted to continue, will compel plaintiff to bring numerous suits against the said defendants for damages, and will compel plaintiff to repeatedly take up said cattle under the estray act, all of which remedy is wholly inadequate, and will not cause said defendants to desist from said acts described herein."

Taken all together, the averments are sufficient.

No other matters contained in the briefs require further analysis.

The judgment is reversed, and the cause

remanded to the superior court, with directions to proceed in accordance with the conclusion herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

182 Cal. 525

In re SOBERANES' ESTATE. (S. F. 9171.)

(Supreme Court of California. March 26, 1920.)

1. Wills ⊜324(3)—Evidence of undue influence held insufficient for submission to jury.

In contest of a will for undue influence, where there was affirmative proof that no undue influence was exercised, and where the evidence showed that the testatrix was acting under independent legal advice, there was nothing to submit to the jury, and the court properly sustained a nonsuit.

2. Wills ⊜400—Exclusion of testimony of undue influence held harmless in view of other testimony given.

In son's contest of mother's will on ground of undue influence, his mother having given all of her property to a daughter, the exclusion of testimony as to the friendly relation between the mother and the children *held* harmless on appeal from judgment of nonsuit where there was testimony that such relations were friendly, such testimony being binding upon the court on a motion for nonsuit.

3. Wills ⊜326—Contestant's testimony binding on court on motion for nonsuit.

Testimony in favor of contestant is binding on the court on a motion for nonsuit.

4. Wills ⊜164(7)—Weakness of mind admissible on issue of undue influence.

Contestant of will on ground of undue influence had a right to show the weakness of mind of the testatrix upon the issue of undue influence.

5. Evidence ⊜471(14)—Question held to call for conclusion of witness as to mental capacity.

Question, "From your association, knowledge, and acquaintanceship with Mrs. S. [testatrix] in 1901, was she competent to transact business for herself and understand business dealings?" *held* improper as calling for a conclusion of the witness.

Department 2.

Appeal from Superior Court, Monterey County; Benj. K. Knight, Judge.

In the matter of the estate of Ysabel Boronda de Soberanes, deceased. Proceedings to contest will by Porfirio Soberanes. Judgment of nonsuit, and contestant appeals. Affirmed.

Z. B. Stuart, C. W. Byrer, and J. W. Hocker, all of Los Angeles, for appellant.

C. F. Lacey, of Salinas, for respondent.

WILBUR, J. This is a contest of the will of Ysabel Boronda de Soberanes, within one year after probate, by Porfirio Soberanes, her son, upon the grounds that the will was not properly executed, that the testatrix was of unsound mind, and that the will was executed under undue influence. The first ground of contest was withdrawn, and a motion of nonsuit was sustained as to the others. The contestant appeals from the judgment, claiming that the evidence was sufficient to establish a prima facie case for the jury. The testatrix died February 19, 1916, aged 84 years. By the terms of her will she left all of her property to her daughter Clotilda, with whom she was residing at the time of the execution thereof. The husband of testatrix died in 1887. Thereafter the testatrix deeded her inheritance to her son Abel. These transfers were unsuccessfully attacked by the other children (Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Id., 106 Cal. 1, 39 Pac. 39, 527), acting through Isabel Soberanes as guardian ad litem for the mother. In 1886 Abel died, devising the land so conveyed to his sister, Clotilda, subject to an annuity of $3,000 in favor of the mother. A general guardian was thereafter appointed for testatrix in 1896, and she remained under such guardianship until April 13, 1901, when the guardian was discharged and she was restored to capacity. Shortly thereafter the will under attack was executed (November 23, 1901). About a year later the testatrix waived the annuity in favor of the daughter Clotilda by instrument executed August 13, 1902, recorded September 3, 1902, and by a deed of the same date, recorded September 10, 1902, the testatrix conveyed to the same daughter her interest in certain real property. Thus the only estate left by the testatrix was $372.70. The surviving children of the testatrix were Benito A. Soberanes, a son 65 years of age, the contestant, Porfirio, a son 58 years of age, Josefa Soberanes de Boronda, a daughter 55 years of age, and Clotilda Soberanes, a daughter about 50 years of age. There were also three children of a deceased son, Jose Feliciano Soberanes. The son Benito contested the will before probate. Without quoting the will in full, it states that the testatrix leaves all her property to her daughter Clotilda, with whom she is living and expects to live until her death; that since the death of her son Abel this daughter is the only member of the family with whom she has been happy; that the daughter and her husband have "spared neither time nor money to make life pleasant and agreeable to me, * * * often receiving little or no pecuniary compensation for money and labor expended in my behalf, and by reason of their kindness to me drawing upon themselves the hatred of my other children." Testatrix gives as a reason for disinheriting her other children the fact that by "their unfilial conduct by continually

harassing me in the courts year after year, suit following suit, willing to squander their own fortunes in attempting to deprive and for several years depriving me of the control of mine, causing me great financial loss, ungrateful to me when I have helped them, those whom I have helped the most being, if possible, the most violent toward me, heedless and thoughtless of me in my loneliness, with never a kind or loving word or act for me in my old age and double bereavement of husband and son, and apparently at least without ever a thought for my happiness or welfare they have filled my life with bitter sorrow which time cannot efface." The will was drawn by an attorney, in accordance with the instructions of the testatrix, and was signed in the presence of three witnesses. The only connection of the daughter Clotilda or her husband with the transaction was that they brought her to the attorney's office and paid his fee for drawing the will; the mother having declared her intention of making a will and leaving to them her property. So far as appears from the evidence, they had no conversation with the attorney. The will was executed out of their presence. Subsequently the attorney showed them the will, but retained possession of it until the death of the testatrix, thereupon producing it for probate. The statements in the will concerning litigation among members of the family is substantiated by the testimony; the first litigation being an effort to set aside the deed from the mother to the son Abel of property which Abel subsequently bequeathed and devised to his mother. Soberanes v. Soberanes, supra. For the last 16 years of testatrix's life the son Benito did not call upon the mother. Clotilda testified that the will was made by the mother of her own motion and in accordance with her own wishes, without any suggestion from herself or her husband, and that the mother frequently expressed a desire to leave the property so that there would be no further trouble. No witness testified that the testatrix was of unsound mind. The son Benito stated that he did not claim and never had claimed that his mother was insane, and that he so testified at the trial of his own contest, "but I declared that she was incompetent." In response to a question, "What do you mean by that?" he replied, "She could not read or write or count or calculate in any shape or form." He further testified, "She had no knowledge of business, could converse intelligently, but when it came to business she couldn't count ten." There was also testimony by the contestant and some of the other members of the family that the relations of the mother and the children were friendly.

[1] Appellant claims that, under the circumstances, a presumption of undue influence arose against the will which necessitated a submission of that question to the jury. This matter is so fully discussed in two comparatively recent cases involving the relation of mother and son (In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Ricks, 160 Cal. 460, 117 Pac. 532) that we deem further discussion unnecessary. Suffice it to say that in this case, where there was affirmative proof that no undue influence was exercised, where the evidence shows that the testatrix was acting under independent legal advice, there was nothing to submit to the jury, and the action of the court in sustaining a nonsuit was proper.

[2, 3] The appellant makes various assignments of error in the rejection of testimony. These assignments are grouped in the brief under two heads: First, rulings excluding certain evidence bearing upon the friendly relation between the mother and children. As they had testified that such relations were friendly and such testimony was binding upon the court upon a motion for nonsuit, the appellant was not prejudiced by these rulings. The other rulings are grouped under the claim that they were erroneous for the reason that contestant had a right to show the weakness of mind of the testatrix upon the issue of undue influence.

[4, 5] There is no doubt of the correctness of the rule invoked, but an examination of the specific questions asked and objections made show that most of them called for conclusions, which were not proper to be offered in evidence. No effort was made to prove by intimate acquaintances the unsoundness of mind of testatrix, and the specific questions to which objections were sustained were not proper, such, for instance, as the following:

"From your association, knowledge, and acquaintanceship with Mrs. Soberanes in 1901 was she competent to transact business for herself and understand business dealings?"

This question called for a conclusion of the witness, and the objection thereto was properly sustained.

Judgment affirmed.

We concur: KERRIGAN, Judge pro tem.; LENNON, J.

(182 Cal. 515)

PORTER v. CITY OF LOS ANGELES et al. (L. A. 4811.)

(Supreme Court of California. March 26, 1920.)

1. Limitation of actions ⟸32(1)—Three-year period for action of trespass applies only where there is entry.

The three-year period allowed by Code Civ. Proc. § 338, subd. 2, for maintenance of an action for trespass upon real property applies only where there is an actual entry upon the premises, or direct or intentional injury amounting to trespass, and does not apply to actions in which the injury is consequential only, in which case the two-year period fixed by section 339, subd. 1, applies.

2. Municipal corporations ⟸663(1)—Abutting owner is presumed to own to center of street.

Under Civil Code, § 831, an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown; hence in the absence of evidence abutting owner will be presumed to own to the center of the street.

3. Municipal corporations ⟸663(1)—One interfering with highway except to use or repair it a trespasser.

A public highway is a mere easement, and the owner of the soil over which it passes has an action of trespass against any person who interferes with it for any purpose but to use or repair it.

4. Municipal corporations ⟸404(6)—City presumptively has authority to excavate tunnel in street.

In a suit by an abutting owner, who claimed that her property subsided as result of city's negligence in constructing a tunnel in a street, *held*, in the absence of averment or proof to the contrary, it will be assumed the city had authority to construct the tunnel.

5. Municipal corporations ⟸394(6)—City constructing tunnel in street must use care not to remove support of abutting property.

Where a city undertakes to construct a tunnel in a street the fee of which is in the abutting owners, it must use ordinary skill and care to sustain the land of the abutting owners, the rule announced by Civil Code, § 832, applicable to coterminous owners being applicable to the case of the city, even though the city and the abutting owner were not coterminous owners.

6. Limitation of actions ⟸32(1)—Municipal corporations ⟸394(6)—City building tunnel in street liable to abutting owner whose land subsided; three-year limitations applicable.

Where a city, in constructing a tunnel in a street the fee of which belonged to the abutting owners, failed to use ordinary skill and care to sustain the abutting land, and it subsided to the injury of the owners, the city, although it was within its authority in constructing the tunnel, is liable to the abutting owners for trespass, and hence the three-year period described by Code Civ. Proc. § 338 is applicable.

Olney, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by Eugenia D. Porter against the City of Los Angeles and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. Ona Morton, of Los Angeles, and J. T. Moriarity, Behymer, Craig & Salzman, Behymer & Craig, and Robert F. Shippee, all of Los Angeles, for appellant.

Charles S. Purnell, Jess E. Stephens and Wm. P. Mealey, all of Los Angeles, for respondents.

SHAW, J. The complaint alleges that the plaintiff is the owner of certain land fronting on Hill street in the city of Los Angeles upon which she was erecting an apartment house, and had proceeded so far as to put in the foundations thereof; that the city of Los Angeles entered into a contract with the defendants Spicer & Wattson for the construction of a tunnel beneath the street along the line thereof in front of plaintiff's land; that in constructing the tunnel the defendants negligently failed to support the soil and earth above and adjacent thereto while performing the work, and that for want of such support the earth above the tunnel caved into the tunnel, and caused the settling and cracking of the surface of the earth above and along the course of the tunnel and the cracking of said foundation; that said settling and cracking was not due to the weight of any building upon the premises, or any act of the plaintiff, and that by reason of said caving of the earth plaintiff was damaged in a large sum of money, for which she claimed damages.

The answers of the defendants, among other things, pleaded as a defense that the action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, fixing two years as the limitation on actions upon a liability not founded upon an instrument in writing. The action was begun on September 7, 1915.

When the cause came on for trial the parties stipulated that the tunnel which caused the caving of the earth and consequent damage to the plaintiff was completed on August 16, 1913. This was more than two years, but less than three years, before the beginning of the action. Thereupon, without further evidence or proceedings, the parties agreed that the question whether the action was barred should be submitted to the court for decision and judgment. The court decided in favor of the defendants, and gave

judgment accordingly. From this judgment the plaintiff appeals.

It does not clearly appear whether the settling of the plaintiff's land took place during the construction of the tunnel or not, but the parties have assumed that the same were coincident in point of time, and we will consider the case upon that basis.

[1] Subdivision 2 of section 338 provides that "an action for trespass upon real property" is not barred until three years from the time the cause of action accrued. If this is an action of that character, the statute of limitations had not run when the action was begun, and the judgment was erroneous. If, however, it comes within the class specified by subdivision 1 of section 339 the action was begun too late, and the judgment was correct. It is the settled law in this state that the three-year period of limitation for an action for trespass upon real property applies only where there is some entry upon the premises of the plaintiff or direct or intentional injury thereto, amounting to a trespass thereon, and does not apply to actions in which the injury caused to the plaintiff's real property is consequential only and arises from some lawful act of the defendant not done upon the plaintiff's property, but committed elsewhere, and causing as a consequence thereof some injury to plaintiff's property not arising from an entry thereon by the defendant or his agencies. Hicks v. Drew, 117 Cal. 305, 49 Pac. 189; Daneri v. Southern C. R. Co., 122 Cal. 507, 55 Pac. 243; Crim v. San Francisco, 152 Cal. 279, 92 Pac. 640. The decisions in other states having a similar statute of limitations are to the same effect. Welch v. Seattle, etc., Co., 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047; Denney v. Everett, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934; Roundtree v. Brantley, 34 Ala. 554, 73 Am. Dec. 470; Eagle, etc., Co. v. Gibson, 62 Ala. 369; Platt, etc., Co. v. Waterbury, 80 Conn. 184, 67 Atl. 508, 125 Am. St. Rep. 111.

The defendant contends that the present case falls within the rule established in the cases just cited.

[2, 3] We are of the opinion that this position is not correct. "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." Civ. Code, § 831. In the manner in which the case was tried it must be determined upon the theory that the allegations of the complaint, supplemented by the stipulation as to the time when the tunnel was completed, constitute the facts of the case. The complaint shows that the plaintiff's land was bounded by Hill street, and nothing appears in the record to show that the presumption that she owns to the center of the way is not correct. We must therefore presume that she was the owner of the title to the center of Hill street. "A public highway is a mere easement, and the owner of the soil over which it passes has * * * an action of trespass against any person who interferes with it for any other purpose but to use or repair it." Starr v. Camden, etc., Co., 24 N. J. Law, 592. "I hold it to be clear that the public have no other right but that of passing and repassing, and that the title to the land, and all the profits to be derived from it, consistently with, and subject to, the right of way, remain in the owner of the soil. The owner may maintain trespass for any injury to the soil, which is not incidental to the right of passage acquired by the people." Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121. The owner of the easement "cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use." North Fork W. Co. v. Edwards, 121 Cal. 666, 54 Pac. 70. The county authorities cannot bore wells along the public highway and take water therefrom without the consent of the owner of the land through which the highway runs. Wright v. Austin, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97. These principles are thoroughly established by the authorities. Gurnsey v. Northern Cal. P. Co., 160 Cal. 705, 117 Pac. 906, 36 L. R. A. (N. S.) 185; Pol. Code, § 2631; Dill. on Mun. Corp. § 1076; Carl v. Sheboygan, etc., Co., 46 Wis. 628, 1 N. W. 295; Bingham v. Doane, 9 Ohio, 168.

[4-6] For the purposes of this action we must assume that the city of Los Angeles was acting in pursuance of its legal rights and powers in causing the tunnel to be constructed under the surface of Hill street. The defendant city refers to another case decided by this court, wherein it was held that said city had no power to construct such a tunnel under a public street solely for the purposes of public travel under the provisions of the state improvement act known as the Vrooman Act. St. 1885, p. 147. We cannot import into the record in this case the facts shown in the record in that case. Nothing appears here to the effect that the tunnel referred to in the complaint was made for the purposes of public travel. There are provisions in the Vrooman Act and in other laws conferring upon the city power to construct tunnels for other purposes, and, as we cannot presume, in the absence of averment, that the city is acting unlawfully, it must be assumed for the purposes of this decision that the construction of the tunnel in a proper and careful manner was an act within the powers of the city.

It appears from the complaint that the tunnel embraced land in the part of the street which belonged to the plaintiff as owner of the abutting lot. The plaintiff was therefore the owner of the soil in that portion of the street, subject to the public easement to use the same for all purposes incident to its

character as a public street. This would include its use for the construction of any tunnel authorized to be made in public streets for municipal purposes. The city, so long as it acted within the powers given to it by law, was not a trespasser upon the soil. It was occupying the same by authority of law, but its rights were subject to the rights of the owner of the soil to this extent, that any act done by it not authorized by law or in a manner not sanctioned by the law, although done in the construction of the tunnel, would be a trespass upon the soil, and an action for resulting injury to the land would be an action for trespass upon real property, within the meaning of section 339. While the city had power, as we must assume, to construct the tunnel, it was under a legal obligation, in so doing, to use reasonable care to avoid injury to the plaintiff's land in which the tunnel was being constructed. Section 832 of the Civil Code provides that—

"Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other."

Within the meaning of this section the defendants for all purposes properly connected with the use of the land as a street were coterminous owners with the plaintiff as to the portion of her lot situated immediately adjoining the street. They were therefore under obligation in constructing the tunnel to use ordinary care and skill and take reasonable precautions to sustain the land of the plaintiff as a coterminous owner. While this is the rule with respect to coterminous owners under the Code, it is clear that a similar rule must apply with respect to the construction of the tunnel in that part of the street belonging to the plaintiff. As they occupy such mutual relations to each other with respect to the soil of that part, the defendants would be under the like obligation to use ordinary care and skill and take reasonable precautions to avoid injury to that part of the land of the plaintiffs in which they were constructing the tunnel. With respect to the parcel of the land situated in the street, therefore, if the defendant failed to use such care and skill and take such precautions, it would be acting beyond its authority, and would be, with respect to the injury caused by such neglect, a trespasser upon the real property of the plaintiff. The complaint alleges that the defendants did fail to take such precautions or to use such care, and that as a result thereof the earth above caved into the tunnel, and caused the settling and cracking of the surface of the earth above whereby she suffered the damage complained of. It states a cause of action for trespass upon the real property of the plaintiff; consequently the action was not barred by the two-year limitation, but comes within the provisions of section 338, fixing three years as the period of limitation. The court below erred in holding, upon the facts before it, that the defendant was entitled to judgment.

The case was not tried on the merits. It is obvious that upon a new trial other questions may arise which are not presented by the record here. The complaint shows that the cracks in the surface above the tunnel occurred within the street lines, and extended therefrom to the part of the lot outside of the street, injuring the ground both within and without the street, and that it also caused injuries to the foundation walls of the building in course of construction by the plaintiff. The evidence may develop conditions which we have not considered. The cracking of the surface within the street would be a direct actionable injury thereto and to the plaintiff's interest therein, if caused by unskillful construction of the tunnel. It would therefore be a trespass on the land of plaintiff, although the damage might be only nominal. If the damage claimed, or a part of it, arises from the injury to the foundation walls, or to the part of her lot outside the street lines, in consequence of the unskillful construction of the tunnel, the question will arise whether or not such injury constitutes the foundation of an action for trespass upon that real property, barred only after three years by section 339, or is merely a consequential injury of the character considered in Hicks v. Drew, supra, and the other cases cited, to which the two-year limitation of section 338 applies. As the complaint is now framed, the necessity for considering such distinction, or whether there is any, does not arise. We have not considered it and express no opinion regarding it.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

OLNEY, J. I concur in the result and the main opinion, with the single exception of its acceptance of the rule of Hicks v. Drew, 117 Cal. 305, 49 Pac. 189, as the settled law of this state. This rule, to which I strongly except, is that subdivision 2 of section 338, Code of Civil Procedure, when it provides a period of limitation of three years for "An action for trespass upon real property" refers only to what were strictly actions for trespass at the common law, and excludes actions for invasions of rights in real property for which at common law the remedy was not trespass, but trespass on the case. The construction so put upon the section has the

remarkable result that, although one of the primary purposes of our reformed procedure was to do away with the refined and frequently illusory distinctions of the common law between forms of action, although the fundamental theory of our law is that it is one of substantive rights for whose breach there is in all cases but one form of action, while the common law was essentially a law of remedies, and forms of action were all important, yet the distinctions of the common law between forms of action are imported into our law and still maintained. This is done, furthermore, not in connection with the form of the particular action, but in a purely incidental connection, that of the period of limitation. No reason whatever can be assigned why such distinctions should be preserved. They are an anachronism in our law, alien to its fundamental theory. They make the rights of the parties to turn, as in this case, not upon the merits, but upon refined and subtle distinctions, whose perpetuation makes the rights of the parties in many cases, as here, difficult of ascertainment without any necessity for such difficulty. I believe that upon this point Hicks v. Drew should be overruled, and the Code section construed to mean that by trespass is meant any wrong to or invasion of rights in real property. Such is the usual meaning of the word "trespass," and such the meaning which has been given to it when used in similar statutes elsewhere. Cahn v. Bonnett, 62 Tex. 674; Bear v. Marx, 63 Tex. 298; Kelly v. Moore, 51 Ala. 364. A reading, also, of this particular provision in connection with the other Code provisions concerning the period of limitations indicates that this was the sense in which the word was used.

I would not take the view that Hicks v. Drew should be overruled if its overruling would have the effect of cutting off any existing right of action. But the only effect of overruling it would be to extend, not to limit, the time within which certain actions may be brought. This being the case, I think it should be overruled in the interest of the administration of justice by as plain and simple rules as possible.

182 Cal. 585

SOUTHERN PAC. R. CO. v. OWENS et al.

(L. A. 5316.)

(Supreme Court of California. April 1, 1920.)

Deeds ⇐166—Right to forfeit conveyance for violation of liquor restriction held not waived.

The right of grantor to enforce a forfeiture reserved in a deed if intoxicating liquors were sold on the premises is not waived by grantor's consent that the town in which the premises were situated might issue liquor licenses, so that evidence of such consent was immaterial and properly excluded in an action to enforce the forfeiture.

Department 1.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against Sallie Owens and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Rowen Irwin, of Bakersfield, and H. A. Ingalls, of Waco, for appellants.

Frank McGowan, Frank Thunen, and Wm. M. Singer, all of San Francisco, for respondent.

LAWLOR, J. This is an appeal by the defendants from a judgment for the plaintiff in an action to declare a forfeiture of the defendants' interest in certain real property. Findings were waived, and there is no dispute as to the facts.

On February 1, 1910, the plaintiff corporation entered into an agreement with defendant Sallie Owens for the sale to her of lot 10 in block 4 in the town of Moron, Kern county. The price agreed to be paid for the lot was $400, and the purchaser paid down one-third of the purchase price; the remainder was paid in two deferred payments. This contract contained a clause as follows:

"Provided, however, that this agreement is on and subject to condition that as a part of the consideration hereof, no wines, beers, or other spirituous, vinous, malt or alcoholic liquors or beverages of any description shall ever be sold or kept for sale or given away upon said premises upon penalty of forfeiture of all right, title and interest in and to said premises and the immediate reversion thereof and the revesting of the title thereto in said railroad company, its successors and assigns. * * *"

And the contract further provided that:

"All of the said foregoing exceptions, reservations, conditions, and limitations shall be written into the deed of said land, herein provided for, and shall run with the land, and all holdings by, through, or under purchaser are subject thereto."

Subsequent to the execution of said contract, defendant Owens sold and assigned her interest therein to defendant A. I. Scott, who expended about $2,500 in the fitting up of a saloon upon the premises, the purchase of stock, and the payment of rents and of a license fee to the city of Taft. In February, 1911, Scott opened up a retail liquor business on the place, and has been conducting it ever since. On September 20, 1911, plaintiff commenced this action against defendants to declare a forfeiture of the premises under and by virtue of the antiliquor clause above quoted. The action proceeded to trial, and

the court adjudged that the defendants, by reason of the violation of the said condition in the contract, had lost and forfeited all right, title, and interest in and to the premises, and decreed that—

"The plaintiff is the owner in fee and entitled to the immediate possession of lot 10 in block 4 in the town of Moron (now Taft). * * *"

Appellants' contention is that the saloon was opened and conducted with the consent of plaintiff, and there was a waiver of the condition in the contract of sale by B. A. McAllister, "land commissioner, Southern Pacific Railroad Company." In support of this contention appellants attempted to prove by one Harry Hopkins, a trustee of the city of Taft, that, at a conference held in the city of San Francisco prior to the breach of the condition, McAllister orally consented to the issuance of liquor licenses in Taft to conduct saloons. The following question was put to this witness:

"State the conversation that was had between you and Mr. McAllister with regard to the issuing of liquor licenses; that is, the city of Taft issuing liquor licenses at that time."

The objection was interposed that the question was irrelevant, incompetent, and immaterial, and that "Mr. McAllister had no authority * * * to in any way bind the plaintiff in this action by any such declaration or conversation." The objection was sustained, and it is upon this ruling that the appellants rely for a reversal of the judgment.

The testimony sought would not tend to prove that McAllister, acting for the plaintiff, waived the breach of the condition in the contract set forth in defendants' answer or condoned the forfeiture as was alleged therein, although appellants' argument seems to assume that such would be the effect. We think that the testimony ws properly excluded. The question put to the witness was not answered, but appellants' counsel made the following statement as to what he intended to prove:

"I offer to show by this witness here that the licenses were issued by and with the consent of the plaintiff, acting through its land commissioner, and who * * * executed the very contract upon which it is now suing; that they [the plaintiff] consented to the issuing of liquor licenses on behalf of the city of Taft; that the same were issued in pursuance of their consent and with their knowledge."

The issuance of liquor licenses in the city of Taft, based upon such an understanding, could not affect the plaintiffs' right to claim a forfeiture in the event of a breach of the conditions contained in the contract of sale. Even if McAllister acquiesced in the issuance of saloon licenses in Taft, this would not constitute a consent to the defendants' opening a saloon on the particular lot involved here. Adopting this view, it is unnecessary to discuss whether plaintiff would have been estopped to insist upon a forfeiture if McAllister—who, it appears, had acted as "land commissioner, Southern Pacific Railroad Company," one year before, when the contract was executed—had in fact informed the defendants that they might open a saloon on the premises and the defendants had acted in reliance thereon.

Judgment affirmed.

We concur: OLNEY, J.; SHAW, J.

46 Cal. App. 206

MYERS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 3289.)

(District Court of Appeal, Second District, Division 2. California. Feb. 19, 1920.)

1. Constitutional law ⊂⊃83(3)—Order committing debtor unable to satisfy judgment held imprisonment for debt.

Where judgment debtor on supplementary proceedings denied that he had money or other property out of which he could pay the judgment, and testified that bonds owned by his wife were held as collateral security by a bank, and where such evidence was the only evidence taken on the supplementary proceedings, the court was without jurisdiction to order that defendant satisfy judgment, and to be confined in the county jail until he complies with such order, under the state and federal Constitutions prohibiting the imprisonment of any person for a debt in a civil action; there being no evidence to support any finding upon which to predicate an order for contempt.

2. Execution ⊂⊃418 — Order of commitment held defective for failure to state facts showing contempt.

Order committing judgment debtor to custody of sheriff until he shall have complied with order requiring him to satisfy judgment, without stating that judgment debtor could pay but had refused to comply with court's order, *held* defective under Code Civ. Proc. § 1209, subd. 5, and section 1219, in failing to show willful disobedience of court's order.

3. Contempt ⊂⊃64—Requirements as to warrant of commitment stated.

Under Code Civ. Proc. § 1209, subd. 5, and section 1219, a warrant of commitment must show that the thing ordered to be done is within the power of the person committed, and that such person has disobeyed the court's lawful order.

4. Contempt ⊂⊃40—Charge, finding, and judgment in contempt proceeding to be construed in favor of defendant.

A proceeding to punish a defendant for contempt is in its nature a criminal proceeding,

and the charge and finding thereon and the judgment of the court are to be strictly construed in favor of the defendant.

Application for writ of review by B. Myers, also known as Boris Myers, against the Superior Court of the State of California in and for the County of Los Angeles, and the Honorable Grant Jackson, Judge thereof, to review an order of commitment. Writ granted.

Willedd Andrews, of Los Angeles, for petitioner.

Frank S. Hutton and Schweitzer & Hutton, all of Los Angeles, for respondent.

THOMAS, J. This is an application for a writ of review. It is alleged in the petition:

That on the 27th day of December, 1918, one A. L. Gore recovered judgment in the superior court of Los Angeles county, in a civil action on a certain promissory note, against petitioner herein. That said judgment is legal and valid. That petitioner has not appealed therefrom or made any motion to set the same aside, and that it is in full force and effect. That on April 14, 1919, pursuant to an order for his appearance in a supplementary proceeding in said case, before Hon. Grant Jackson, judge, petitioner appeared and testified in behalf of the plaintiff in that action. That said proceeding was continued from said day to November 18, 1919, when he again testified on behalf of said plaintiff—transcript of which latter testimony is set out in full in the petition—and that thereafter the court made the following order:

"This supplemental proceeding came on regularly to be heard the 18th day of November, 1919, and thereafter regularly continued from time to time until February 5, 1920, Messrs. Schweitzer & Hutton and H. L. Widman, Esq., appearing as counsel for plaintiff, and Willedd Andrews, Esq., as counsel for defendant, and after full and complete examination of said defendant as to any property or money in his hands or control which said defendant refuses to apply to the satisfaction of said judgment, the court finds,

"That said defendant now has in his possession and under his control, $15,000.00 in cash and securities in the form of Canadian war bonds and sufficient to satisfy said judgment, and has sufficient property out of which he is able to pay the judgment herein.

"Now therefore on motion of said plaintiff

"It is ordered that said defendant forthwith pay to the clerk of this court so much of the money in his possession as aforesaid as necessary to satisfy said judgment, and

"It is further ordered that until said defendant so apply said money to the satisfaction of said judgment, that he be committed to the custody of the sheriff of Los Angeles county, California, and that he be confined in the county jail until such time as he complies with the order of this court.

"Dated: February 6, 1920.

"[Signed] Grant Jackson, Judge."

That said superior court has exceeded its authority and had no jurisdiction to make said order. That petitioner has no appeal from said order, and has no plain, speedy, or adequate remedy other than by writ of review. That he is beneficially interested in this proceeding, and that pending another proceeding in this court he was ordered released from the custody of the sheriff of Los Angeles county upon his depositing the sum of $1,000 with the clerk of court as bail. Following this is a prayer for the writ that the said order of commitment might be reviewed by this court, and thereupon that said order might be adjudged void and of no effect.

[1] The only evidence taken on the supplementary proceedings was the testimony of petitioner herein, which testimony was either true or false. If true, then, after having read the entire record, the evidence shows that petitioner had no money or other property belonging to him with or out of which he could pay the judgment against him. If false, then there is absolutely no evidence before the court. In either case, the court was without jurisdiction to make the order in question.

There is nothing in the record showing that defendant was the owner, possessor, or had under his control any cash, except the sum of $1.67, which the trial judge himself found in a purse that petitioner had in his pocket at the time of the supplementary proceedings. The Canadian war bonds referred to in the order of commitment were, according to the record, purchased with the $15,000 referred to in said order, and the evidence shows conclusively that they are on deposit as collateral security with the Home Savings Bank of Los Angeles, Cal., placed therein by petitioner's wife, who according to the testimony, was the owner thereof; she having purchased certain real estate with money borrowed from said bank, and to secure the payment of which said bonds were so held. The evidence further conclusively shows that petitioner was unable to procure the bonds in question, for reasons which must now be obvious. This being true, the order of commitment was made without authority of law. To permit the imprisonment here imposed, under the facts disclosed by the record before us, would be to sanction a violation of the state and federal Constitutions prohibiting the imprisonment of any person for a debt in a civil action (Knutte v. Superior Court, 134 Cal. 660, 66 Pac. 875; In re Cowden, 139 Cal. 244, 73 Pac. 156); and this is particularly true when it appears that the petitioner has been ordered by the court to do something which it is conclusively shown to be out of his power to do (Ex parte Cohen, 6 Cal. 319; Ex parte Rowe, 7 Cal. 176; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167; Ex parte Overend, 122 Cal. 201, 54 Pac. 740; In re Cowden, supra; In re Garner, 177 Pac. 162; Egilbert v. Superior Court, 6 Cal. App. 190,

91 Pac. 748; People v. Forester, 29 Cal. App. 460, 155 Pac. 1022).

[2-4] Even although it be conceded that the evidence disclosed facts which would authorize the making of such an order, still it will be seen from the order itself that it is fatally defective, in that it fails to find as a fact that petitioner, having property from which the judgment could be paid, had refused to comply therewith by applying such property, or any portion thereof, to the payment of said judgment. Section 1219 of the Code of Civil Procedure provides:

"When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he has performed it, and in that case the act must be specified in the warrant of commitment."

Section 1209 enumerates the various acts and omissions in respect to courts of justice and proceedings therein that are contempts of the court's authority, providing, in subdivision 5, that "disobedience of any lawful judgment, order, or process of the court" is such contempt. These two Code provisions therefore, call for two facts which must appear in the "warrant of commitment": (1) That the thing ordered to be done must be within the power of the person so ordered to perform; and (2) that such person, although he has it within his power so to do, has disobeyed the court's lawful order. The order made does not measure up to these requirements. "The statute says the facts showing the contempt must appear upon the face of the order." Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372. "A proceeding to punish a defendant for contempt is in its nature a criminal proceeding, and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused." Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580. We have no hesitancy in saying that from the record before us it conclusively appears that petitioner was ordered to appear in supplementary proceedings; that he did appear; that he testified; that he told the court of his doings, etc.; that the money and bonds referred to were not his, but were the property of his wife; that he was ordered to bring said bonds into court; that he did not do so, but showed that the same were held by the bank referred to as collateral, and that said bank would not give them up; and that for this reason it was physically impossible for him to comply with the court's order. There is no evidence in the record, therefore, to support any finding upon which to predicate an order for contempt.

It therefore results inevitably from these considerations that the record discloses a case where the court had no power to proceed and punish the petitioner as for a contempt, and its judgment accordingly must be annulled.

It is therefore ordered that the writ issue.

We concur: FINLAYSON, P. J.; SLOANE, J.

46 Cal. App. 256

SADICOFF v. JACKSON. (Civ. 2720.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1920. Hearing Denied by Supreme Court April 15, 1920.)

Trial ⊂=395(8)—Signing of findings within five days after service does not affect judgment.

Code Civ. Proc. § 634, providing that a copy of findings prepared by a party by the court's direction shall be served on all the parties at least five days before the findings are signed, is merely directory, and the fact that findings were signed less than five days after they were served on defendant did not impair the validity of the judgment.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Harry G. Sadicoff, a minor, by H. C. Morton, his guardian ad litem, against C. E. Jackson. From a judgment for plaintiff, defendant appeals. Affirmed.

H. L. Sacks, of San Francisco, for appellant.

Morton & Thompson, Harold C. Morton, and Fred Horowitz, all of Los Angeles, for respondent.

CONREY, P. J. Defendant appeals from a judgment for $389.02, damages for wrongful conversion of personal property of the plaintiff. We have before us the judgment roll, without any bill of exceptions.

No attempt is made by appellant to present any point on the merits of the case. He merely suggests that the findings of fact were served on his attorney on February 20, 1918, and were signed and filed on the 25th of that month, which he says was one day before expiration of the period of time prescribed by section 634, Code of Civil Procedure, and therefore claims that the judgment is "void."

The cited Code section is merely directory, and even if it appeared by the record (in fact it does not so appear) that the findings had been prepared by a party under an order directing him so to do, and findings were signed less than five days after proposed findings were served on defendant the validity of the judgment would not be impaired thereby. Amundson v. Shafer, 36 Cal. App. 398, 172 Pac. 173.

The point presented by appellant is truly mathematical, since it has no dimensions. It

is plain that the appeal has been taken for purposes of delay. Therefore it is ordered that the judgment be affirmed, and that the plaintiff recover from defendant, besides costs, the additional sum of $50 damages.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 239

TRAVIS GLASS CO. v. ROBBINS.
(Civ. 2754.)

(District Court of Appeal, Second District, Division 1, California. Feb. 20, 1920.)

1. Sales ⊜273(3)—Seller of milk bottles held not to have warranted bottles to withstand special method of sterilization.

Where milk company sterilized bottles by special method with commercial soda, seller of bottles, having delivered bottles corresponding in shape and finish with the sample bottle, was not liable for breach of warranty under Civ. Code, § 1770, because such sterilization spotted the bottles, where seller had no knowledge of the method by which buyer sterilized its bottles; the use of the word "certified" as part of the milk company's name being insufficient to charge seller with knowledge thereof.

2. Trial ⊜404(1)—Finding as to goods sold being without value construed.

In seller's action for purchase price of bottles sold to milk company defended on ground that bottles being spotted by special method of sterilization were worthless to buyer and that seller by reason thereof had breached warranty of suitability, finding that the bottles were worthless for use in defendant's business, "and are of no value whatsoever," *held* not a determination that bottles were worthless generally for the purpose of containing milk; such finding having reference merely to milk company's method of sterilization.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Travis Glass Company against Edward F. Robbins, doing business under the fictitious firm name of Arden Dairy, Certified. Judgment for plaintiff, and defendant appeals. Affirmed.

James E. Kelby, of Los Angeles, for appellant.

J. W. Falkner, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued to recover the purchase price of a certain lot of glass bottles. Judgment was in its favor, and the defendant appeals from the judgment and also from an order made denying his motion for a different judgment upon the findings of fact.

Plaintiff at the time material to this controversy was engaged in the manufacturing of glass articles in the state of West Virginia, and was represented in Los Angeles by a sales agent. Defendant was engaged in the business of conducting a dairy, which included the delivery of milk to customers in glass bottles. In May, 1916, defendant placed an order with the local agent of the plaintiff for a large quantity of bottles, aggregating in price the sum of $1,021.48. The contract for the bottles was in form a written order, specifying the quantities and sizes of the bottles desired, and this order was signed by plaintiff's agent, and also by the agent of the defendant. Upon the face of the order appeared the statement: "Sample bottles showing exact finish wanted is being sent by express." The bottles were manufactured and shipped to defendant, were received by him, but he found them unsuited to his use, and attempted to rescind the contract and demanded back the amount of freight charges which he had paid. In the answer filed, as one of the defenses to the action, defendant alleged in substance the following facts: That he was, at the time the order for bottles was given, engaged in selling and delivering "certified" milk; that said milk was largely supplied for the use of invalids and children; that by reason of its special use the milk was required to be absolutely pure and delivered in clean and sanitary bottles; that in the business in which defendant was specially engaged the usual and ordinary method of sterilizing bottles was to place them in a heated solution of commercial washing soda; that when defendant attempted to use the bottles received from the plaintiff and sterilize them in the usual manner "spots and patches" appeared over the inner surface, and "to such an extent that the interior surface presented in such spots a frosted appearance; that such frosted appearance could only be removed by scraping, and that when removed, left the surface of the bottle in an etched and roughened condition, which could not be cleansed thoroughly or properly or at all; that such frosted appearance developed immediately upon said bottles being put into use"; that a chemical examination showed that the frosting so appearing consisted of "silica, alumina, and lime, and indicated a chemical decomposition or breaking down of the constituents of the glass." There were the further allegations that in defendant's business it was only possible to use smooth, glazed bottles which might be thoroughly cleansed and sterilized, and that the condition which developed on the bottles in question gave the appearance that such bottles were not clean, and that for such reason they were wholly worthless, "valueless, and unfit for use in defendant's business, and * * * of no value whatsoever." Defendant also alleged that the order was given for bottles for the particular purpose of being used as containers for certified milk,

"and that the same was well known to plaintiff and to plaintiff's said agent." There was also a cross-complaint filed, claiming damages by reason of loss suffered by defendant in this business because of the attempted use of the bottles.

The court made findings determining the facts generally to be as set out in the answer of the defendant as to the condition of the bottles after sterilization; found that "by reason of such condition of said bottles, and all of them, they were and are wholly worthless, valueless, and unfit for use in defendant's business, and are of no value whatsoever." The court affirmatively found, however, as follows:

"The said bottles were desired by the defendant for the particular purpose of being used as containers for certified milk, but that was not well known to plaintiff, although it may have been to plaintiff's soliciting agent. * * * The shipment of bottles corresponded in shape and finish with the sample bottle that had been forwarded to plaintiff, and that was all that defendant stated to plaintiff that the sample bottle was sent for."

It may be added that the written order designated the purchaser as "Arden Dairy, Certified."

[1] It is the contention of appellant in the main that the bottles were manufactured under special order for a special purpose, to wit, to be used as containers for "certified" milk, and that the plaintiff under the circumstances should be held to warrant that the glass in the bottles was so constituted as to be able to withstand the chemical used in the sterilization process. It is claimed that by the use of the word "certified" the plaintiff was charged with knowledge of the fact that the bottles required a special method of sterilization such as was employed by the defendant. The appeal is presented on the judgment roll; hence we have not the evidence before us. While the trial court found that the use which defendant desired to make of the bottles involved the use of commercial soda as a cleansing agent, it does find that the particular purpose was not "well known to plaintiff, although it may have been to plaintiff's soliciting agent." This finding negatives knowledge on the part of the plaintiff of the fact adverted to. There is nothing in the findings to show that by the mere use of the word "certified" it was indicated to the manufacturer of the bottles that it would be necessary in sterilizing the containers to use a caustic chemical which might have a deteriorating effect upon the glass. The contract stated that the sample bottle showed the "finish wanted," and the court found that the bottles delivered corresponded "in shape and finish with the sample bottle." Section 1770 of the Civil Code does provide that—

"One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

Under the findings of the court it cannot be said either that the manufacturer knew that a special method of sterilization was to be used, or that the bottles were not generally suitable for the purpose of the dairy business.

[2] Aside from the proposition discussed, it is argued that a failure of consideration was shown under the finding made by the trial judge when he determined that by reason of the condition of the bottles they were worthless for use in defendant's business, "and are of no value whatsoever." It is urged that this finding had the effect of deciding that, irrespective of the special use to which defendant desired to put the bottles, they were valueless—in other words, valueless generally for the purpose of containing milk. We do not so construe the finding. The finding followed the allegations of the answer, the whole text of which plainly indicates that it was the purpose to allege a special contract for the manufacture of bottles for a special purpose, and that the bottles as manufactured did not suit the purpose intended. The last phrase, that the bottles were of no value whatsoever, should, we think, be construed with what immediately precedes it, and be qualified by the language there used.

The judgment, in our opinion, upon the record presented, should be sustained.

The judgment and the order denying the motion for a different judgment upon the findings of fact are affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 246

HIRAIDE v. WEYL-ZUCKERMAN & CO.

(Civ. 2728.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1920.)

1. Trial ⟸400(1)—Court cannot change findings of fact after judgment.

After judgment the court cannot by his amended judgment in order to reduce recovery substitute a new theory of recovery, thus undertaking to change the findings of fact.

2. Trial ⟸400(1)—Finding cannot be corrected after judgment without new trial.

An erroneous finding cannot be corrected after judgment except by granting new trial.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by S. Hiraide against Weyl-Zuckerman & Co. From judgment for plaintiff, defendant appeals. Reversed.

Shelton & Levy, of San Francisco, and Sidney J. Parsons, of Los Angeles, for appellant.

L. B. Stanton, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment rendered against it for balance of the purchase price owing to the plaintiff on a contract for potatoes sold and delivered.

The following facts were found by the court, all of which were established by the evidence: On June 6, 1917, defendant agreed to buy from plaintiff two carloads of potatoes of 270 sacks each, to be delivered f. o. b. cars at Anaheim, Cal., at the price of 3 cents per pound. The first carload was delivered and paid for. On the 16th day of June the plaintiff tendered for delivery a second carload of potatoes weighing 30,975 pounds. Defendant inspected the potatoes and found that some of them were sunburned. Thereupon, as a condition of acceptance of those potatoes, the parties entered into a written modification of their contract in the following terms, signed by the plaintiff:

"I hereby accept one-half payment for 270 sacks potatoes 30925 lbs. at $3.00 cwt. $464.63 and agree to stand behind the shipment and get the balance as soon as returns come."

Thereupon, defendant paid to plaintiff said sum of $464.63 on account of said carload of potatoes and thereafter shipped them and caused them to be sold at El Paso, Tex. At that place it was found that some of the potatoes had spoiled and were unfit for sale, and the sale was of the remainder of the lot.

Responding to an allegation of the answer that said carload of potatoes was accepted by the defendant and delivered by the plaintiff upon consignment, the court found that said allegation that they were on consignment was not true. Nevertheless, the court found that by said modification of the contract the plaintiff agreed that defendant should sell or cause to be sold the said 270 sacks of potatoes and be entitled to deduct from the proceeds the value of any potatoes which should be found to be spoiled upon such sale and delivery and pay the balance of the proceeds, less said sum of $464.63, to the plaintiff. The court further found that there is due, owing, and unpaid from defendant to plaintiff for said carload of potatoes the sum of $271.55, with interest at 7 per cent. from June 16, 1917. Judgment was entered accordingly on February 28, 1918, for said principal and interest, making at that time a total sum of $283.06.

The defendant moved for a new trial upon which the court announced its decision that the motion be granted, unless the plaintiff consent to a reduction of the judgment from the sum of $283.06 to the sum of $225.42, with interest from July 26, 1917. The plaintiff filed such written consent, and thereupon the court ordered that the amount of the judgment be reduced to the sum of $225.42, with interest then amounting to $12.27, making a total of $237.69, and the motion for a new trial was denied.

Appellant contends that it was obligated to account for the actual proceeds of the produce after credit for all its expenses in disposing of the unspoiled potatoes, and that the net proceeds were only $471.85, so that the balance due plaintiff was only the sum of $7.22, which amount was tendered by the defendant.

It was shown by uncontradicted evidence that the defendant paid out for freight $232.98, for weighing $4, for drayage $1.50, for storage $4, for sorting potatoes at El Paso $22.75, and that the loss in spoiled potatoes was 7,013 pounds, which, at $3.20 per hundredweight, would amount to $224.40. These sums, together with said sum of $464.63, amount to $954.26. The defendant, in its account of sales as rendered to the plaintiff, arrived at the balance of $7.22 by deducting an aggregate sum of $953.36, from the sum of $960.58, which it charged to itself as for 30,018 pounds of potatoes (being 30,925 pounds less "loss by evaporation") at $3.20 per hundredweight. It will be seen from the findings that the court formally rejected the theory of a delivery of the potatoes to the defendant on consignment. In this we think the court was right. This being so, it should follow that the goods were sold and delivered to the defendant on the contract as modified, the same being treated as a contract of sale. But the court then proceeded to charge defendant with the gross proceeds at the rate received for the potatoes at El Paso, instead of the contract rate. This resulted in an excessive judgment, partly right in its announced theory, and wrong in partly basing its computation upon the wrong theory. On the facts as shown by the evidence, the plaintiff was entitled to receive payment for 30,925 pounds of potatoes, less 7,013 pounds of spoiled potatoes, and less the further sum expended by defendant for sorting potatoes at El Paso; this process being required by the fact that a part of the potatoes was spoiled. The actual price of 23,912 pounds at 3 cents per pound is $717.36. Deducting the sum of $22.75 for sorting and the $464.63 paid on account left a balance due to plaintiff in the sum of $229.98, the sum which, under the evidence, the court should have found to be due and unpaid. On this state of the record, and excluding from consideration the proceedings subsequent to the original entry of judgment, defendant's motion for a new trial should have been granted.

[1, 2] Appellant contends that on this record the court was not authorized to escape the necessity of granting a new trial by re-

ducing the amount of the judgment; that this is not the ordinary case of remission of damages as a condition to the denial of a new trial. The argument is that the "amended" judgment substitutes a new theory and undertakes to change the findings of fact, a thing which, after judgment, the court cannot do. We think that this argument is sound, and conclusive in its application here. The "amended" judgment is in conflict with the court's finding that appellant was bound to pay "the balance of the proceeds" less the amount previously paid. That was an erroneous finding, but it cannot be corrected after judgment, except by granting a new trial.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 243

PATRICK v. TETZLAFF. (Civ. 2772.)

(District Court of Appeal, Second District, Division 1, California. Feb. 20, 1920.)

1. Evidence ⟸376(6) — Oath that original books regularly kept are correct not required.

Where the original character of the books of a tradesman or shopkeeper is proved, and it is shown that they have been regularly kept following the usual course of business of the person producing them, an affirmative oath on the part of the tradesman or shopkeeper keeping them that they are absolutely correct is not required to render them admissible in evidence and prima facie proof of the items disclosed thereby.

2. Evidence ⟸355(1), 383(7) — Cards on which workmen entered time and from which account was made up constituted prima facie proof.

Where under the system employed in a repair shop workmen entered the time they were employed on particular jobs on cards over their signatures, and the bookkeeper made up the total charge from such cards, the cards constituted original memoranda of the items of the account for the amount of labor performed and were prima facie proof thereof.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by L. L. Patrick against Theodore H. Tetzlaff, doing business as the White Garage Repair Shop. From a judgment for defendant, plaintiff appeals. Affirmed.

Paran F. Rice and D. Z. Gardner, both of Los Angeles, for appellant.

Wm. La Plante, of Los Angeles, for respondent.

JAMES, J. Appeal by plaintiff from a judgment entered in defendant's favor.

This action, as formulated by the complaint, was one of claim and delivery, wherein it was alleged that the defendant "wrongfully" took from the possession of the plaintiff a certain automobile and continued to retain possession of the same after demand made. The usual judgment in the alternative was asked for. The defendant filed what he designated as a cross-complaint, wherein it was set up that the automobile in question was delivered to him for the purpose of having many repairs made, and that he was entitled to payment of his repair bill, which amounted to the sum of $454, before relinquishing possession of the machine to the plaintiff. The trial judge determined the facts to be as alleged in the cross-complaint, and, it evidently being made to appear that plaintiff had taken possession of the machine as a right preliminary in his action of claim and delivery, it was ordered that the defendant recover possession, and that, in case delivery could not be had, "defendant and cross-complainant recover from plaintiff and cross-defendant the sum of $454." As to whether the filing of such a cross-complaint is appropriate to an action of replevin may be doubted, but, as that question is not at all involved in the argument upon this appeal, we leave it undecided.

[1, 2] The only matter urged as ground for reversal is that the trial judge erred in admitting in evidence certain shop cards showing the time devoted by several of the employés of the defendant to the work of repairing plaintiff's automobile. There were materials furnished, but the correctness of those items was admitted by the plaintiff. The bookkeeper of the defendant testified as to the system employed in the shop of defendant by which the time charge against any particular job was made up. This system consisted first in original memoranda made by the individual workmen wherein the items of the hours employed were set down over the signatures of the workmen, and these cards were turned in to the bookkeeper, who made up his total charges by aggregating the figures shown on all cards. The bookkeeper identified the several signatures attached to the cards as being those of the workmen employed in making the repairs in question. The bookkeeper further testified that under the system employed each job as it was entered upon was given a certain number and the cards which were turned in identified the work under the number selected. No witness testified in words that the charges were correct. It was agreed, however, that the total number of hours shown on the cards was the number charged; but the plaintiff objected to the evidence on the ground that no proper foundation was laid therefor, and that the same was incompetent and hearsay. It seems to be well established that the books of a tradesman or shopkeeper,

when it is shown that they have been regularly kept following the usual course of business of the person producing them, are admissible in evidence and are prima facie proof of the items disclosed thereby. Pertinent to this question, in Ruling Case Law, vol. 10, § 377, "Evidence," it is declared:

"Entries in books, in order to be admissible, ordinarily must have been made in the regular course of business and as a part of the party's system of keeping his accounts. The fact that the entries are made by clerks in the regular routine of their employment, and under the natural impulse of an employé to perform his duties accurately, is the safeguard of the accuracy of the entry. Indeed, under the systems of bookkeeping in modern business houses the mechanical precision with which numerous employés record various transactions, together with the absence of any personal motive to misrepresent the facts of the transaction, makes the modern book of accounts a very high form of evidence in respect of transactions that are the proper subject-matter for a book of account."

It would be to impose a most difficult rule upon the commercial world to hold that, notwithstanding ample proof as to the original character and regularity of the keeping of accounts, there must be in addition an affirmative oath on the part of the tradesman or shopkeeper producing them that they are absolutely correct. In large establishments employing a great multitude of clerks this proof would be in many cases beyond reach. We think that the cards offered in evidence constituted original memoranda of the items of the account for the amount of the labor performed, and that they were prima facie proof of the fact. White v. Whitney, 82 Cal. 166, 22 Pac. 1138; Carroll v. Storck, 57 Cal. 366. It would seem further that a transcription from the cards regularly made upon the books would also constitute an original entry within the meaning of section 1947, Code of Civil Procedure.

Considering the one question which is submitted for determination on this appeal by the plaintiff, we think that no error is shown.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 218

MERCHANTS' REALTY & INVESTMENT CO. v. KELSO. (Civ. 2732.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1920.)

Corporations ⊂=80(5), 90(1)—Misrepresentation that corporate stock is nonassessable is one of fact.

Representation that stock is nonassessable is assurance that the company has taken all steps necessary to waive right to levy statutory assessments, and is a representation of fact, which if false entitles the subscriber to rescind and is a complete defense to an action on the subscription.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Merchants' Realty & Investment Company, a corporation, against A. P. Kelso (sometimes known as Albert P. Kelso). From judgment for defendant, plaintiff appeals. Affirmed.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

CONREY, P. J. Action to recover on a subscription contract whereby the defendant agreed to take and pay for shares of stock of plaintiff corporation. The defendant claimed the right to rescind the contract upon the ground that the agents of the corporation in their negotiations with the defendant, which resulted in the contract, falsely and fraudulently represented to the defendant that the capital stock of the corporation was nonassessable; that the defendant signed the contract in reliance upon said statements which he believed to be true and without which he would not have entered into such contract. At the trial the court overruled plaintiff's objections to the defendant's offer of evidence proving that such representations were made by plaintiff's agents. The facts were proved as alleged by the defendant, and judgment was rendered in his favor, from which judgment the plaintiff appeals.

It is conceded by appellant that the rule of law by which the decision of the trial court on the question at issue must be tested was determined adversely to appellant in the case of Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544, which decision was rendered by this court and rehearing thereof denied by the Supreme Court. It was said therein that—

"A representation that the stock of a corporation is nonassessable should be held to be an assurance that the corporation has taken whatever steps that are necessary to effectually waive its right to levy the assessments provided for by the statute, and this representation would be one of fact and not of law. If untrue, it would be actionable and entitle the purchaser to rescind his contract."

See, also, Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 445, 170 Pac. 446, where the same principle was applied, although relating to a different class of facts. The cases relied upon by appellant, such as Haviland v. Southern California Edison Co., 172 Cal. 601, 608, 158 Pac. 328, Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St.

Rep. 126, and McCarter v. Zeller, 35 Cal. App. 593, 170 Pac. 636, were cases in which the alleged misrepresentations included mere opinions on questions of law and did not include or imply any representation of fact. We are satisfied that the ruling made in Browne v. San Gabriel River Rock Co., supra, should be adopted as the rule of decision in this case.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 793

MERCHANTS' REALTY & INVESTMENT CO. v. NEIGER. (Civ. 2763.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1920.)

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Merchants' Realty & Investment Company, a corporation, against E. A. Neiger. From judgment for defendant, plaintiff appeals. Affirmed.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for appellant.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for respondent.

PER CURIAM. Action to recover on a contract of subscription for stock of the plaintiff corporation. Judgment for the defendant, from which the plaintiff appeals.

The facts are closely like those shown by the record in Merchants' Realty & Investment Co. v. Kelso (Civil No. 2732) 189 Pac. 116, in which decision has been this day filed.

On the authority of that decision, the judgment in this case is affirmed.

46 Cal. App. 353

HAUN v. ROSENMAYER et al. (Civ. 3271.)

(District Court of Appeal, First District, Division Two, California. Feb. 26, 1920. Hearing Denied by Supreme Court April 20, 1920.)

1. Brokers ⊂=86(4)—Evidence held to warrant finding for broker as procuring cause of sale.

Evidence *held* to warrant finding that plaintiff's assignor, a broker, was the procuring cause of the sales made by defendant, and thus defendant was liable for commissions.

2. Appeal and error ⊂=1010(1)—Finding supported by evidence not disturbed.

Finding supported by evidence will not be disturbed on appeal.

3. Brokers ⊂=56(3)—Broker need not personally conduct negotiations.

Where broker was the procuring cause of a sale of cauliflower made by a California shipper to a Chicago buyer, the fact that the broker did not personally conduct the negotiations and was not present in California, it appearing after broker called the matter to the attention of the Chicago buyer its representatives negotiated with the shipper, will not deprive broker of rights to commission.

4. Partnership ⊂=64—Brokerage firm held not doing business in California so as to require registration.

Where a firm of Chicago brokers interested a Chicago buyer in defendant's cauliflower, and after the broker's negotiations for sale for a few carloads the buyer's representative made a contract in California for further shipments, the brokers, who were the procuring cause of the contract, cannot be deemed to have been doing business in California, and so failure to register the names of the members of the firm in accordance with Civ. Code, § 2466, although the firm name did not disclose the individual names, will not preclude recovery.

5. Appeal and error ⊂=1071(6)—Failure to find on issues not ground for reversal unless evidence was submitted.

Failure to find on some issues made by the answer, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue.

6. Brokers ⊂=85(7)—Correspondence between purchaser and broker admissible to show procuring cause.

In an action by assignee of brokers for compensation for selling numerous cars of cauliflower, correspondence between purchaser and the brokers is admissible to show that the brokers were the procuring cause.

7. Interest ⊂=19(1) — Not allowable before judgment in favor of broker for commissions.

In an action on the quantum meruit for broker's commissions for sales made, interest cannot be allowed before judgment.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Fred A. Haun against J. J. Rosenmayer and others. From a judgment against the named defendant alone, he appeals. Modified and affirmed.

Geo. H. Wilson and J. W. Hocker, both of Los Angeles, for appellant.

Hollzer & Greenberg, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant J. J. Rosenmayer from a judgment against him alone in the sum of $3,534.96 for commissions upon the sale of goods. The plaintiff is the assignee of Sutphen & Co., a copartnership engaged in business as brokers and manufacturers' agents in the city of Chicago. The defendant was engaged in Los Angeles in the business of buying cauliflower from the farmers and packing the same in

barrels and then selling in the Eastern markets in carload lots. The defendant paid commission to the plaintiff's assignor upon a sale of 5 carloads to Libby, McNeill & Libby, a Chicago buyer, and the dispute is over the commission upon an additional 80 cars sold to the same purchaser a day or so later. The appellant attacks the finding of the trial court to the effect that the plaintiff's assignor rendered services to the defendant as a broker in securing the purchaser for these additional 80 cars of cauliflower. This finding is based upon the correspondence between the parties, which is set out in the record. It can serve no useful purpose to quote that correspondence in full here, and in the interest of clarity we shall merely call attention to those portions which justify the conclusion of the trial court. On November 18, 1916, following up other correspondence, the brokers telegraphed the defendant as follows:

"Have buyer several cars cauliflower seven dollars shipping point. Will inspect, accept and pay for flower Los Angeles. Wire number of cars and where inspector now at San Francisco can meet you. If only one car let Budlong have it, terms sight draft. If more wire us."

To this defendant replied on November 19:

"Am able to load two cars a week at eight dollars per barrel subject to changes. Will ship Budlong one car also at eight dollars. Demand big, market higher. If inspector comes to Los Angeles will make arrangements."

On November 19, 1916, the brokers telegraphed to the defendant that they had—

"sold Libby McNeill five cars or more if available same price and terms. Their Mr. Eustace now California will see you early part week."

To this telegram defendant replied:

"Will ship Budlong car next week. Will be able to ship later all you can sell. Too early yet, don't guarantee future prices."

On November 21, 1916, Sutphen & Co. wrote the defendant:

"Referring to the Libby, McNeill & Libby cauliflower deal, they will buy five cars at $8 Los Angeles, if you can supply them or they will take one car this week at $8.00, then wire us price on balance. Their man will be with you today or tomorrow. In your telegram you say that you can give us all the cauliflower we can sell and that it is too early yet to quote price. * * *"

Libby, McNeill & Libby wired their agent at Los Angeles on November 21:

"Rosenmayer quotes thro Sutphen fortyfive gallons cauliflower in brine eight dollars Los Angeles, need badly, see Rosenmayer today, inspect cauliflower, buy all possible if good color. * * *"

On November 22, 1916, Mr. Beilfus, the Los Angeles agent of Libby, McNeill & Libby, in accordance with these instructions, called on the defendant and bought 5 cars at $8; on November 23 he bought 30 cars at $8.25; and on November 24 he bought 50 cars at $8.50. On November 23 Sutphen & Co. wrote to the defendant:

"Libby, McNeill & Libby have sent a man to see you. They will buy five cars, more if you have them at the same price. Both Budlong and Libby have agreed to have the cauliflower shipped at once."

On November 27, 1916, Sutphen & Co. wrote defendant again:

"We are pleased to learn that you are able to supply Libby, McNeill & Libby with 70 or 80 cars cauliflower. They have informed us over the phone of the terms and conditions as set forth in the attached sales ticket. Presume they have cleaned up everything you have outside of the order for Budlong. * * *"

The defendant paid the commission upon the first 5 cars only and refused to pay the commission on the 80 cars sold subsequently. The complaint was in two counts: First, upon an express contract and agreed commission of 5 per cent.; and, second, for the reasonable value of the services rendered.

[1-3] The contention of the appellant that this evidence does not show the plaintiff's assignor entitled to commissions upon the 80 cars of foodstuff is without merit. It is admitted that Sutphen & Co. negotiated the sale of the first 5 carloads to Libby, McNeill & Libby. It also appears that there was a prospect then of selling more goods to this same purchaser, and that Sutphen & Co. advised the defendant that the negotiations would be carried on by the representative of the purchaser, who was then in California. These negotiations were carried on and a sale consummated by said representative. It therefore appears that, while the details of the sale were arranged between the representative of the purchaser and the seller in Los Angeles, the transaction was made possible by the efforts of the brokers in Chicago in negotiating with the buyer, and the buyer's direction to its agent to arrange the details of the transaction with the seller was in accordance with its arrangement with the broker. It therefore appears that the findings of the trial court upon this question find abundant support in the evidence, and they cannot be disturbed by us. It is not necessary that a broker should personally conduct negotiations between his principal and the purchaser or that he should be present when the bargain is completed; it is sufficient that his efforts are the producing cause of the sale, and that through his agency the purchaser is brought into communication with the seller, although the parties then negotiate in person. Pierce v. Nichols, 50 Tex. Civ. App. 443, 110 S. W. 206, 208; Keys v. Johnson, 68 Pa. 42; Hill v. McCoy, 1 Cal. App. 159,

166, 81 Pac. 1015; Levy v. Wolf, 2 Cal. App. 491, 495, 84 Pac. 313; Justy v. Erro, 16 Cal. App. 519, 522, 117 Pac. 575.

[4, 5] Defendant also alleges as a defense to this action that plaintiff's assignor is a copartnership, doing business under a firm name and style which does not disclose the names of the several partners; that such a designation constitutes a fictitious name, and that the partnership failed to file a certificate with the county clerk of Los Angeles county showing the names in full and places of residence of all the members of the partnership, as required by section 2466, Civil Code, and that the transactions sued upon occurred in the county of Los Angeles; that therefore the plaintiff is barred from maintaining the action. The section of the Code referred to expressly applies to "every partnership transacting business in this state under a fictitious name." The trial court found, and the evidence clearly was to the effect, that the plaintiff's assignor did not transact business in this state. The testimony of the members of the firm of Sutphen & Co. was that that company never had an office in California, and that the company transacted business in Chicago for packers in California; they had no agents in the state of California, and their orders from people in Chicago were mailed to packers in California. The appellant complains that the court did not find expressly upon this special defense because it did not find whether or not Sutphen & Co. were doing business under a fictitious name. The trial court found that the services for which recovery is sought in this action were rendered outside of the state of California. The record contains no evidence that we could discover which would support a finding upon this issue in favor of the appellant. The only evidence in the record upon the subject is the evidence above referred to which is contrary to the contention of the appellant. It is said in People v. McCue, 150 Cal. 195, 200, 88 Pac. 899, 901:

"It is well settled that a failure to find upon some issue made by the answer, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue."

It is true that the business of closing the contract between the defendant and the purchaser was done at Los Angeles; but the business of securing the purchaser, which is the service for which the suit is brought, and the business in which Sutphen & Co. was engaged, was done in Chicago.

[6] Appellant objects to the introduction in evidence of certain correspondence between the purchaser and the broker, which correspondence clearly shows that the purchaser was secured by the broker. The objection to this evidence is that it was not binding upon the defendant. Similar objection is made to the introduction of a telegram by the purchaser to its agent, stating that the defendant had quoted prices to it through Sutphen & Co. It is urged that, as there is no evidence that the agent told defendant that he had been sent by Sutphen & Co., this evidence of that fact is inadmissible. The objections made in these connections are answered by the language of the case of Sussdorff v. Schmidt, 55 N. Y. 319, 323, where it is said that, if the broker was the producing cause of the sale, his right to compensation would not be affected by the circumstance that the defendants were ignorant of it at the time. This rule has also been stated by the appellate court of our state in the case of Justy v. Erro, 16 Cal. App. at page 522, 117 Pac. at page 576.

[7] The other errors urged by appellant we consider to be without merit, except the contention that the trial court erred in allowing interest upon the judgment from June 1, 1917. The judgment was rendered on July 23, 1918. A finding was made that the reasonable value of the services rendered by the plaintiff's assignor is $3,378.55. Judgment is given for this amount plus interest from June 1, 1917, upon the second count of the complaint, which is a count in quantum meruit. It has been expressly decided in the case of American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 768, 121 Pac. 709, that this is improper. The reasons therefor are set out in that opinion. In the present case the allegation regarding the reasonable value of the services was controverted as in the case of American-Hawaiian, etc., Co. v. Butler, supra, and the reasoning of that case applies here. The allowance of interest before judgment was therefore erroneous.

The judgment is modified so as to eliminate the interest from June 1, 1917, until date of judgment. When this amount is deducted the judgment will be for $3,378.55, the reasonable value of the services, together with interest thereon from date of judgment until paid at the rate of 7 per cent. per annum, together with the necessary costs and disbursements incurred in this action, amounting to the sum of $36.70. As so modified, the judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

46 Cal. App. 301

AUENER v. SUITER et al. (Civ. 2084.)

(District Court of Appeal, Third District, California. Feb. 24, 1920.)

1. Husband and wife ⟸262(2)—Burden on husband to show that lands conveyed to wife belonged to community; "presumption."

Under Civ. Code, § 164, declaring presumption that property conveyed to a married woman is her separate property, and Code Civ. Proc. §§ 1959, 1961, declaring that a "presumption" is a deduction which the law expressly directs to be made from particular facts, a husband asserting that property conveyed to his wife during marriage was community estate which she could not dispose of has the burden of proving that fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption.]

2. Husband and wife ⟸131(3)—Evidence held insufficient to show that property conveyed to wife was not her separate estate.

Where a husband after death of his wife attacked her conveyance of property which she acquired under deed direct to her, *held*, that the evidence was insufficient to rebut the presumption that the property was her separate estate.

3. Husband and wife ⟸131(3)—Presumption that property belongs to separate estate may outweigh positive testimony.

The presumption declared by Civ. Code, § 164, that property conveyed in writing to a married woman is her separate estate, while not conclusive, may outweigh the positive testimony of witnesses.

4. Appeal and error ⟸1010(1)—Finding supported by evidence not disturbed.

Finding of trial court supported by evidence will not be disturbed.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by August Auener against Martha Jane Suiter and others. From judgment for defendants, plaintiff appeals. Affirmed.

W. F. Palmer, of Los Angeles, for appellant.

Walter F. Dunn, of Monrovia, and John P. Dunn, of Los Angeles, for respondents.

ELLISON, Presiding Judge pro tem. The plaintiff brought this action to quiet title to certain lots in the town of Monrovia, Los Angeles. The complaint is in the usual form, merely alleging the plaintiff's ownership and that defendant, without right, claims an interest in the property. The answer consists of a denial of the allegations of the complaint and of a claim of ownership in the defendant. The findings of the court were to the effect that the plaintiff is not the owner of the property. Judgment was entered in favor of the defendant, from which the plaintiff appeals.

The evidence shows that the plaintiff was the husband and the defendant the mother of Osa W. Auener. Osa W. Auener died June 16, 1916. For some time prior to her death Osa W. Auener held the legal title to the lots in question; they having been deeded to her by Mrs. Marsh and her husband by a grant, bargain, and sale deed. Just prior to her death Osa W. Auener executed a grant, bargain, and sale deed of the lots to her mother, the defendant herein, and it is under this deed that she claims.

It is the plaintiff and appellant's position that, while the record title to the lots was in his wife, they were community property, having been purchased with money the community property of himself and wife. The finding in favor of the defendant is an implied finding that the lots, at the time of the transfer to the defendant, were the separate property of the deceased spouse.

[1] The only point raised on the appeal is that the holding of the court that the lots were the separate property of the deceased spouse is not sustained by the evidence.

Section 164 of the Civil Code provides:

"Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

"A presumption is a deduction which the law expressly directs to be made from particular facts," and unless controverted the finding must be according to the presumption. Code Civ. Proc. §§ 1959, 1961.

"By reason of the deeds the wife became presumptively the owner of the lands therein described as her separate property. It was therefore incumbent on plaintiffs to overthrow this presumption by sufficient and proper evidence. The burden was upon plaintiffs to show by sufficient evidence that the lands so conveyed to the wife were community property. This evidence must have been sufficient to justify the court in finding as a fact that the lands were community property. * * *

"Here all presumptions are in favor of the conveyances to the wife. They are presumed to have been made for a consideration paid by the wife, or, if we concede that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property. The law will not allow idle presumptions to be indulged in as against a deed delivered and recorded. Facts must be proved from which it is clearly made to appear that the property in such case is community property, or the deed will be given effect according to its terms."

Alferitz v. Arrivillaga, 143 Cal. 648, 649, 77 Pac. 657, 658.

Tested by the principles extracted from the above decision, we are of the opinion that the finding of the court to the effect that the lots in question were the separate property of the deceased spouse cannot be disturbed.

[2] Briefly stated, it appears that the

plaintiff and Osa, his wife, were married October 6, 1905, in Indiana, and lived continuously as husband and wife until her death. When married, appellant was a millinery traveling salesman. He owned some lots and was earning $150 per month. His wife had neither money nor property. Appellant traded lots and some cash for a building and sold the same so as to have $2,000. That fall he became sick, was in the hospital six weeks, and ever since has been crippled and walks with great difficulty. He afterwards lived in different cities of Colorado, California, Washington, Oregon, and Nevada. The wife was employed at times as a milliner, and earned from $20 to $35 per week, and off this they lived.

In 1911 they had accumulated some $2,414.21; out of this he paid $1,700 on some Tulare county lands, and the contract to purchase them was taken in their joint names. The wife took some of the money left after making the payment on the Tulare land and opened a millinery store at Redlands. Out of the money she earned in the Redlands business she paid $122.50 interest and $500 principal on the Tulare lands. At the time she paid the $500 on the Tulare lands she told the grantor that all the money paid on it was hers and demanded a deed in her name alone. The deed was so executed. Appellant was then in the East and knew nothing about the deed being made to his wife until he returned in August or September, 1912. Subsequently, the Tulare lands were exchanged for the lots in dispute and the deed therefor made to her alone. Without going into more details of the life and business affairs of the parties, it is sufficient to say that from all the evidence in the case it must be held that the property in dispute was bought with community property and funds.

As to the naming of the wife alone in the deed to the lots in controversy, the appellant testified that he first became aware of the fact that only his wife's name appeared in the deed after it was executed and sent to Santa Barbara:

"I knew she wanted it in her name. Q. Did you have any conversation in reference to it? A. Well, just in a general way. Q. What was said by yourself and wife at that time? A. Well she always contended that in the condition I was in that I would pass away first; in other words, she told me if the property was in her name it would save some possible trouble and expense. This was before the deed was executed."

The appellant also testified he did not make a gift of this property to his wife.

We have, then, a case where the wife held a grant, bargain, and sale deed of the property executed to her as sole grantee. This is strong evidence in favor of the respondent's case and must prevail unless overcome by other evidence.

[3] "It is true that the presumption established by section 164 of the Civil Code is not conclusive, but may be disputed and overcome by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony." Volquards v. Myers, 23 Cal. App. 500, 138 Pac. 963.

The other evidence in the case showing the community source of the purchase price, the testimony of the plaintiff that he did not give the property to his wife, only raises a conflict of evidence upon the issue, and the force of it as tending to overcome the presumption was somewhat weakened by the appellant's testimony to the effect that before the deed was made he and his wife had talked it over and she wanted it in her name because she thought he would die first and such a deed would cause her less expense and trouble.

"The presumption declared in section 164, although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose." Pabst v. Shearer, 172 Cal. 239, 156 Pac. 466; Gilmour v. N. Pasadena Land, etc., Co., 178 Cal. 6, 171 Pac. 1066.

[4] Treating the presumption as evidence, we have a case wherein the trial court has made a finding upon conflicting evidence. It has found that the presumption has not been overcome. Its finding has evidence to support it. We see no legal cause to interfere with its conclusions.

The judgment is accordingly affirmed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 228

BISHOP v. DESCALZI et al. (Civ. 2544.)

(District Court of Appeal. Second District, Division 1, California. Feb. 20, 1920.)

1. Sales ⊂⊃181(12)—Evidence held to sustain finding that oranges met prescribed test.

In an action for breach by the buyer of a contract for the purchase of oranges of a prescribed government test, conflicting evidence *held* to justify finding that the fruit tendered by plaintiff conformed to the test.

2. Sales ⊂⊃179(4)—Acceptance of fruit damaged by frost after examination, waives that defense.

Where the buyer of oranges while they were on the trees was notified by the seller that they had been damaged by frost, but, after examination by his agent, directed the seller to deliver the fruit, he could not defend an action for the purchase price on the ground of damage by the frost.

3. Sales ⊂⊃384(1)—Buyer's refusal to accept fruit makes him liable for that thereafter destroyed before resale.

A buyer who wrongfully refused to receive the oranges he contracted to purchase is liable for the price of oranges destroyed thereafter by frost before the owner could resell them, regardless of whether the title to the oranges had passed or not.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by D. O. Bishop against John B. Descalzi and others. Judgment for plaintiff, and defendants appeal. Affirmed.

D. E. Perkins, of Visalia, for appellants.

Middlecoff & Feemster, of Visalia, for respondent.

CONREY, P. J. Action by plaintiff to recover the sum of $590, balance due on a contract for oranges sold and delivered; also to recover the further sum of $1,100 damages for breach of the same contract by refusal of defendants to receive a part of the oranges sold and to pay for same. Judgment in favor of plaintiff on both demands, from which judgment defendants appeal.

The terms of the contract were as follows:

"Lindsay, California, October 21, 1916.

"This is to certify that the Descalzi Fruit Company, of Pittsburg, have bought of D. O. Bishop his entire crop of Washington navel oranges at 2 cts. per lb. delivered at the packing house, said crop to be merchantable fruit, free from splits and to conform to the government test of 8-1. $500.00 to be advanced; balance payable as cars are loaded."

Appellants claim: (1) That the evidence is insufficient to sustain that portion of the findings which found the oranges in question to be "merchantable fruit, free from splits and to conform to the government test of 8 to 1"; (2) that the evidence is insufficient to sustain the last paragraph of finding X, which is as follows:

"That on or about the 27th day of November, 1916, the defendants, through their agent, inspected said plaintiff's crop of Washington navels mentioned in said contract of October 21, 1916, and accepted all the oranges in the lower 10 acres of said grove consisting of about 109,500 pounds as complying with said contract of October 21, 1916, and instructed plaintiff to pick and deliver the same to defendants at the packing house in Lindsay; that immediately thereafter plaintiff commenced to pick said crop on said lower 10 acres, and deliver it to the said defendants at said packing house in Lindsay, and continued to so pick and deliver until on or about the 4th day of December, 1916, by which time plaintiff had picked and delivered 54,500 pounds of said oranges, when said plaintiff was stopped and delayed in said picking and delivery by the acts of said defendants, and thereafter, on the 6th day of December, 1916, said defendants notified said plaintiff that defendants refused to accept any more of said crop of oranges or to pay for the same, and demanded of plaintiff that plaintiff return said $500 advanced to him; and that thereafter, on the morning of the 8th day of December, 1916, and before defendants had retracted said notice of refusal to accept said oranges, and before said plaintiff could, with reasonable diligence, have effected a resale thereof, said 55,000 pounds of said crop of oranges still remaining on the trees unpicked were destroyed by frost without any fault on the part of the plaintiff."

At the date of the contract the crop of oranges referred to in the contract was on the trees in a 20-acre orchard of the plaintiff. In the evidence the orchard is referred to in three sections respectively as the upper 10 acres, the south 5 acres, and the middle 5 acres. The oranges which were delivered and for which compensation is sought in the first cause of action in the complaint were taken from the lower 5 acres. The oranges which were not delivered and for which compensation is sought in the second cause of action were grown on the middle 5 acres. No recovery is sought on account of oranges grown on the upper 10 acres.

At the time when the contract was made the defendants paid to the plaintiff the sum of $500 as provided in the contract. Defendants' answer contains a counterclaim for said sum of $500.

On the 13th and 14th days of November a frost occurred in plaintiff's orange grove whereby the fruit in the lower part of the grove was damaged. Plaintiff gave information of that fact to Mr. A. E. Walkden, who represented the defendants in all of these transactions, and Mr. Walkden stated he would go out and look at the fruit. Plaintiff said to Walkden that if they did not want the fruit he would pay them back their deposit.

Within about three days after the date of the frost Mr. Walkden went through the orchard with the plaintiff and made some examination, but reached no conclusion. He came again on November 26th and made a more careful examination. Thereupon, according to plaintiff's testimony, Walkden stated to plaintiff that the upper 10 acres was not damaged at all, that the second 5 acres was very slightly damaged, and that the lower 5 acres was considerably damaged. Walkden stated that he would telegraph to the defendants, who were at Pittsburg, Pa., and would then report to the plaintiff.

By the government test of 8 to 1, as mentioned in the contract, it was intended that the juice of the oranges should contain soluble solids equal to or in excess of eight parts to every part of acid contained in the juice, the acidity of the juice to be calculated as citric acid without water of crystallization. On November 27th the plaintiff took sample oranges, in the manner described in his testimony, from the lower 5 acres and separately took samples from the middle 5 acres, and took them to the Hillside packing house to be tested. This was the packing house at which the oranges were to be delivered. It was admitted at the trial that those tests were made and that they resulted as follows: "One tested 8.1 to 1, and the other test shows 9 to 1." On November 28th the plaintiff had certain tests made of the oranges from the upper 10 acres, with results of 7 to 1 and of 7 and a fraction, but with no results coming up to the standard of 8 to 1. It should further be stated that in going through the grove Mr. Walkden cut a great many oranges for the purpose of ascertaining their condition with respect to the effect of frost. On the evening of November 28th, according to plaintiff's testimony, Mr. Walkden called plaintiff on the telephone and stated that he had got a message that they had accepted the fruit, and he wanted plaintiff to go to picking the next morning; that they did not want to pick the damaged fruit until the last, but wanted him to pick the upper fruit first. Plaintiff stated to him: "That fruit won't test up. What are you going to do about that?" Walkden replied: "Well, go to picking down below there, then."

Between November 29th and December 4th plaintiff picked and delivered at the packing house the quantity of oranges referred to in the first cause of action stated in his complaint. On the evening of December 3d Walkden called plaintiff on the telephone and stated that the manager of the packing house would not pack or ship that fruit for him because it was badly frozen. On December 4th plaintiff and Walkden met at the packing house. Walkden stated that he could not ship that fruit. Plaintiff inquired if he meant to pay him for it. Walkden stated he would not answer that question. Walkden did not at that time say anything about the fruit not testing 8 to 1. On December 6th the defendants at Pittsburg telegraphed to the plaintiff at Lindsay, Cal., as follows:

"We hereby demand immediate return of five hundred dollars advanced you account your failure deliver oranges as required."

That telegram was the only reply which plaintiff received to his question put to Walkden as above stated.

George Sparks, a witness for defendant, and who had been many years in the orange business, testified that he saw the fruit that was delivered by plaintiff at the packing house; that it was somewhat frozen and was not up to the 8 to 1 test. He further stated that fruit changes in regard to that test after being picked and brought to the warehouse; that is, it improves and the solid content increases; that all fruit is improved in its test from the time it is brought in until several days after. Mr. Walkden testified that he declined to receive the fruit on account of the test and damaged stock; that he understood that it did not test up to the 8 to 1 test; that when he told plaintiff to pick his fruit he asked him to pick off all sunburned and outside fruit and damaged fruit and throw it on the ground and not deliver it. On this last point plaintiff testified as follows:

"Q. Don't you remember, when he was there in the orchard on one occasion, before you commenced picking, that you and he were talking about the frozen fruit, and that he told you that when you picked the fruit you should not take the outside fruit or the sunburned fruit, but should pick the inside fruit only; that is, the fruit on the inside of the tree, which was not likely to be so badly frozen? A. No, sir. I will tell you, he did talk some about me culling out; that is, not taking the fruit that is outside, the most exposed fruit; we did talk about that; but I didn't agree not to take that; I wouldn't agree to not putting that fruit in. But I did take the fruit off and throw it on the ground. I hired two men. I put two men in there and had them pick off the outside fruit and throw it on the ground, and instructed the picker boss to tell them not to pick that fruit. I done that voluntarily, though, not that I had any understanding with him that I should not do it. Q. Didn't you have an understanding with him, and didn't he tell you that he wanted the frozen fruit culled out? A. No, sir; he never told me he wanted it, because the understanding was that they should take all the fruit there was. That was the understanding right there in the orchard; and if they didn't want it all I would pay them their money back. He said he didn't want their money back; they wanted the fruit. Q. Well, this fruit that you delivered there at the Hillside packing house was badly frozen, wasn't it? A. Yes, sir; it was damaged fruit. It was understood; and we both understood and agreed and admitted that it was damaged fruit, Mr. Walkden and I both."

There is other testimony stating that tests of the delivered fruit were made on or about December 11th, which came up to the standard of 8 to 1, and that, in the opinion of the witnesses, it was merchantable fruit.

On the 8th of December, 1916, there came a second freeze which damaged the remainder of the fruit on the lower 10 acres of plaintiff's grove so that its value was entirely lost. According to plaintiff's testimony, he could have delivered all of that fruit before the second freeze came on December 8th if his deliveries had not been interrupted by the circumstances above stated. He further testified that between the 6th day of December, when he received the telegraphic demand from the defendant company, and the 8th day of December, when the second freeze came, he could not have disposed of the remainder of the fruit that was on the lower 10 acres. The amount of this undelivered fruit, being the fruit involved in the second cause of action, is well established by the evidence. If the plaintiff is entitled to recover anything at all, it cannot seriously be contended that the amount of the judgment is excessive.

[1, 2] Notwithstanding some conflict in the evidence concerning some facts, it is plain from the testimony which we have outlined that there is in the record sufficient evidence to justify the finding that the fruit in question was merchantable, free from splits, and it conformed to the 8 to 1 test. Admitting that there was some damage by frost, the extent of that damage was not such that at the time of picking and delivery of the delivered fruit, and at the time when the remainder would have been delivered if the deliveries had not been interrupted by defendants, the oranges were not of merchantable quality. This fact was determined by the defendants themselves, by their authorized representative. Being satisfied on that point by his own investigations, his instructions to pick and deliver constituted an acceptance, subject to no condition except that the oranges should comply with the 8 to 1 test. And since, as upon sufficient evidence the court found, all of the fruit for which compensation is sought in this action did at that time conform to the required test, there remained no fact on which refusal to accept and pay for it can be justified.

[3] The question whether or not title to the fruit on the middle 5 acres had passed to the purchaser is immaterial, because the destruction of that fruit on the trees, by the second frost, was caused by the defendants, and was a loss due to their own acts by which the picking and delivery was delayed.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 261

PEOPLE v. THOURWALD. (Cr. 490.)

(District Court of Appeal, Third District, California. Feb. 23, 1920.)

1. Infants ⟸20—Evidence sustaining conviction for lewd act on female under 14.

Evidence *held* to sustain conviction of having committed a lewd and lascivious act on the body of a female child under the age of 14, in violation of Pen. Code, § 288.

2. Criminal law ⟸742(1)—Truth of testimony of prosecutrix for jury.

In prosecution for committing lewd and lascivious act on body of female under 14 in violation of Pen. Code, § 288, there being no inherent improbability in her recital on the stand, it was solely for jury to determine whether her testimony was truthful.

3. Infants ⟸20—Rape ⟸54(1)—Prosecutrix need not be corroborated.

Testimony of prosecutrix in a rape case is not required to be corroborated to justify conviction, nor is it in a prosecution for commission of lewd and lascivious act on body of female under 14.

4. Criminal law ⟸1153(2)—Competency of infant under 10 question for court.

When judge examines witness under age of 10 before permitting him or her to testify, and it appears witness can relate facts intelligently, and appears to understand obligation of oath or consequences of giving false testimony, decision of judge that he or she is competent to testify is conclusive on reviewing court, unless record clearly shows abuse of discretion.

5. Witnesses ⟸77—Competency of child under 10 must be investigated.

Under Code Civ. Proc. § 1880, subd. 2, it is not only proper, but necessary, that before permitting a child under 10 to testify such investigation should be made of question whether child is competent witness as will enable court to determine matter properly and justly.

6. Witnesses ⟸77—Showing of competency of 9 year old witness.

In prosecution for committing lewd and lascivious act on body of female under 14, examination of the 9 year old child by the court as to her competency as a witness, despite Code Civ. Proc. § 1880, subd. 2, *held* sufficient to justify decision she was competent.

7. Criminal law ⟸406(4)—Testimony of defendant on preliminary examination admissible to show admission of presence at scene of crime.

In prosecution for committing lewd and lascivious act on body of female under 14, testimony given by accused before committing magistrate on preliminary examination of charge *held* admissible to show admission by defendant, not of his guilt, but that he was present where crime was alleged to have been committed at time of commission.

8. Criminal law ⟸539(2)—Testimony of accused on preliminary examination admissible.

Where an accused under a felony charge voluntarily becomes a witness at preliminary

hearing under circumstances rendering it clear that his testimony is purely voluntary and free from restraint or undue influence, testimony may be given in evidence against him on his trial.

9. Criminal law ⊂406(5)—Statements of defendant to arresting officer as to presence at scene of crime, admissible.

In prosecution for lewd and lascivious act on body of female under 14, testimony of officer who arrested defendant, giving his extrajudicial statements as to what occurred between him and prosecutrix, *held* admissible to show defendant was where it was claimed acts were perpetrated, at time they were alleged to have taken place.

10. Infants ⊂20—Question as to reputation of defendant, accused of lewdness with infant, should have been confined to time prior to offense.

In prosecution for lewd and lascivious act on body of female under 14, question to female residents of town as to whether they knew defendant's general reputation for morality should specifically confine knowledge of witnesses to time prior to date of alleged offense.

11. Criminal law ⊂1036(1) — Failure to object to testimony on trial a waiver.

When defendant makes no objection on trial to any testimony offered against him, presumption is, if such testimony is legally improper and objectionable, that he waives any objection he might have interposed, and he cannot make it for the first time on appeal.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Charles Thourwald was convicted of having committed a lewd and lascivious act upon the body of a female child under fourteen, and from the judgment and an order denying new trial he appeals. Affirmed.

James D. Fairchild, of Yreka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. By an information filed by the district attorney in the superior court of the county of Siskiyou, defendant was charged with having committed a lewd and lascivious act upon and with the body of one Gladys Jackson, a female child of the age of 9 years. A jury found the defendant guilty of the crime charged, and he prosecutes this appeal from the judgment of conviction pronounced upon him.

The information is based upon section 288 of the Penal Code, which, in substance, provides that any person willfully committing any lewd or lascivious acts upon or with the body of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or such child, shall be guilty of a felony, for which the guilty party shall be imprisoned in the state prison for not less than one year.

[1, 2] The point first urged by the appellant for a reversal is that the evidence is wholly insufficient to have justified the verdict. The point is without merit, as the following synoptical statement of the facts, as developed by the evidence, will show:

Defendant is a painter and paper hanger and, on the 13th day of May, 1919, was engaged in painting an unoccupied house in Dunsmuir adjoining the residence of Mrs. Mabel Neusse, mother of the prosecuting witness, Gladys Jackson. Mrs. Neusse testified that at about 3 o'clock in the afternoon of said day she and a Miss Vera Volenti, who was temporarily stopping with her, went to the vacant house to see how near finished it was. As they stepped onto the porch they looked through a window and saw defendant rising from a bed. They went into the house and witness testified that Gladys Jackson "came running out of the bedroom and grabbed on to me, just shaking all over, and started crying." The child was taken home and, after considerable urging, told her mother that defendant had put his hands under her clothes and pinched and hurt her and put his hands on her privates. Mrs. Neusse discovered a mark or scratch where the girl said defendant had pinched her.

Miss Volenti corroborated Mrs. Neusse as to seeing defendant spring from the bed and as to the subsequent occurrences. She also said she saw red marks rather high up on the inside of the leg of Gladys.

Gladys Jackson testified that she went to the house where defendant was working and that he asked her what her name was; that they were in the front room and that defendant picked her up, took her into the bedroom, set her on the bed and put his hands between her legs. She was asked whether he unbuttoned his pants and replied, "Yes, sir," and she made the same reply to the question: "Did he lay on top of you, or do you know?" she said: "Then he heard my mother coming, then he got up."

It is urged that the testimony of the prosecutrix is not of such a character as to justify the conclusion, beyond a reasonable doubt, that the defendant committed upon and with her body lewd and lascivious acts, and this argument seems to be based upon the proposition that the child's testimony consisted almost entirely of monosyllabic answers to categorical questions propounded by the district attorney. But this objection constitutes no valid reason for holding, as a matter of law, that the prosecutrix did not tell the truth about the defendant's conduct towards her. There was no objection made by defendant to the method of examining the little girl by the district attorney, and, so far as

the record, as we have it here, discloses, her story appears to have been straightforward and truthful. At any rate, there being no inherent improbability in her recital of the story, it was solely for the jury to determine whether her testimony was truthful or otherwise, and the verdict is conclusive of the proposition that her testimony was entitled to and given full credit. If there were shown, by cross-examination or otherwise, some inconsistencies in her statement of the facts of the malodorous transaction (and such certainly was if it occurred as detailed by the infant), it was for the jury to consider such inconsistencies and determine whether they were such as to justify the repudiation of her testimony in its entirety. The jury appear to have found no such inconsistencies in her testimony as to warrant them justly in concluding that her testimony, in the main, did not involve a truthful representation of what actually occurred between her and the defendant at the time of the alleged commission of the lewd and lascivious acts.

[3] The testimony of the prosecutrix in a rape case is not required to be corroborated to justify a conviction, and this is true as to a case of the character of the one now before us. Upon her testimony alone, a verdict of conviction may securely rest, it being entirely the province of the jury to decide whether such testimony is true or false. It is not necessary to cite authorities in confirmation of so well-settled propositions as these. In this case, however, it will be noted, the testimony of Gladys Jackson, the prosecutrix, is not entirely without corroboration. The testimony of her mother, and that of the witness, Miss Volenti, corroborate the child's story to some extent.

[4-6] It is next objected that the court erred in permitting the prosecutrix, Gladys Jackson, to testify as a witness in the case, the claim being that she was, by reason of her immature years, incompetent to testify as a witness under the terms of section 1880 of the Code of Civil Procedure. Said section (subdivision 2 thereof) provides that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses.

It will be observed that the section does not provide unqualifiedly that children under the age of 10 years shall not be witnesses, but those children only under the age mentioned "who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," thus leaving it to the court before which such children are called as witnesses to determine, upon an examination into the question of their competency, whether they are intellectually capable of giving testimony or becoming witnesses. And when the judge examines a witness under the age of 10 years before permitting him or her to give testimony in the case, and it appears to the judge from such examination that such witness is capable of relating intelligently the facts respecting which he or she is about to be examined, and that the witness appears to understand the obligations of an oath or the consequences following the giving false testimony, the decision of the trial court that he or she is competent to testify as a witness is conclusive upon a reviewing court, unless the record clearly shows an abuse of discretion in the decision of the question. People v. Baldwin, 117 Cal. 244, 256, 49 Pac. 186. We think that there can be no doubt that it is not only proper, but necessary, under the terms of the second subdivision of the Code section above named, that, preliminarily to permitting a child under the age of 10 years to testify in a cause before a court, such investigation should be made of the question whether such child is a competent witness as will enable the court to determine the matter properly and justly (People v. Bernal, 10 Cal. 67), and in this case such an investigation appears to have been given that question. The record shows that, preliminarily to the examination of the prosecutrix, defendant's counsel objected to her testifying on the ground that she was not of sufficient age to comprehend the sanctity of an oath. In reply to questions by the court, she testified that she was 9 years old, that she lived in Dunsmuir and went to school; that she knew what it meant when she held up her hand and was sworn to tell the truth; that she was going to tell the truth, and she knew it would be wrong if she did not tell the truth; that if she did not do so she would be punished. We cannot say that that showing was not sufficient to justify the court in deciding that the prosecutrix was competent to testify in the case as a witness.

[7, 8] It is urged that the court erred in allowing, over objection by the defendant, the district attorney to introduce in evidence at the trial the testimony given by the accused before the committing magistrate at the preliminary examination of the charge stated in the information.

It appears that the defendant, at the trial, did not take the witness stand in his own behalf. One of the specific objections to that testimony was, at the trial and is here, that it was offered by the district attorney and allowed by the court "as admissions against interest," whereas, so the argument goes, the testimony so given by the accused did not contain "a single admission against interest." This position of the defendant as to the testimony furnishes a reason why the error of admitting it, if error it was, should be held to be innocuous in its effect upon and without prejudice to the rights of the accus-

ed. And it is true that the testimony involved a denial by the defendant of doing anything wrong with the prosecutrix, and nowhere contains any statement of an incriminatory character, except the mere fact that the child was in the building where the accused was at work, and that they were the only persons in the building until the mother of the child and Miss Volenti made their appearance there. Moreover, the officer who arrested the defendant testified to a statement made to him by the accused which involved substantially all the facts to which the defendant himself testified before the committing magistrate. We do not, however, consider the act of allowing said testimony to go into this record as error, for it was admissible for the purpose of showing that the defendant was present at the place where the crime is alleged to have been committed at the time of its alleged commission. The rule in this state is, and has been ever since the early case of People v. Kelley, 47 Cal. 125, that, where an accused under a felony charge voluntarily becomes a witness at the preliminary hearing of the charge before a magistrate under such circumstances as to render it clear that his testimony so given was purely voluntary, and free from restraint or undue influence, such testimony may be given in evidence against him on his trial for the offense in the superior court. See, also, People v. Sexton, 132 Cal. 37, 64 Pac. 107. While the rule, so far as it requires as a test of the admissibility of such testimony that it shall have been given voluntarily, refers to testimony in which the accused has either directly or indirectly confessed his guilt of the charge, still, in this case, although the accused did not in his testimony confess his guilt, it clearly enough appears that the defendant, voluntarily and of his own volition, took the witness stand and testified in his own behalf before the committing magistrate, and not under pressure of any description. But counsel for appellant makes the further point that the testimony given by the accused at the preliminary hearing of the charge could not, in any event, be admissible in evidence at the trial of the accused, except under the conditions set forth in subdivision 3 of section 686 of the Penal Code, and that the conditions rendering the testimony admissible were not shown to exist in this case—to the contrary, they were, it is said, shown not to exist. The section named provides, as an exception to the general rule that a defendant in a criminal case is entitled to be confronted with the witnesses against him, in the presence of the court, that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has likewise cross-examined or had an opportunity to cross-examine the witness—the deposition of such witness so taken may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state. The testimony of the defendant in this case was obviously not admitted upon the theory upon which said section is framed, nor, obviously, could it be. That section has reference entirely to witnesses in a criminal case other than the defendant, who, of course, could not be put upon his trial for a felony in his absence or if he were insane. As above explained, the testimony was offered and received and was admissible for the purpose of showing the admission by him not of his guilt, but of the material fact in the people's case that he was present at the place where and when it is claimed the crime charged was committed. It was, in brief, offered and received upon the theory that it involved an admission against interest.

[9] It is claimed that the testimony of the witness Sam Fiske, who arrested the accused upon the charge alleged in the information, giving the extrajudicial statements of the accused relative to what occurred between him and the prosecutrix in the building in which it is claimed that the crime charged was committed, was incompetent and immaterial, and that the allowance of it by the court against the objection of the accused was improper, and that its effect was prejudicial to the accused. Like the testimony of the defendant given at the preliminary hearing, the testimony of the officer of the statements of the accused at the time of his arrest relative to the occurrences between him and the prosecutrix was proper for the purpose of showing that the defendant was where it was claimed that the lascivious acts were perpetrated at the time they were alleged to have taken place. The officer's testimony, other than showing that fact, carried with it nothing of an incriminatory character, and could not have tended to prejudice the defendant in the slightest degree. The extrajudicial statements of the defendant so presented to the jury did not involve a confession, but a positive denial of guilt, and were corroborative only of the evidence of the prosecutrix, of her mother, and of Miss Volenti that the defendant and the child were together and alone in the building wherein it is claimed that the crime charged was committed at the time of its alleged commission.

[10, 11] Three female witnesses, residents of Dunsmuir, where the crime charged is

alleged to have been committed, were introduced by the district attorney for the purpose of testifying, and they did testify, that the defendant's general reputation for morality in Dunsmuir, where he had resided for a number of years, was bad. This testimony was offered as in rebuttal of testimony submitted by the defendant that his general reputation for morality in Dunsmuir was good. The form of the question put to each of the said witnesses by the district attorney, after each had said that she had known the defendant in Dunsmuir for a number of years, was as follows: "Do you know his general reputation in the town of Dunsmuir for morality?" The witnesses each answered that she knew his reputation in the particular referred to, and said, in reply to the further question as to what that reputation was, that it was bad. The attorney for the appellant now makes the point that the first question should have specifically confined the knowledge of the witnesses of the general reputation of defendant for morality to a time prior to the date of the alleged commission of the crime charged, and that, the question not having been so framed, the statement of the witness that his general reputation for morality was bad might have reference to the time subsequent to the commission of the offense, and based solely upon the fact that defendant was accused of and arrested for committing said alleged crime. There is much force in counsel's criticism of the question referred to, but the difficulty that confronts him in attempting to make the point available to his client on this appeal is that, at the time the question was asked of each of the people's rebuttal witnesses on character, he did not object to said question, or in any form raise before the trial court the point that the question was improper and calculated to bring forth improper testimony. When a defendant in a criminal case makes no objection at the trial of the charge against him to any testimony offered against him, it is to be presumed that, if such testimony is legally improper and objectionable, he waives any objection he might have interposed thereto. He certainly cannot make his objection for the first time on appeal. Undoubtedly, if, at the trial, objection had been made to the question complained of here, and thus the attention of the trial court directed to it, the latter would readily have perceived the impropriety in the form of the question, and have required the district attorney so to frame it as to have obviated the objection here made against it. Obviously, appellate courts are in no position to do that.

There are no other points made.

The judgment and the order appealed from are affirmed.

We concur: ELLISON, Presiding Judge, pro tem.; BURNETT, J.

46 Cal. App. 359

WELLMAN v. FORSTER et al. (EMIL OLCOVICH CO., Intervener). (Civ. 3266.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1920. Hearing Denied by Supreme Court April 20, 1920.)

1. Stipulations ⟸18(1) — Waiving claim to property precludes question of ownership.

In an action of replevin, where plaintiffs recovered judgment for possession of property and damages for its detention, and appellants by stipulation waived all claim to the property, the appellate court is bound by the stipulation and cannot consider any question relating only to plaintiff's right to possession.

2. Replevin ⟸72—Evidence held to support finding of damage for detention.

In replevin of bar fixtures, testimony by witness as to the rental value of fixtures, and by other witnesses to the value of the property, *held* to sustain a judgment allowing damages for detention less than the rental value testified to.

3. Appeal and error ⟸1011(1)—Findings on conflicting testimony as to damage cannot be set aside.

Where the testimony of witnesses given in open court was sharply conflicting, the trial court's determination cannot be disturbed on appeal.

4. Evidence ⟸543(4) — Witness held competent to testify to rental value of bar fixtures.

The general manager of a company dealing in bar fixtures, who had been engaged in that business for 25 years, and had handled 90 per cent. of that business in the community immediately preceding the trial, was sufficiently qualified so that it was not an abuse of the court's discretion to permit him to state his opinion of rental value of fixtures replevied.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Replevin by John H. Wellman against George H. Forster and others as defendants and the Emil Olcovich Company, intervener. From a judgment awarding plaintiff the property not claimed by intervener, and giving judgment for damages for its detention, the defendants appeal. Affirmed.

Davis & Rush and Edward F. Wehrle, all of Los Angeles, for appellants.

Roy V. Rhodes, of Los Angeles, for respondent.

Loeb & Walker, of Los Angeles, for intervener.

BRITTAIN, J. The defendants appealed from a judgment against them in a suit in replevin for certain bar fixtures and furnishings installed in a saloon in Los Angeles under a contract between one Conroy and the Brunswick-Balke-Collender Company, the plaintiff's assignor. The judgment was for the return of the property claimed, except a

small part concerning which there is no dispute and which the trial court determined could not be removed from the saloon without injury to the realty. The holder of the lease of the realty from whom Conroy and his successors in interest rented the saloon intervened in the action and is satisfied with that part of the judgment protecting the realty from injury.

After the installation of the property Conroy became financially involved, and with the consent of the plaintiff's assignor he assigned all his rights under the contract in question to Forster & Stoner, copartners. They in turn approached the brink of bankruptcy, and a meeting of their creditors was called. A transfer of the partnership property was made to three trustees, of whom one was M. L. Cruse, who was an employé and who described himself as the credit manager of the plaintiff's assignor. In violation of instructions given him by the manager of the corporation, he signed the name of the Brunswick-Balke-Collender Company to the assignment, which was also signed by other creditors. The defendants and appellants, other than Forster & Stoner, are creditors claiming under the assignment and the three trustees to whom the assignment was made. By stipulations between the parties subsequent to the entry of the judgment, the appellants waived all claim to the property, which has been delivered to the plaintiff.

[1] The only question to be determined on this appeal, therefore, is whether or not the judgment can be sustained in so far as it awards to the plaintiff the sum of $1,526 as damages, computed at the rate of $2 a day during the period of the detention of the property. In the absence of any showing or contention to the contrary, it must be assumed in support of the judgment that there was no consideration for the waiver of claim to the property other than the recognition of the right of the plaintiff to have it in accordance with the provisions of the judgment. If the stipulations showed that possession of the property only had been given to the plaintiff, reserving to the defendants their claim of ownership, some of the questions argued by the appellants might have been material on this appeal, but the stipulations have answered all questions concerning the nature of the contract between Conroy and the plaintiff's assignor, all questions regarding the authority of Cruse and the effect of payments after the assignment, adversely to the appellants. This court is bound by the answers to which the appellants assented on entering into the stipulations. In this view of the case the plaintiff was entitled to possession of the property at the date of his demand, and possession was wrongfully withheld by the defendants thereafter until the judgment was entered. The court found that the plaintiff was thereby injured to the extent of $2 a day during the intervening period, and the determination of the aggregate of $1,526 at that rate was merely a matter of computation.

The appellants contend the evidence was insufficient to support the finding in regard to damages. Witnesses for the defendants testified the property had no rental value, and that some of the large brewing concerns had in storage similar equipment they would gladly have loaned to any one who would undertake to sell their beer. As against this evidence, a witness for the plaintiff testified that the reasonable rental value of the withheld property was $250 per month. This evidence was introduced over the objection of the defendants on the ground that the witness' qualification to give opinion evidence on the subject had not been shown. It is contended that the admission of the statement was reversible error, and that in any event the evidence is overcome by that on the part of the defendants' witnesses; also that it does not sustain a judgment for $2 a day.

[2] Disposing of these contentions in their inverse order, it appears that injury was caused by the wrongful withholding. From the evidence before him, the trial judge was justified in assessing damages at any reasonable sum less than the highest sum stated as the rental value. There was evidence that the property, if removed at the time of the demand, was worth $5,000. The estimates of the defendants' witnesses were, respectively, $500 and $1,000, although one of them stated that in place the property was worth $7,000 to $9,000. It was property subject to abuse and rapid deterioration. If the trial court adopted the estimate of value of the plaintiff's witness, as he had a right to do, under the circumstances and conditions existing, the award of $2 was supported by the evidence.

[3] In view of the sharp conflict of evidence, this court can give no consideration to the argument dealing with the weight of the evidence or the credibility of the respective witnesses. They were seen and heard by the trial judge, and he was best qualified to determine those matters.

[4] Concerning the qualifications of the plaintiff's witness to testify in regard to value and rental value of the property, it was shown that he was the general manager of the Brunswick-Balke-Collender Company; that he had been in the business of buying, selling, and dealing in fixtures of the character involved in this suit for a period of 25 years, and that he had handled 90 per cent. of the bar fixture business in Los Angeles and its vicinity for 5 years immediately preceding the trial. It does not appear that there was error or abuse of discretion in permitting him to testify on the subject of rental value or of value of the property from which the court was to determine the amount

of damages for the deprivation of the plaintiff of the use of his property.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 311

RAY v. AMERICAN PHOTO PLAYER CO.

(Civ. 3263.)

(District Court of Appeal, First District, Division 2, California. Feb. 25, 1920.)

1. Parties ⊂=95(4)—Refusal of amended answer showing plaintiff's true name, held not abuse of discretion.

In an action to rescind a contract of sale, where plaintiff sued in the name by which he made the contract, it was not an abuse of court's discretion to refuse, at the opening of trial, defendant's request for leave to file an amended answer, alleging that that was not plaintiff's true name.

2. Appeal and error ⊂=1041(3)—Refusal of amended answer harmless, where evidence to show facts was admitted.

Defendant was not prejudiced by court's refusal to allow an amended answer, alleging that the name under which plaintiff was suing was not his true name, where all evidence offered as to plaintiff's name was admitted.

3. Names ⊂=20 — Person may change name without court action.

Under the common law, a man may change his name at will without court proceedings therefor, and may sue or be sued in any name by which he is known and recognized.

4. Names ⊂=10—Name by which plaintiff was generally known is not "fictitious name."

Where plaintiff had been generally known for years by the name in which he made the contract and brought the action, though it was not his birth name, it was not a fictitious name within Civ. Code, §§ 2466, 2468, as amended in 1911, requiring every person transacting business under a fictitious name to publish and file a certificate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fictitious Name.]

5. Appeal and error ⊂=719(8), 1011(1)—Findings not attacked or based on conflicting evidence are controlling.

Findings of trial court not attacked by appellant or based on conflicting evidence are controlling on appeal.

6. Sales ⊂=170—Date for performance immaterial where performance was refused for unreasonable time.

In an action to rescind a contract for the purchase of an organ, where it appeared that defendant had refused to make any effort to put the organ in condition, and it was useless at time of trial, it was immaterial whether defendant had agreed to install the organ on a date a year before the trial, or had merely agreed to use every effort to do so, since the delay in performance was unreasonable.

7. Pleading ⊂=237(1)—Amendment to conform to evidence proper.

It was proper to permit plaintiff at the close of the trial to amend his complaint to correspond with the evidence.

8. Principal and agent ⊂=171(4)—Acceptance of payment to agent ratifies promise by agent on receipt.

Where the principal accepted the payment to his agent and retained it, he ratified a promise by the agent to place the organ for which the payment was made in satisfactory condition, which promise the agent wrote on receipt.

9. Sales ⊂=121, 126(3)—Rescission not waived by extending time at request of other party.

A buyer does not waive his right to rescind a contract for the purchase of an organ by making payments induced by promise to fix the organ and by delaying rescission at the request of seller.

10. Appeal and error ⊂=664(1)—Court's findings cannot be impugned by judge's oral statements.

The findings of the trial court cannot be impugned by oral and perhaps slightly considered statements of the judge on a single question arising during the trial.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Carl Ray against the American Photo Player Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. C. Ringole, and H. A. I. Wolch and Martin L. Haines, both of San Francisco, and Andreani & Haines, for appellant.

Allison & Dickson, of San Bernardino, and Fred W. Morrison, of Los Angeles, for respondent.

BRITTAIN, J. The defendant appeals from a judgment against it by which a contract for the sale of an organ with piano attachment was declared rescinded. The plaintiff was also given judgment for money he had paid on account of the stipulated purchase price of the instrument.

At the opening of the trial the defendant's request for leave to file an amendment to its answer was denied, and this is assigned as error. The defendant had dealt with the plaintiff as Carl Ray. The suit was brought in that name. By the proposed amendment the defendant sought to set up a special defense in the nature of a plea in abatement, alleging in substance that Carl Ray was not the real name of the plaintiff. Notwithstanding the ruling on the motion to amend, during the cross-examination of the plaintiff, he was asked, "What is your real and true name?" He stated that it was Melvin Barringer. He was then asked, "The name of

Ray is not your real name?" He replied that it had been for 14 years. Later, being interrogated further on the subject, he said he had used the name of Ray for 14 years, and during that time he had never used the name of Barringer for any purpose whatever, "only in marriage." He was married under that name "years ago"—"several years ago." He was asked if he was not divorced under the name of Barringer, but, objection being made, he was not permitted to answer. There was no attempt to show that at the time the contract in suit was made or during the period between that date and the time of the trial the plaintiff had ever passed or was known to any one under any name but that of Ray. A number of witnesses were called on both sides of the case, and all referred to him as Mr. Ray. One of them was Mrs. Ray. Another had known him for 10 years, and had been employed by him before the plaintiff came to California.

[1] The matter of permitting amendment at the opening of the trial was one largely within the discretion of the court, and upon the record it cannot be said this discretion was abused.

[2] If there was error in the ruling, it does not appear that the defendant was injured, for it was afforded an opportunity to go into the matter of the plaintiff's name. In the absence of other evidence on the subject, it is bound by his answer that Ray had been his name for 14 years. The statement that he had been married under the name of Barringer a number of years before is not necessarily at variance with the direct statement. He may not, and probably did not, have any decree of court changing his name, and it is not strange that in marrying he used his former name under the belief that this was necessary. There is no evidence that he was known by any other name than Ray, or transacted any business, or used in any way either before or after his marriage any name different from that in which he contracted with the defendant and in which he sued.

[3] Under the common law a man may change his name at will and sue or be sued in any name by which he is known and recognized. Linton v. First Nat. Bank (C. C.) 10 Fed. 894; Graham v. Eiszner, 28 Ill. App. 269; Emery v. Kipp, 154 Cal. 83, 86, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792. "The name is not the person, but only the means of designating the person." Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. "A man may lawfully change his name, without resorting to legal proceedings, but for all purposes the name thus assumed * * * will constitute his legal name, just as much as if he had borne it from birth." Christianson v. King County (D. C.) 196 Fed. 791, 799.

[4] The defendant contends that by the amendment of sections 2466 and 2468 of the Civil Code in 1911 this rule of law has been modified in California. Those sections are in that part of the Code dealing with partnerships. Before the amendment of 1911 a partnership doing business under a fictitious name or a designation not showing the names of the persons interested as partners was required to publish and file in the office of the county clerk a certificate showing the names of the partners, and, failing in this, they were not permitted to maintain a suit on the partnership's account. The reason for this regulation is plain, and it has been pointed out in a number of cases where the statute has been applied. By the amendments of 1911 the words "every person transacting business in this state under a fictitious name and" were inserted in section 2466 before the words "every partnership," and a corresponding change was made in section 2468 relating to the maintenance of suits by those who failed to make the certificates in accordance with the provisions of section 2466. The purpose of these provisions is to prevent fraudulent trading. If a man, for instance, living in a community under the name of John Smith and known to his neighbors by that homely name, should make a single contract or carry on a business under another name, he would be using a fictitious name within the meaning of the statute, and might not be permitted to maintain an action on any transaction undertaken in the fictitious name without compliance with the requirements of the Code. On the other hand, those sections add nothing to the requirements of the common law regarding a man taking a new and genuine name. If he changes his name and uses and is known by the new name in all his affairs, it becomes his legal name, and it follows that it is not then fictitious.

[5] It is said in the appellant's brief that there is some evidence to sustain the greater portion of the findings. From those which are unattacked, or which are based on conflicting evidence, it appears that when the instrument was installed it could not be operated because of defects in its construction; that since July 23, 1917, the defendant has failed and refused to place it in a condition to be operated, and refused to do any more work or make any repairs upon the instrument, and that at the time of the trial it was not in a condition to be played or operated. These findings are controlling upon appeal.

[6] The court found that the contract provided, among other things, that the defendant should install the instrument by March 17, 1917. It was also found that it was not installed until May 14, 1917, but the further finding was made that the delay in installation between these dates was not unreasonable. The appellant rightly maintains that

the contract only provided that the defendant should "make every effort to have the organ completely installed by March 17." The evidence showed that it was intended that the installation should take place by March 17. Even under the technical contention of the appellant the contract required installation within a reasonable time, and the findings show, not only that it was not installed in a condition to be operated at the time of the trial, which opened March 5, 1918, but that after July 23, 1917, the defendant refused to do anything toward fulfilling the obligations of the contract binding on it. The statement concerning the date when performance was promised is immaterial in a case where performance of a contract is refused and the refusal is persisted in for an unreasonable period.

[7] At the close of the trial the plaintiff was permitted to amend his complaint to correspond with the evidence. The findings are in accord both with the amendment and the evidence. Such amendments of pleadings are proper.

[8] On April 2, 1917, the plaintiff paid to an agent of the defendant $500, the principal of a note given in part payment for the instrument. At that time, in response to notice given by the plaintiff that it was unsatisfactory, the agent of the defendant promised that the instrument should be placed in a condition satisfactory to the plaintiff. This promise was evidenced by a statement written in the receipt for the $500. The appellant contends the authority of the agent to make the promise was not shown. The promise was but a reaffirmance of what the defendant was obligated to do. The defendant received the money, and by this appeal is resisting its repayment. A principal may not take the benefit of a transaction of his agent on behalf of the principal, and deny the authority of the agent. The retention of the benefit constitutes a ratification of the act of the agent.

[9] The appellant contends that the plaintiff waived his right to rescind by making the payment he was induced to make by the new promise, and by failing to rescind more promptly. The defendant cannot rely upon delays which have been the result of indulgence it induced the plaintiff to extend to it. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951; Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.

[10] The appellant lastly contends that from remarks made by the judge before whom the case was tried, at the time the amendment of the complaint was under consideration, it may be deduced he could not have believed certain of the findings of fact he subsequently signed. In the first place, there appears nothing inconsistent in the two statements when the entire record is considered, and in the second place the findings of the court cannot be impugned by reference to oral and perhaps slightly considered statements of the judge upon a single question arising during the progress of a trial. Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; Shively's Estate, 145 Cal. 400, 78 Pac. 869; Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307; Spencer v. McCament, 7 Cal. App. 84, 93 Pac. 682; O'Connell v. Behan, 19 Cal. App. 111, 124 Pac. 1038.

Notice of rescission was given on September 11, 1917, and under the circumstances disclosed by the record it was given with reasonable promptitude. The judgment was for the money paid on account of the purchase price. Damages sought by the plaintiff were not allowed. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 225

GEORGE RICE & SONS v. COWAN.
(Civ. 2767.)

(District Court of Appeal, Second District, Division 1, California. Feb. 20, 1920.)

Limitation of actions ⟸29(2)—Loan properly included in book account.

Where an open book account existed between a corporation and defendant who was a stockholder, director, and employé and while the account was running defendant borrowed a sum of money from the corporation, intending to pay interest thereon, and such amount was entered in the books of accounts without any objection on defendant's part, defendant cannot, in an action on the account, maintain that such loan was not the subject of an open book account, and hence barred by the two-year statute of limitations (Code Civ. Proc. § 339), instead of section 337, subd. 2, the four-year statute, although the business of lending money was not one of the purposes for which the corporation was organized.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George Rice & Sons against Park W. Cowan. Judgment for defendant, and plaintiff appeals. Reversed.

Milton K. Young and Will Hays, both of Los Angeles, for appellant.

Samuel H. Pardue, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff appeals from a judgment in its favor for the sum of $68.58, with interest, and which excluded an item of $600 and interest for money loaned by plaintiff to defendant and included in an open book account. The appellant contends

that the evidence is insufficient to justify the court's finding to the effect that the cause of action on said item of $600 is barred by subdivision one of section 339 of the Code of Civil Procedure. That money was loaned by the plaintiff to the defendant more than two years and less than four years from the date of commencement of this action. The cause of action therefore was not barred, unless such item was not capable of being included in an open book account. Code Civ. Proc. § 337, subd. 2.

The defendant was a stockholder and director of plaintiff corporation, and was also an employé of the plaintiff. That an open book account did exist between them, consisting of various items, is a fact beyond controversy. While the account was running and unsettled, the defendant found it necessary to borrow the sum of $600 to enable him to make a payment on account of the purchase by him of certain real property. As shown by his own testimony, he obtained the money from the plaintiff for the purpose above stated. He did not ask the plaintiff to charge the item on the books, but did not object to it so doing. "I had been having items charged to me on the books of account there for some time. I was familiar with the facts that an account was kept. * * * I expected it to be charged to me. I expected it, made a loan of it. I didn't know whether it would be charged in that book account or not. They would have to make a record of it. I didn't know of any place else they would make a record of it." Defendant further testified that "there was nothing said about paying it back, in any way, shape or form; as I remember it, there was nothing said about interest." The plaintiff's witness, Irwin H. Rice, through whom the loan was made, testified that the defendant said that he needed $600 and thought it would be just as well if he would take it out of the company and pay the company interest on it at the rate of 6 per cent. On this evidence the court found that the defendant agreed to pay interest at the rate of 6 per cent. per annum, and that said loan and interest so agreed to be paid was not a proper subject of book account, although the same was regularly entered in said open book account. In rendering judgment the court's theory apparently was that, because the transaction was a loan upon a direct promise to pay the same with interest, and because the business of lending money was not one of the purposes for which plaintiff corporation was organized, therefore this transaction could not be the subject of open book account between the plaintiff and defendant.

In Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253, 146 Pac. 692, 694, the court quotes 1 Ruling Case Law, p. 207, as follows:

"The expression 'outstanding and open account' has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes."

In Schneider v. Oakman Consolidated Mining Co., 176 Pac. 177, the defendant claimed that a certain item charged in an open book account of plaintiff's assignor, one Dillon, against the defendant, could not be charged against defendant in that account because it was due upon a "special contract." But the court said that it could see no reason why the item was not properly so charged. "Oakman, the president of the company and its responsible directing officer, wrote Dillon telling him not to worry about this $1,500, and assuring him that it would be paid. It was somewhat irregular to enter it upon the books as late as August, 1914, but it made a part of the transaction between the parties and was properly included in the account between them. The justice of the claim is not denied, and the only defense set up thereto is the statute of limitations, and that it was not properly included in the proofs to sustain the account." On the facts thus existing the court sustained the claim as one properly included in the book account. The defense in that action, as in the case at bar, was that the item was barred by subdivision 1 of section 339 of the Code of Civil Procedure. We think that the court's decision upon the point at issue was erroneous.

That part of the judgment from which plaintiff appealed is reversed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 257

WOOD et al. v. MESMER. (Civ. 2750.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1920.)

1. Appeal and error ⊜761—Points should be presented in briefs in regular order.

Points made by appellant should be presented definitely and in regular order in briefs, and should not be scattered through argument to impose on appellate court unnecessary labor of searching them out and numbering them before they can be stated in appropriate order.

2. Trial ⊜404(2)—Finding in action on account that defendant became indebted not conclusion of law.

In action on account for services rendered and materials furnished, finding by trial court that defendant became indebted to plaintiff in stated sum on open book account, or that defendant became indebted to plaintiff for work and labor performed, materials furnished, etc., at and within a stated period of time, is a finding of fact, and not a mere conclusion of law.

3. Contracts ⊜349(7)—Evidence of printers' prices admissible in action for printing newspapers.

In action by printers on account for services rendered and materials furnished to defendant in printing his newspapers, evidence as to prices charged by printers' board of trade, and evidence showing that plaintiffs' charges were in accordance with that schedule, *held* admissible, plaintiffs claiming they were to be allowed reasonable profit under schedule of the printers' board of trade, defendant claiming he was to pay on cost basis.

4. Contracts ⊜221(3)—Printers entitled to hold issue of paper because not paid on delivery, and yet to recover.

Plaintiffs, who had been printing defendant's newspapers for him, on printing the last issue of a paper when there was a balance due them from defendant on account of previous business, were not bound to deliver such issue without concurrent payment, and could hold issue, failing to receive payment, and recover for its printing.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Earl Charlton Wood and Melvin Sisson Wood, copartners doing business under the fictitious name of Twin Printers, Wood & Wood, against Joseph Mesmer. From judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 178 Pac. 314.

Stanley Visel and J. L. Murphey, both of Los Angeles (Arthur G. Fisk, of Los Angeles, of counsel), for appellant.

James S. Bennett, of Los Angeles, for respondents.

CONREY, P. J. Action to recover upon an account for services rendered and materials furnished by the plaintiffs to the defendant at his special instance and request. There was a counterclaim by the defendant. Judgment was entered in favor of the plaintiffs for $490.44, balance found due to plaintiffs, with interest and costs. The counterclaim was in part on a demand for rent and in part for damages for breach of contract.

[1] As is far too common in the briefs which come to this court, the points made by appellant in support of his appeal are not presented definitely and in regular order. They are scattered through the argument, so that there is imposed upon the court the unnecessary labor of searching them out and numbering them before they can be stated in appropriate order. Under such circumstances, if the court should fail to notice any point intended to be made, the omission would easily be justified.

[2] Appellant contends that the findings do not sustain the judgment. His claim seems to be that certain of the findings are wholly conclusions of law and omit to find upon the ultimate facts. There is no merit in this claim. The seventh cause of action stated in the complaint declares upon an open book account for an amount covering plaintiff's entire demand. The previous causes of action are separate statements of account on which it is alleged that defendant became indebted to plaintiffs for work and labor performed, materials furnished, and moneys paid out for defendant at his special instance and request. The findings respond directly to these allegations as contained in the seventh cause of action and in each of the others. They likewise respond directly to the affirmative allegations of the answer. In an action of this kind a finding by the court that the defendant did become indebted to the plaintiff in a stated sum upon an open book account, or that the defendant became indebted to the plaintiff for work and labor performed, materials furnished, etc., at or within a stated period of time, is a finding of fact, and not a mere conclusion of law. Appellant cites no authority in support of his stated theory.

[3] Between the 24th day of November, 1915, and the 1st day of January, 1916, the plaintiffs occupied certain premises of the defendant in the city of Los Angeles and used a printing plant of the defendant therein under an agreement to pay rent therefor. The defendant was the owner and publisher of two weekly newspapers. It was a part of the contract that the plaintiffs would print these newspapers for the defendant and receive compensation therefor. The principal part of plaintiffs' cause of action is for recovery of that compensation. In this connection the defendant claimed that he was to pay for those publications on an actual cost basis, not exceeding a certain sum for each

issue of the papers. The plaintiffs' claim was that they should be allowed a reasonable profit figured under a schedule known as the schedule of the printers' board of trade. Appellant claims that the court erred in allowing the plaintiffs to introduce evidence as to the prices charged by the organization known as the printers' board of trade. In support of this claim he prints in his brief (from the typewritten transcript) certain testimony of M. L. Helpman, Jr., the agent of defendant through whom the negotiations were had with plaintiffs which resulted in their contract with defendant. Counsel for appellant states that this evidence was the only statement directly upon the foregoing question as to the terms of the contract, and that this evidence without contradiction shows that defendant's contention is correct, and that there was no agreement for a standard of charges upon a basis established by the printers' board of trade. It appears, however, from testimony printed in the brief for respondents that the plaintiff Earl C. Wood testified that in the conversations between himself and defendant's agent, Mr. Helpman, and which resulted in the transactions covered by this action, it was stated that plaintiffs were to charge for the printing work which they would do for him "on the uniform standard cost basis"; that he showed to Mr. Helpman the system of charges as used in his office, which was on the schedule made out by the printers' board of trade and according to the uniform standard cost system. With this evidence before the court, it follows, of course, that the court did not err in receiving the evidence which it did receive as to the prices charged by the printers' board of trade, or in receiving the evidence which proved that plaintiffs' charges were in accordance with that schedule.

Appellant contends that the court's finding that none of the allegations contained in paragraphs 3 and 4 of the counterclaim of defendant are true is contradictory to other findings of the court, and that this finding as to paragraphs 3 and 4, if a true finding, negatives plaintiffs' right to recover. Said paragraphs 3 and 4 are not complete in themselves and refer back to the two preceding paragraphs of the counterclaim. So read, it is perfectly clear that the finding in question is consistent with the other findings of the court. The findings, without contradiction or inconsistency, establish the amount of plaintiffs' demand as controlled by a standard of charges that is sustained by the evidence, and allow to the defendant as an offset to plaintiffs' demand the full sum of rent proved to be due, as well as an additional sum of $35 which he did not claim.

[4] We think that the court did not err in allowing plaintiffs compensation for printing the last issue of the paper called the Jeffersonian. The plaintiffs printed that edition and informed defendant's agent that he could have it, but would have to pay for it when delivered. As there was then a balance due to plaintiffs from defendant on account of the previous business and there was nothing in the contract which entitled the defendant to claim a further extension of credit, plaintiffs were not bound to deliver these last papers without concurrent payment therefor, and they were entitled to recover in this action for that item of work done by them for the defendant. It further follows that defendant was not entitled to recover damages for expenditures made by him in reprinting the said issue of the newspaper.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

182 Cal. 572

KERFOOT et al. v. SCHUTZ. (L. A. 5330.)

(Supreme Court of California. March 31, 1920. Rehearing Denied April 29, 1920.)

1. Contracts ⊂=322(1) — Unserviceable condition of well must have been due to contractor's breach.

In an action for breach of contract to drill a well on the ground that the well was so crooked as to make it impossible to insert pumping machinery, plaintiffs could not meet the burden of proof resting upon them by merely showing that after a certain lapse of time following the completion of the well it was not in serviceable condition; it being essential that they should show that such condition was the result of breach by defendant of his contract.

2. Contracts ⊂=354—Cause of crooks in well casing held within issues in action for breach.

In an action for breach of contract to drill a well, plaintiffs alleging that the well was so crooked that pumping machinery could not be installed, and the issue being as to whether there were any crooks in the well casing, and, if so, whether they were caused by unworkmanlike construction of the well, a finding that the manner in which defendant filled and tamped the earth in digging the well "did not bring about or cause the bends or crooks in said casing" *held* within the issues.

3. Contracts ⊂=322(3) — Evidence held to show that unserviceable condition of well was due to owner's fault.

In an action for breach of contract to drill a well wherein plaintiffs contended that the well was so crooked that pumping machinery could not be installed, evidence *held* to support a finding that the well was originally straight, and that the crooks in the casing were caused by the acts of plaintiffs in taking out a pump.

4. Appeal and error ⊂=1011(1)—Findings on conflicting evidence not disturbed.

A decision of the trial court on conflicting evidence will not be disturbed on appeal.

5. Appeal and error ⊂=1071(5)—Unnecessary finding unsupported by evidence will not justify reversal.

That a finding of fact not necessary for the judgment is not supported by evidence will not justify a reversal.

Department 1.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by A. J. Kerfoot and another against H. H. Schutz for damages for breach of contract. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. W. Kaye and Kaye & Siemon, all of Bakersfield, for appellants.

E. F. Brittan and Anderson & Barton, all of Bakersfield, for respondent.

LAWLOR, J. Plaintiffs appeal from a judgment in favor of defendant. The action was for damages on account of the alleged failure of the defendant to perform a contract for the drilling of a water well.

On the 18th day of August, 1914, plaintiffs were the owners of certain land which they desired to bring under cultivation for horticultural purposes by the development of water wells. At that time the defendant had been engaged in the business of drilling water wells in Kern county for a number of years. With a view to carrying out the plans of the plaintiffs relating to the improvement of the land mentioned, the defendant entered into a contract in writing with the plaintiffs for the drilling of one well, which contract is set forth as an exhibit attached to the complaint in this action. The agreement shows that it is one by which defendant agrees to drill a water well upon land belonging to plaintiffs and to sink such well in a workmanlike manner. It was stipulated that plaintiffs might make tests to determine the water producing capacity of the well, and a limited time was fixed for the completion of the work.

The only specification of breach upon which appellants rely in their printed brief is alleged in the complaint as follows:

"The said well for the depth of about 115 feet is crooked, and the casing inserted therein varies from a perpendicular position to such an extent that it is impossible to insert pumping machinery in said well for the purpose of pumping water therefrom."

On this appeal it is contended: (1) That the findings of fact made by the trial court are outside of the issues; and (2) that there is no evidence to support the findings. Findings 8 and 12 are respectively that the manner in which the defendant filled and tamped the earth in digging the well "did not bring about or cause the bends or crooks in the casing of said well," and "that the careless and reckless acts of plaintiff * * * in installing and removing said pump were the sole cause of such bends and twists in the casing in said well."

[1, 2] It was not enough to meet the burden of proof resting upon plaintiffs to show merely that after a certain lapse of time following the completion of defendant's work the well was not in serviceable condition. It was essential that plaintiffs should show this condition to be the result of a breach by the defendant of the terms of his contract. The allegation of the complaint quoted above, upon which plaintiffs rely, was denied by the defendant. The issue was thus joined as to whether there were any crooks or bends in the well casing, and, if there were, whether they were caused by an unworkmanlike construction of the well. Finding 8 was directed clearly to this issue. It is not necessary to decide whether finding 12 is outside of the issues presented by the pleadings because it was not essential to the judgment. So much for the issues in the pleadings.

[3, 4] Appellants also attack these findings upon the ground that they are unsupported by the evidence. One A. G. Miller, an agent of the corporation which undertook in behalf of plaintiffs to install a pump in the well after the completion thereof by defendant, was called by the plaintiffs, and testified in part as follows:

"We made an examination or test before we put the pump down, to determine whether the well was plumb, only by a mirror. We noticed the well was straight as wells ordinarily are before we put the pump in."

This testimony was elicited on cross-examination, and was not controverted. Plaintiffs were suing defendant for breach of contract. Their witnesses testified that the well, shortly after being completed by defendant—after plaintiffs had inserted and operated their pump—was not in proper and workmanlike condition. The defendant offered the above-quoted testimony to prove that this condition was not the result of any breach by him of the contract. The plaintiffs introduced other testimony to show that the improper manner in which the earth was tamped and filled in by defendant was the cause of the defects in the well. The issue of responsibility was thus presented, the court decided it upon conflicting evidence, and the finding will not therefore be disturbed.

[5] Appellants' chief point is that there is "not a shred of evidence" to support finding 12 that the unserviceable condition of the well was the result of the plaintiffs' negligence. Even if this were true, it would not justify a reversal of the judgment, which, as we have said before, rests upon finding 8 that the defects were not the result of negligence on the part of defendant.

The judgment is affirmed.

We concur: OLNEY, J.; SHAW, J.

182 Cal. 645

In re WYMAN'S ESTATE.

NEFF v. WILLIAMS, Public Adm'r, et al.

(S. F. 9065.)

(Supreme Court of California. April 7, 1920.)

1. Executors and administrators ⊜21(1) — Daughter of widow's husband held entitled to administer widow's estate.

Under Civ. Code, § 1310, giving a devise or legacy to a beneficiary who predeceased testator to the beneficiary's descendants, if any, section 1386, subd. 8, providing that the estate or portion of a widow who dies without issue which was common property, or which she received from her husband, shall go to his issue, and Code Civ. Proc. §§ 1350a, 1365, the daughter of the deceased husband of testatrix, who willed her property to her husband, is entitled to letters of administration with the will annexed, rather than the public administrator.

2. Executors and administrators ⊜21(2) — Petition for administration and proof held to show that portion of property came from husband of testatrix.

Petition and proof for letters of administration with the will annexed to the daughter of testatrix's husband, which showed that the husband died before testatrix, leaving her an undivided half of almost his entire estate, and that she died within 9 months of the decree of distribution, and among the property listed as her estate was that coming from her husband, *held* to show that a portion of her estate was derived from her husband, so as to entitle his daughter to administration.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Maria C. Wyman, deceased. From a judgment denying her application for letters of administration with the will annexed, and granting such letters to Amos O. Williams, as public administrator, Nettie Neff appeals. Reversed.

J. A. Olson and Ira S. Lillick, both of San Francisco, for appellant.

A. M. Free and F. H. Bloomingdale, both of San Jose, for respondents.

KERRIGAN, Judge pro tem. This is an appeal from the order granting the petition of the public administrator of Santa Clara county for letters of administration with the will annexed in the estate of Maria C. Wyman, deceased, and is taken by one Nettie Neff, claiming to be entitled to have issued to her such letters of administration, and whose petition in that behalf was denied.

Maria C. Wyman died on the 5th day of January, 1919, leaving a will dated March 31, 1900. By the terms of this will she bequeathed a small legacy to a nephew residing in Florida, and all the rest, residue, and remainder of her property to her husband, Charles F. Wyman, who was also nominated executor of the will. Her husband however, died on the 3d of April, 1917. By his will the bulk of his estate, which consisted of real and personal property, was devised and bequeathed to his said wife and to Nettie Neff, his daughter by a former marriage, to be shared equally between them. It is to be noted that Mrs. Wyman left no child surviving her, nor lineal descendant, nor brother, nor sister, and that a part of her estate consists of property received by her under the terms of the will of her deceased husband. It also appears as a fact in the case that Mr. and Mrs. Wyman were first cousins.

Under these facts the question arises whether Nettie Neff, the daughter of the predeceased spouse of the decedent, is entitled to letters of administration with the will annexed upon her estate in preference to the public administrator.

[1] The right to appointment as administrator with the will annexed follows the same order as that prescribed for the appointment of an administrator of the estate of a person dying intestate (Code Civ. Proc. § 1350a), and that order we find laid down in section 1365 of that Code. Therein it is provided:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when * * * entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

"1. The surviving husband or wife, or some competent person whom he or she may request to have appointed;

"2. The children; * * *

"7. The next of kin entitled to share in the distribution of the estate.

"8. The public administrator. * * *

"This section shall apply to the relatives of the previously deceased spouse of decedent when entitled to succeed to some portion of the estate under subdivision 8 of section 1386 of the Civil Code."

Turning to subdivision 8 of section 1386 of the Civil Code, its language is in part as follows:

"If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation. * * * If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent,

devise or bequest, such property goes in equal shares to the children of such spouse," etc.

From the statement of the facts in this case as set forth above it is seen that the appellant comes within the class of persons upon whom are conferred rights of succession by said subdivision 8 of section 1386, Civil Code, and consequently would, in case of the intestacy of the decedent, be entitled to succeed to a portion of her estate. While she is thus given the status of an heir, her right to letters of administration is conditional—as indeed is that of relatives of a decedent qualified to administer upon the estate—upon whether or not she is entitled to succeed to the estate or any portion thereof. Estate of Crites, 155 Cal. 392, 101 Pac. 316. She is so entitled by virtue of section 1310 of the Civil Code. Being a lineal descendant of a relative of the deceased (for it will be remembered that Mrs. Wyman's husband was also related to her by consanguinity) to whom was devised or bequeathed a part of her estate and who died before the testator, she comes within the terms of that section, which provides that in the case described such lineal descendant takes the share of the estate given to the ancestor.

It follows from the foregoing that the court erred in granting the petition of the public administrator for letters of administration upon the estate of the decedent in preference to that of the appellant unless, as claimed by the respondents, it nowhere appears in this proceeding, either by her petition or any adequate proof upon the hearing, that appellant comes within the classes of persons enumerated in said section.

[2] In this connection it is urged by the respondents that there is no averment or adequate proof that any property owned by decedent at the time of her death constituted common property of Mrs. Wyman and her deceased spouse, or that any of such property came to her by descent, devise or bequest from such spouse. We are of the opinion that the record fails to bear out this contention of the respondents. We think that it sufficiently appears therefrom that a part of the estate of the decedent consists of property owned by Charles F. Wyman at the time of his death, either separately or in common with his wife, and bequeathed to her by him. Thus, it appears from the record that the decree of distribution of his estate was made on April 19, 1918, under which his surviving wife received an undivided one-half interest in almost the entire estate. She died within nine months of the making of this decree, and in the petition for letters of administration by which the present proceeding was instituted much of the identical property is set out as forming part of the estate of the decedent which came to her under and by virtue of said decree of distribution. This contention of the respondents is therefore not well founded.

It follows from what we have said that the trial court committed error in granting the petition of the public administrator as against that of the appellant, and that the order appealed from should be reversed. It is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

(182 Cal. 603)

ESCOBAR v. ROGERS et al. (Sac. 2828.)

(Supreme Court of California. April 3, 1920.)

1. Sales ⟸483—Property of conditional seller, though in buyer's possession, is subject to execution.

Under Code Civ. Proc. §§ 688, 698, relating to execution, the property of a seller who had delivered possession under an agreement that default should entitle him to retake the articles and declare forfeited installments paid is subject to execution, though in possession of the conditional buyer.

2. Sales ⟸483—Conditional buyer may waive right to possession as against judgment creditor of seller.

A conditional buyer, in possession under an agreement giving the seller the right to retake the property on default, etc., may, under Civ. Code, § 3513, where execution on a judgment against the seller is levied on the property, waive his right to possession as against the judgment creditor.

3. Sales ⟸483—Conditional buyer is entitled to property as against seller's judgment creditor.

One in possession of property under an agreement giving the seller right to rescind in event of default, etc., is entitled to possession of the property as against a judgment creditor of the seller.

4. Sales ⟸467—Title held to remain in seller until payment of entire purchase price.

Under a conditional sale agreement, *held* that the title remained in the seller until payment of all installments of the purchase price; the seller having right to rescind for default, etc.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Joseph Escobar against Manuel Rogers and another. From a judgment for plaintiff, defendants appeal. Reversed.

L. C. Pistolesi, of San Francisco (O. F. Meldon, of Sausalito, of counsel), for appellants.

D. M. MacLean, of Modesto, and Leon R. Yankwich, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiff in an ac-

tion for the partition of certain personal property consisting of 65 head of cows and other live stock, hay, wagons, plows, a tank, a separator, a gas engine, and a cultivator, of which, plaintiff alleged in his complaint he and defendant Rogers were joint owners, each having an undivided one-half interest in such property. Defendants Manuel Rogers and C. H. Kemp answered separately. The former set out in hæc verba the contract, the particulars of which are hereinafter summarized, between himself and the plaintiff for the sale of the subject-matter of this action, and both defendants alleged that all right, title, and interest in or to the said property had passed out of plaintiff by virtue of the sale thereof to defendant Kemp in execution of a judgment, hereinafter discussed, against the plaintiff.

There is practically no dispute as to the facts. On October 30, 1912, Escobar, Rogers, and two others were conducting a dairy in the county of Marin, each owning an undivided one-fourth interest therein, part of which was the property we have already mentioned. On October 30, 1912, Escobar and Rogers entered into the agreement set out in the latter's answer, the validity of which agreement is admitted by the plaintiff. By the terms of the contract, plaintiff's interest in the property described in the complaint was sold to the defendant Rogers for the sum of $3,700. The purchase price was to be paid in four installments, the last installment of $1,000 to become due and payable on the 1st day of September, 1915, and title was to remain in the vendor until payment in full should have been made. The property was, however, to be in the possession of the vendee, Rogers, from and after the execution of the agreement. It was further provided that, in the event of the failure of the vendee to pay any of the installments as they fell due, the vendor might elect either to treat the transaction as a completed sale and sue for the whole of the purchase price, or to rescind the agreement, reclaim his interest in the property, and retain as liquidated damages all payments previously made by the vendee. Pursuant to these provisions, the vendee entered into the exclusive possession of the property, and subsequently removed the greater portion thereof to a ranch in Merced county. The first three installments under the contract were met, but the last payment of $1,000 was never made. The vendor chose to rescind the contract, and instituted this action on January 30, 1916, praying for a partition of the property. It further appears that a default judgment for $107.50 was entered against the vendor herein on May 11, 1914, in an action between him and one R. B. Williams in the justice's court for Sausalito township, Marin county. After due proceedings an execution was issued to the sheriff of Merced county, who, on April 21, 1915, levied upon "the entire interest of Joseph Escobar in the stock under the control and possession of Manuel Rogers at the Bates ranch, i. e. 45 head of cows, 3 horses, 15 calves, 15 head of dry cows and heifers, and two bulls. And sold the whole of same in one parcel to C. H. Kemp. * * *"

The case was tried before the court without a jury. The court found:

"That on the 29th day of January, 1916, plaintiff, Joseph Escobar, and the defendant Manuel Rogers were, ever since have been, and now are, owners as tenants in common, each owning an undivided one-half interest in and to" the property described in the complaint. "That said C. H. Kemp has no right, title, or interest in the property hereinbefore described acquired through said sale under execution" above mentioned.

Judgment was entered, directing the sale of the personalty in question, and an equal division of the proceeds between Escobar and Rogers. The appeal is by both defendants from the judgment.

Arguments of the appellants are grouped under three main contentions: (1) That the findings of the court in respect to the legal effect of the sale on execution "are inconsistent, conflicting, and contrary to law"; (2) that the findings are contrary to the evidence in so far as it is found that the plaintiff is the owner of one-half of the property in controversy; and (3) that the findings are contrary to the evidence, in that it is found that the plaintiff has any interest in the hay or in the gas engine described in the complaint. It will not be necessary to discuss the two last points raised by appellants, for the reason that the judgment must be reversed on the grounds stated in the first point.

[1, 2] The question presented for decision is thus stated in respondent's brief:

"Did the fact that the title remained in Escobar under the terms of the contract of conditional sale give him a leviable interest in the personal property above mentioned on the date of the levy, the 21st of May (April?) 1915?"

In our opinion Escobar, the conditional vendor and judgment debtor, had a leviable interest. It was not for him, but for Rogers, the vendee, who had the right to the possession of the property, to object to the taking of the possession and custody thereof by the sheriff, and it does not appear that Rogers has ever questioned the right of the sheriff to make the levy.

In the case of Remmington v. Cady, 10 Conn. 44, the fundamental principle was laid down that "all of the property of a man shall be liable to the payment of his debts." Such is the policy and the law of this state as expressed in section 688 of the Code of Civil Procedure:

"All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, * * * are liable to execution. * * *"

And section 698 of the same Code provides that a certificate of sale delivered by the officer making the sale "conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied." While no case in this jurisdiction has been cited, and we are aware of none, where this question has arisen as between the conditional vendor and the purchaser at an execution sale under a judgment recovered against such vendor, we think it plain that the title of Escobar to the personal property described in the complaint was a leviable interest within the meaning of section 688 of the Code of Civil Procedure. It is not the law that, where A. and B. are tenants in common, A. can defeat the right of his creditors to levy upon the property merely by transferring the possession to B. under a conditional contract of sale, for this would tend to encourage practices in fraud of creditors. We quote from Humphreys v. Hopkins, 81 Cal. 551, 553, 22 Pac. 892, 893 (6 L. R. A. 792, 15 Am. St. Rep. 76):

"A debtor cannot, by placing or allowing his property to be in the possession of a third party, screen it from attachment. However lawful the possession of the bailee, the property is still subject to attachment or garnishment at the suit of a creditor of the owner. Such rights as the bailee may have to the use or possession of the property * * * will of course be protected, but, saving the rights of the bailee, the creditor may take it." (Italics ours.)

As we have seen, it is not shown that the vendee, Rogers, offered any objection to the seizure or sale of the interest of his vendor, Escobar, although at the time he (Rogers) was not in default under the contract of sale and had the right to receive full title to the property upon complying with the conditions of payment. If he had chosen to assert his rights under the agreement, he could have retained the possession of the property as against the creditors of his vendor, but this was under a law intended solely for the benefit of a conditional vendee which he might waive under section 3513 of the Civil Code, which reads as follows:

"Any one may waive the advantage of a law intended solely for his benefit."

The vendee, Rogers, having waived his right to the possession of the property as against Kemp, the purchaser at the execution sale, the vendor, Escobar, cannot claim with reason that said execution sale passed no title in the property. The vendor and judgment debtor will not be heard to complain of an act which affected only the rights of his vendee.

[3] Respondent's brief quotes Freeman on Executions, section 121, as follows:

"If a bailee has against the owners the right to retain possession of the property a specified time, he has the same right as against an officer proceeding under a writ against the owner. The officer cannot in such case lawfully seize the property."

The correctness of this statement may be conceded, but we agree with appellants' contenuon that the rule "is intended for the benefit and protection only of the bailee or person having the right to the undisturbed possession of the personal property." On this question there can be no difference in principle between the position of a pledgee and that of a conditional vendee, and as to the former the same authority says (section 120):

"If a pledgee chooses to waive his rights there is no impediment to the levy upon and sale of pledged property under a writ against the pledgor."

As we have pointed out, the vendee, Rogers, offered no objection to the seizure of the property. He thereby waived his right to retain the possession thereof under the agreement. None of the cases cited by respondent in support of his view is in point, inasmuch as they involve controversies, not between the conditional vendor and his judgment creditor, but between an attaching creditor and a bailee, a prior equitable mortgagee, a lessee, a cestui que trust, or a vendee, respectively.

[4] The only other contention raised by respondent is that the sole interest which Escobar had in the property at the time of the levy "was a lien for the payment of the final installment." This cannot be sustained. By the terms of the agreement between Escobar and Rogers, as we have seen, the former was to retain the legal title until full payment of the purchase price had been made. It was this legal title that defendant Kemp acquired by his purchase at the execution sale.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.

182 Cal. 597

COON v. SONOMA MAGNESITE CO.
(S. F. 8347.)

(Supreme Court of California. April 3, 1920. Rehearing Denied May 3, 1920.)

1. Easements ⟸14(2)—Indefinite right of way may be reserved.

A right of way may be reserved in a deed by a description which would be too indefinite to be a valid exception of the fee from the conveyance, such easement giving the owner of the servient estate the right to designate a reasonable way, and, if he fails to do so, the owner of the dominant estate may.

2. Deeds ⟸140—Indefinite exception for a road construed as valid easement rather than invalid exception of fee.

Under Civ. Code, § 1069, requiring an exception to be construed most strongly in favor of the grantor, an exception of a strip of land for a road, the description of which is too indefinite to be a valid exception of the fee, will be construed as a reservation of an easement, which need not be described with certainty.

3. Easements ⟸50—Reserved easements for road cannot be used for railroad.

A grantor who reserved an easement for a road across the land conveyed cannot authorize another to construct across the strip a private railroad, which would be a detriment to the land rather than a benefit as a road might be.

4. Deeds ⟸138—Reservation of easement or exception of fee to be determined from whole instrument.

Though there is a well-defined difference between reservations and exceptions, the use of the word "excepting" or "reserving" in a deed does not necessarily determine whether there is an exception or reservation, but that must be determined by a construction of the whole conveyance to ascertain the real intention of the parties.

5. Deeds ⟸140—Exception held to be reservation of easement, not exception of fee.

Where grantor conveyed a tract "saving and excepting therefrom" a strip for a road to be built, the phrase "for a road" modifies the whole clause and indicates an intention to reserve an easement for a road, rather than to except from the conveyance the fee to the strip.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by J. T. Coon against the Sonoma Magnesite Company. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb and W. H. Cobb, both of San Francisco, for appellant.

J. R. Leppo and Kellogg & Kyle, all of Santa Rosa, for respondent.

WILBUR, J. Plaintiff claims title to 160 acres of land across which the defendant was constructing a railroad and telephone line at the time of the commencement of the action, under a claim of ownership of a strip 40 feet wide. The action was to enjoin the further construction of the railroad. The trial court granted the relief prayed for and adjudged that the plaintiff was at the time of the commencement of the action the owner in fee simple of the entire quarter section and that the defendant had no interest therein, and enjoined the defendant from constructing said railroad. Both plaintiff and defendant claim under conveyances from a common grantor, one M. C. Meeker. Meeker conveyed the quarter section to the plaintiff by deed containing the following clause:

"Saving and excepting therefrom a strip of land forty feet wide along the banks of the east fork of Austin creek all the way across the said land, for a road to be built at some future time."

Subsequently Meeker entered into a contract with A. B. Davis, in which it was recited that Davis was desirous of securing transportation facilities for the transfer of the Sonoma Magnesite Company's material from their quarries to the Northwest Pacific Railroad at a point at or near Watson, Sonoma county, Cal., and desired the right of way for the construction of a road from said quarries to Watson, "which road over the land described herein shall be for the exclusive use of the parties hereto, and the Sonoma Magnesite Company," and then declared that Meeker "does hereby grant to the party of the first part a right of way not to exceed forty feet in width through his land for the construction of said road, it being understood and agreed that said road shall, as far as practicable, follow the meanderings of East Austin creek." The defendant claims that the above-mentioned clause in the deed from Meeker to Coon was an exception so that the fee was retained in Meeker to the 40-foot strip along East Austin creek, and that, as Meeker was thus the owner of the fee, he had a right to grant a right of way for the railway in question to Davis for the defendant. Plaintiff's claim is that the description contained in the above-mentioned clause is so indefinite and uncertain as to be void, and that therefore the plaintiff took title to the entire 160 acres described in the deed from Meeker to him. The trial court took the view that the description was void for uncertainty and found that the title to the entire 160 acres was in the plaintiff and granted relief accordingly, enjoining the defendant.

The first question requiring solution is as to the effect of the clause in the deed from Meeker to Coon. The phrase "saving and excepting therefrom a strip of land forty feet wide," etc., is apt in its phraseology for an exception of the fee in the land, and if there was no further provision in the clause

it should undoubtedly be construed as an exception rather than a reservation. But the clause "for a road to be built at some future time" makes it necessary to consider whether or not it was the purpose of the parties merely to reserve a right of way for a road.

[1] If we construe the clause as a reservation of a right of way, the objection that the description is too uncertain to be valid would be overcome by the rule which permits the delimitation of the right of way subsequent to the conveyance. As was said in Ballard v. Titus, 157 Cal. 673, 683, 110 Pac. 118, 122: "It is settled law that where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way, and if he fails to do so, the owner of the dominant estate may designate it. Jones on Easements, § 337; Kripp v. Curtis, 71 Cal. 62, 65 [11 Pac. 879]; Blum v. Weston, 102 Cal. 362, 369 [41 Am. St. Rep. 188, 36 Pac. 778]." See, also, Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6.

[2] Under our Code, which establishes a different rule from that of the common law, an exception is construed most strongly in favor of the grantor. Civ. Code, § 1069; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Ballard v. Titus, supra. If the clause is so uncertain as to be void when construed as an exception, but is valid when construed as a reservation of an easement, this rule of construction would require us to construe the clause as a reservation of an easement for a road, as most favorable to the grantor, and the conclusion of the trial court that the defendant had no interest in the 160 acres of plaintiff, because of the uncertainty in the conveyance, was erroneous for the reason that the grantor Meeker at least retained a right of way for a road, and the conveyance by Meeker to Davis for the construction of the road for the benefit of the defendant authorized the construction of a road along the right of way so reserved and designated by the defendant, provided such designation was a reasonable one. See Pollard v. Maddox, 28 Ala. 321.

[3] While it is true that the deed from Meeker to Davis purported to grant a right of way "across my land," the purpose of the instrument shows that it was to secure to the defendant a road for the transportation of its materials from their quarries to the railroad near Watson, Sonoma county, along East Austin creek, and would therefore authorize the construction of a road along the strip so reserved by his grantor Meeker. But the right of the defendant to construct a railroad instead of a wagon road is predicated upon the theory that the fee of the 40-foot strip is "excepted" from the operation of the deed from Meeker to the plaintiff, for only on this theory is the conduct of defendant authorized, because an easement for a wagon road would not justify the construction of a railroad along such strip. We will therefore further consider the question as to whether or not the 40-foot strip referred to in Meeker's deed to plaintiff is an exception of the fee.

[4] While the difference between reservations and exceptions is well defined (Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207), it is universally held that the use of the word "excepting" or "reserving" is not alone determinative of the question, but that the effort of the court should be to construe the whole conveyance for the purpose of ascertaining the real intention of the parties and give it effect accordingly, regardless of the use of the appropriate terms "reserving" or "excepting" (Painter v. Pasadena L. & W. Co., 91 Cal. 81, 27 Pac. 539; Devlin on Deeds, vol. 2, §§ 980, 980a). The only language in the clause under consideration which indicates that the intent of the parties was to reserve the fee is the provision for the "exception" of a strip of "land."

[5] The fact that this is a strip 40 feet wide which meanders a stream, and is to be used for a road, is, however, an indication that the parties contemplated an easement rather than an exception. It is evident that the parties had in mind the construction of a road which would be beneficial to both parties. Until such road was constructed, the grantee would have the right to use this strip as well as the balance of the land for any suitable purpose, and thereafter for any purpose not inconsistent with the easement. The phrase "for a road" modifies the whole clause. Similarly in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee. Abercrombie v. Simmons, 71 Kan. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 516, note, 6 Ann. Cas. 243, note. It is true that there are cases holding that apt words for the conveyance of a fee will vest the fee in the railroad company, but the same reasoning which would justify a conclusion that unless it is exceptionally clear in the conveyance that a fee is intended, a right of way only is conveyed, would lead to the conclusion that the clause with reference to the 40-foot strip in the deed from Meeker to plaintiff merely reserved a right of way for a road. If we should construe the deed as excepting a fee in the land of a 40-foot strip along the East Austin creek, such exception would be valueless to the defendant, unless it is also held that it had a right to locate its railroad or road upon a grade and in places where it would be possible to construct such a railroad or road. It is true that there are decisions that, under certain circum-

stances where a fee is excepted or granted by indefinite and uncertain description, the grantor has a right to elect where he will locate the land thus imperfectly described (Smith v. Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226; Simpson v. Blaisdell, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep. 348; 13 Cyc. 679; Benn v. Hatcher, 81 Va. 25, 59 Am. Rep. 645); or such deed may be treated as an agreement to convey (Louisville R. R. v. Boykin, 76 Ala. 560; Hoard v. Huntington, 59 W. Va. 91, 53 S. E. 278, 8 Ann. Cas. 929). Under these decisions, if applicable—and on this point we express no opinion (see Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207)—defendant would have a right to locate the 40-foot strip of land, but the appropriate location for a wagon road might not be at all practicable for a railroad. On the whole, therefore, we conclude that it would be contrary to the intention of the parties to the deed from Meeker to Coon to use the strip in question for a private railroad, which is a great disadvantage to the land of the plaintiff, rather than an advantage, and that the deed should be construed as reserving a right of way for a wagon road. In view of the conclusion that the defendant is entitled to use a 40-foot right of way to be located as stated in Ballard v. Titus, supra, for a wagon road, and is not entitled to use the strip for a railroad, it is necessary to reverse the case in order that further proceedings may be had in accordance with this opinion. In view of our conclusion that the appellant is entitled to a right of way for a road and to a reversal of the judgment, we deem it unnecessary to discuss the points advanced by it concerning the form of the action.

The judgment appealed from is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

182 Cal. 555

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. PACIFIC SURETY CO.
(S. F. 8433.)

(Supreme Court of California. March 30, 1920.)

1. Insurance ⟸679 — Reinsurer held liable notwithstanding insurer's failure to send reinsurance advices.

Under reinsurance contract making reinsurer's liability commence simultaneously with that of insurer provided that, upon insurer's failure to send reinsurance advices to reinsurer within 10 days "after receipt * * * of advice of the issuing of the policy or renewal receipt," such liability shall commence from the moment of the dispatch of reinsurance advices, reinsurer was liable notwithstanding insurer's failure to send reinsurance advices, where such failure was due to ignorance that any reinsurance had arisen because of advices received that a second policy was issued in lieu of a previously issued policy, since the advice of the issuing of the policy requiring insurer to send reinsurance advices must be one showing existence of reinsurance.

2. Pleading ⟸205(1)—Reinsurer held not entitled to attack on general demurrer settlement of claim by insurer.

Reinsurer, having by reinsurance contract authorized insurer to bind it by a settlement, could not, in insurer's action on the reinsurance contract, attack the settlement of a claim upon general demurrer.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the Pacific Mutual Life Insurance Company of California against the Pacific Surety Company. From judgment sustaining demurrer to complaint, plaintiff appeals. Reversed.

R. S. Gray, of San Francisco, for appellant.

Denson, Cooley & Denson and Cooley & Lachmund, all of San Francisco, for respondent.

LENNON, J. This is an action for money claimed to be due under a reinsurance contract. The general demurrer to the amended complaint was sustained without leave to amend, and plaintiff appeals from said judgment.

Plaintiff and defendant entered into a reinsurance contract whereby defendant reinsured the "second excess" of $5,000 on accident insurance policies written by the plaintiff where the principal sum exceeded $10,000. In other words, if the plaintiff issued one or more policies to one person, and the total insurance exclusive of accumulations amounted to $20,000 or over, plaintiff carried the first $10,000 of the risk, another reinsuring company carried the risk for the next $5,000, and defendant assumed the risk for the second excess of $5,000. The companies were to share proportionately in any accumulations which should arise under these policies. There was a provision that plaintiff was to have the right to settle disputed claims and bind the defendant thereby. The Chicago office of the plaintiff in April, 1914, issued a policy of accident insurance for $10,000 to Dr. Steere. The following June a second policy for the same amount was issued to said Dr. Steere, and the advices received at plaintiff's home office in Los Angeles stated that this second policy was issued in lieu of the first policy. On July 13, 1914, Dr. Steere was murdered, and July 17 plaintiff received word that the widow of Dr. Steere claimed both

policies were in force; this being the first knowledge on the part of plaintiff of the possibility of such claim being made. On the day following the receipt of this information, plaintiff notified defendant of the issuance of the two policies and the claim that both were in force at the time of the death. The widow commenced suit against plaintiff for $30,000. Plaintiff concluded that under all the circumstances it was advisable to settle the claim, and did so for $17,000. This suit is for the alleged proportionate liability of defendant under its contract.

The portions of the reinsurance contract which are of importance for the purposes of this case are as follows:

Article I. "4. Whenever the 'Pacific Mutual' has issued on one life several policies the reinsurance shall extend proportionately under each policy; and in the event of a claim arising it shall be construed that the 'Reinsurance Company' has assumed a proportionate risk in each of such policies, and in each and every provision and condition of such policies."

Article II. "2. The liability of the 'Reinsurance Company' for each risk shall commence simultaneously with that of the 'Pacific Mutual,' provided only that the 'Pacific Mutual' shall dispatch the reinsurance advices to the office of the 'Reinsurance Company' within ten (10) days (Sundays and holidays excepted) after receipt at its home office in Los Angeles, California, of advice of the issuing of the policy or renewal receipt by the 'Pacific Mutual.'

"3. All liability of the 'Reinsurance Company' shall cease when the risk terminates under the respective policy or renewal. If the 'Pacific Mutual' shall neglect to advise the 'Reinsurance Company' within the above ten days, then the liability of the 'Reinsurance Company' in respect to the reinsurance so omitted to be advised shall commence from the moment of the dispatch by the 'Pacific Mutual' of such advice."

The sole question presented to the court for determination is one of the construction of the terms of a written contract, i. e., whether the reinsurance company is absolved from responsibility by the failure of the insuring company to dispatch reinsurance advices when such failure was without fault on the part of the insuring company and due to ignorance that any reinsurance had arisen. From a careful reading of the contract it is apparent that the precise contingency now presented was not in the minds of the parties at the time the contract was drawn and, consequently, was not provided for, namely, the case where a claim is brought within the reinsurance agreement without knowledge until after the death of the insured that the policy was within the agreement. It remains, therefore, to determine the general intent of the parties from the contract as a whole. As was said in Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota, 121 Fed. 609, 613, 57 C. C. A. 635, 639:

"To the counsel of each of these parties this contract seems plain and unambiguous, and its meaning certain, and yet it has an entirely different signification to the representatives of each of these corporations. This fact, repeated perusals, and a careful study of the writing present very convincing evidence that its terms are not altogether clear, that they were well calculated to raise this controversy, and that they are susceptible of two constructions. It remains to determine which is the more natural, probable, and rational interpretation. There is no evidence in the record that either of the two interpretations urged upon our consideration would have deterred either of the parties from entering into the agreement. What they intended to stipulate, what they understood the contract to mean, and what they would have done if their interpretation of it had been different, can be deduced only from the contract itself, the situation of the parties, and the circumstances surrounding them when they made it."

It is contended in support of the judgment that the contract plainly requires that the defendant should be promptly advised of the issuance of any policy by which it incurred a liability under its reinsurance agreement. This contention is made and based upon the theory that the provision in paragraph 3 of article 2 of the reinsurance agreement was inserted in the contract with this object in view and renders the giving of reinsurance advices a condition precedent to the liability of defendant. From this it is argued that, if the plaintiff at its home office in Los Angeles received erroneous information from its Chicago office which operated to prevent it from giving to the defendant the reinsurance advices by virtue of which the defendant's liability would have commenced to run concurrently with that of the plaintiff, it is the misfortune of the plaintiff, from which it alone must suffer.

[1] We cannot accede to that interpretation of the contract. The contract plainly provides that the liability of the reinsurance company commences simultaneously with that of the Pacific Mutual Company and arises automatically without notification of any kind. The one proviso attached to the existence of the liability is that reinsurance advices must be sent by the insuring company within 10 days "after receipt at its home office in Los Angeles, California, of advice of the issuing of the policy or renewal receipt." In case of a failure to send reinsurance advices under those circumstances, and only in case of such a failure, the liability of the reinsurance company does not commence until the advice is actually sent. The liability of the reinsurance company comes into existence, then, on the issuance of the policy by the insuring company, and the only contingency that can relieve the reinsurance company is the failure of the insurance company to dispatch reinsurance advices after receipt at

its home office of advice of the issuance of the policy. Clearly the advice of the "issuing of the policy" within 10 days after the receipt of which plaintiff is to send reinsurance advices can only mean advice of the issuing of such a policy as the parties had in contemplation, that is, one showing, either by itself or in connection with one or more others, the existence of such "reinsurance." Any other interpretation would be unreasonable, for a requirement that "reinsurance advices" be sent after the receipt of advices of the issuance of any policy would be purposeless, inasmuch as "reinsurance advices" can only be sent where a policy has been issued upon which reinsurance has arisen, and it is only with "reinsurance" that the contract deals.

When, therefore, plaintiff receives word that a second policy is not within the agreement for the reason that it is issued in lieu of the first, no occasion has arisen for sending reinsurance advices. If it later turns out that a claim is presented within the reinsurance agreement by reason of both policies being in force at the same time, according to the contract the liability of the reinsurance company arose when the second policy was issued and the only contingency which could have absolved it from liability has not arisen, namely, neglect on the part of the insuring company to send reinsurance advices after receipt of the advice of the issuance of the policy, for the insuring company has never received any advice of the issuance of a policy upon which reinsurance has arisen. It will be noted that the contract provides that "if the Pacific Mutual shall neglect to advise the 'Reinsurance Company' within the * * * ten days" after receipt at its home office in Los Angeles of advice of the issuance of the policy, the liability of the reinsurance company shall not commence until the actual moment of the dispatch of the reinsurance advices. If the Pacific Mutual has never been advised at its home office of the issuance of a policy within the reinsurance agreement, there is no time from which the 10-day period began to run against the Pacific Mutual and, consequently, nothing to prevent the liability of the reinsurance company from arising and continuing in existence from the time of the issuance of the policy upon which the claim is being made.

While it is true that the contract shows that it was intended that the defendant was to be promptly advised of the issuance of any policy by which it incurred a liability under its reinsurance agreement, there was nothing in the contract limiting its liability only to cases where it had been so notified; the only limitation on liability was in the case of neglect by plaintiff to send such notification within 10 days after receipt of advice of the issuance of the policy, and, where plaintiff received no advice of the issuance of a policy within the contract, it was under no obligation to send reinsurance advices. This was the only protection afforded defendant, and, in view of the fact that the contract seems to have been carefully drawn to cover a most important branch of the business of plaintiff and defendant, the court is not at liberty to imply an obligation in favor of defendant that it should only be liable when notified by plaintiff irrespective of the knowledge of plaintiff that the policy was one on which reinsurance had arisen. Such an obligation is one so absolute in nature that, if intended to be imposed on plaintiff, it should have been clearly set forth in the contract. As the contract stands, not only is no such intention expressed, but a contrary intent appears, namely, that defendant is to be bound unless plaintiff fails to forward information received by it at its home office that reinsurance has arisen. Of course, any claim of fraud or negligence would place a different aspect upon the case. The facts are now being considered only for their sufficiency upon general demurrer.

[2] The defendant is not in a position, upon general demurrer, to attack the settlement of the claim between plaintiff and the widow of the insured, in view of the power given plaintiff by the contract of making settlements binding upon defendant.

The complaint does not fail to state a cause of action under the contract, and the demurrer should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.

SHAW, J., deeming himself disqualified, does not participate in the foregoing.

182 Cal. 25

ST. JOHN v. CONSOLIDATED CONST. CO. (L. A. 5230.)

(Supreme Court of California. Jan. 6, 1920. Rehearing Denied Feb. 5, 1920.)

1. Judgment ⊂=590(2)—Record held to show judgment was not upon matters adjudicated in former action.

Record upon appeal from judgment upon an open book account *held* to show that the items upon which judgment was rendered were not included in a former judgment which had been paid, so that the matter was open for adjudication in this action, and was not res adjudicata.

2. Pleading ⊂=323(4)—Permitting the filing of bill of particulars after statutory time within the discretion of court.

An exception that the court erred in permitting plaintiff to serve and file his bill of particulars more than the five days after demand therefor as required by Code of Civ. Proc. § 454, is not well taken, since it was within the court's power to relieve the plaintiff of his default and permit him to file a bill of particulars at the opening of trial, and, it not appearing that such action was prejudicial to the defendant upon the merits of the case or upon presentation to the court, no abuse of discretion appears.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by A. C. St. John against the Consolidated Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Weller, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

LAWLOR, J. The appeal is from the judgment entered in favor of the plaintiff in the sum of $3,000 found by the court to be due the plaintiff from the defendant in an action on an open book account for cement furnished.

The complaint, after alleging the corporate existence of the defendant, merely alleges:

"That said defendant is indebted to plaintiff on an open book account for cement furnished to said defendant within four years last past at the city of Los Angeles, county of Los Angeles, state of California, in the sum of $3,000."

It is then alleged that no part of this sum has been paid, but that the whole thereof is still due, owing, and unpaid.

In its answer the defendant denied the indebtedness, and alleged that prior to the commencement of this action plaintiff had assigned and transferred all claims held by him against the defendant to the Riverside Portland Cement Company, a corporation, which commenced an action against the defendant in the superior court of Los Angeles county, and judgment was rendered in favor of the plaintiff therein, which was paid and satisfied by this defendant, and that all rights and claims of the plaintiff herein were adjudicated in that action.

The court found that the defendant was at the time of the commencement of the action, and still is, indebted to the plaintiff in the sum of $3,000, and that no part of the sum has been paid; that prior to this action the plaintiff had assigned all claims held by him against the defendant to the Riverside Portland Cement Company, a corporation; that the said Riverside Portland Cement Company did commence an action against the defendant entitled "Riverside Portland Cement Company, a Corporation, Plaintiff v. Consolidated Construction Company, a Corporation, Defendant, No. B–1098"; that said action was tried and judgment therein rendered in favor of the plaintiff therein and against the defendant herein; that said judgment has become final and has been fully paid and satisfied by the said defendant; that the said sum of $3,000 sued on in plaintiff's complaint herein was not included in the judgment in the said action No. B–1098; that the court in that action did not adjudicate the question of the indebtedness of the defendant to the plaintiff in this action; that the claim of the plaintiff herein was in no way passed upon or adjudicated in the former action, and that that action is not a bar to the recovery of the plaintiff herein; that before the commencement of this action the Riverside Portland Cement Company had reassigned to "A. C. St. John, the plaintiff herein, all right, title, and interest to it assigned in said demand of $3,000 by the said A. C. St. John; and that at the time of the commencement of this action" the plaintiff was the owner of the claim against the defendant. Judgment was thereupon entered for the sum of $3,000, with interest at the rate of 7 per cent. from the date of the commencement of this action.

[1] 1. The principal point relied on by appellant as ground for reversal of the judgment herein is the claim that the matter in controversy was adjudicated in the former action in which the Riverside Portland Cement Company had judgment against the defendant, and that therefore the matter is res judicata. As we have indicated above, the court found specifically that "the court in that action did not adjudicate the question of the indebtedness of the defendant to the plaintiff in this action; that the claim of the plaintiff herein was in no way passed upon or adjudicated in the former action." An examination of the record in the former case shows that this finding was fully justified. It appears that the cement company

refused to sell cement to the defendant, whereupon it was arranged that the cement company should sell to St. John, the plaintiff here, who was a stockholder of the defendant, upon his personal credit, and that St. John would then resell to the defendant. This was done. On account of cement so sold St. John paid the cement company $3,000, and the defendant paid $2,000. There was a considerable balance still due the cement company, and for this it brought suit against the defendant, the complaint containing two different sets of counts, so to speak—one set on the theory of a sale by St. John to the defendant and an assignment by St. John of his claim to the plaintiff; and the other on the theory of a sale direct by the cement company to the defendant. The balance sought to be recovered in both sets of counts took no account of the payment of $3,000 by St. John. The court found the facts as stated above, and also that St. John was acting throughout for the defendant and as its agent, and gave judgment against the defendant, but only for the balance due the cement company after the payment of $3,000 by St. John was taken into account. In other words, the judgment gave to the defendant the benefit of the $3,000 paid by St. John. This is the $3,000 which St. John seeks to recover in the present action. It is perfectly plain from the foregoing statement that the defendant in all justice still owes St. John the $3,000 which he paid for it and of which it got the benefit, and that its defense here is an unconscionable one. It is also apparent that the action by the cement company was decided exclusively upon the basis of determining merely what was due the cement company on its own account, and not as assignee of St. John, and without any determination whatever as to the obligations between St. John and the defendant. There was, therefore, no adjudication as to such obligations, and they were open for adjudication in this action.

[2] 2. The only other point urged by appellant is "that the court erred in permitting the plaintiff to serve and file his bill of particulars more than five days after demand therefor, as required by section 454 of the Code of Civil Procedure." It appears that the demand was served more than a year and a half before the trial, and subsequently called to the attention of plaintiff's attorney by counsel for the defendant, and that no attempt was made to comply with the demand prior to the day of the trial. At the opening of the trial, however, the court allowed the plaintiff to file the bill of particulars over the objection of counsel for the defendant, offering to allow a continuance of five days in order to give counsel time to examine the bill and prepare for trial. This offer of the court was refused by counsel for the defendant, who reserved an exception to the ruling of the court.

It was within the power of the court to relieve the plaintiff of his default and permit him to file a bill of particulars; and it not appearing, and it not being claimed, that the action of the court in so doing was prejudicial to the defendant upon the merits of the case, or upon their presentation to the court, no abuse of discretion appears.

The judgment is affirmed.

We concur: OLNEY, J.; SHAW, J.

182 Cal. 549

SUTTER BUTTE CANAL CO. v. AMERICAN RICE & ALFALFA CO. et al.

(Sac. 2817.)

(Supreme Court of California. March 30, 1920.)

1. Waters and water courses ⊂=258—Evidence of effect on crop of delay in furnishing water in action to enforce water lien admissible.

In actions by irrigation company to foreclose liens securing notes given by rice company in payment for water, evidence as to effect upon rice crop of delay in furnishing water was admissible to show it was proximate cause of rice company's loss set up as counterclaim.

2. Waters and water courses ⊂=258—Evidence held to show defendant ready to receive water before available.

In actions by irrigation company to foreclose liens securing notes in payment for water given by a rice company counterclaiming for damage through failure to furnish water evidence that defendant rice company was ready to receive water before date when it was available *held* sufficient to sustain verdict for it on its counterclaim.

3. Appeal and error ⊂=699(4)—Record should show whether instructions were given at request of party complaining.

Under Code Civ. Proc. § 609, it is important for record to show whether or not instructions complained of are given at request of party complaining, which should be made clear by judge, as, in default of such explanation, party complaining may find objection precluded by rule favoring regularity of trial proceedings.

4. Appeal and error ⊂=1064(2)—Assumption on instruction of breach of contract by plaintiff not misleading.

In action by irrigation company to foreclose liens securing notes in payment for water given by a rice company which counterclaimed for failure to furnish water, in view of opening statement of counsel, course of evidence, other instructions, and argument before jury, assumption in instruction that there had in fact been a breach of contract by plaintiff irrigation company *held* not to have misled jury.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Sutter Butte Canal Company against the American Rice & Alfalfa Company and others. From an adverse judgment, plaintiff appeals. Affirmed.

W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for appellant.

Elston, Clark & Nichols, of Berkeley, and G. F. Jones, of Oroville, for respondents.

WILBUR, J. Plaintiff brought two actions to foreclose liens to secure promissory notes, made in payment for water, given it by the defendant corporation, which will be hereafter referred to as the defendant; the other defendants being joined solely because of their interest in the land upon which plaintiff claims a lien. The defendant filed counterclaims for damages alleged to have been suffered because of the partial failure of a rice crop alleged to be due to the delay of the plaintiff in furnishing irrigating water. The issues raised in these actions on these counterclaims were consolidated and tried before a jury, and verdict was rendered thereon in favor of the defendant for $20,000. The court decided in favor of plaintiff's right to recover upon the promissory notes and therefore deducted the amounts thereof from the counterclaim found by the jury, and judgment was rendered against the plaintiff for the balance of $14,051.10. Plaintiff appeals.

Two contracts in writing granting a water right were executed by the parties, both dated May 9, 1914. By one of these contracts plaintiff agreed to furnish the defendant irrigating water for 400 acres of land; by the other, for a tract of 560 acres. The former called for 2½ cubic feet per second normal rate, and, upon demand, for 5 feet additional. The contract for the 560 acres called for 3½ cubic feet per second normal rate, and, upon demand, for 7 feet additional. The plaintiff charged not only for the normal quantity of water, but also for such additional water required by defendant for raising rice, and these actions were to recover on the promissory notes given in payment therefor. If we were called upon to construe these contracts between the parties to determine whether or not the plaintiff was obligated to furnish such additional water for the season of 1914, a difficulty arises because they provide that, when the additional water is required, notice to that effect shall be given in January of each year. As the contracts were executed in May, no notice could have been given thereunder for the additional water in 1914, as required by the terms thereof. The delay of which the defendant complains was in the failure to furnish water before June 5, 1914, immediately upon the execution of the contracts. It is unnecessary to determine this question on this appeal, for the reason that in the trial court no distinction was made between the normal and "additional" requirements as to water. The former was provided for in paragraph 1, and the latter in paragraph 11, of the contract. The court interpreted the contract in its instructions to the jury, and no complaint thereof is made on this appeal. This instruction is as follows:

"The jury is further instructed that, by the language of the contract in evidence, the Sutter Butte Canal Company, plaintiff herein, agreed to furnish water from and after May 9, 1914, and if you find that the defendant, American Rice & Alfalfa Company, was ready in the year 1914 to receive said water at such time or later for the purpose of making valuable use thereof in the raising of rice, the obligation rested on the plaintiff to supply such water."

"The jury is instructed that, under the terms of the written contract between the canal company and the rice company, the rice company was entitled to have the water called for by the contract delivered to the land described in the contracts after May 9th, the date of those contracts."

Upon this interpretation of the contract the issues of fact were presented to the jury, plaintiff contending that water was in its canal on and after May 24, 1914, and that the defendant was not ready to use such water and did not use it before the 5th day of June, 1914. If plaintiff's contention was correct, the defendant would not be entitled to damages, and the court so instructed the jury. The defendant claimed that it was ready to use water as early as May 5th, and that, although it needed water daily after May 9th, the canals necessary for furnishing such water were not yet completed by the plaintiff, and even when completed no water was available to defendant therein until after June 1, 1914. The distinction between the plaintiff's duty to furnish the "additional" water and the normal supply was first referred to during the argument in this court. Even in its petition for a hearing in this court no such distinction was made. This petition states:

"It (the contract) does not specifically state the date upon which the furnishing of water shall commence each and every year. Of course, it is to be furnished only during the irrigating season, and not all the time. And the true and obvious construction to be given to this paragraph (1) would be that the water should be furnished when respondent was ready to receive and take the same upon its land. No other construction can be reasonably given it. * * * Under that contract and upon the theory upon which the case was tried and necessarily had to be tried, at least within a reasonable time after its execution, or at least some time thereafter, if respondent was ready to receive the water on its land, appellant would be required to furnish it. * * *"

The errors complained of by appellant are confined to objections to that portion of the evidence of the defendant tending to prove that water on or prior to May 15th was essential to maturing a crop of rice; that the delay in flooding its land was caused by the plaintiff; and that the court improperly instructed the jury, in this, that the instructions assumed that there had been a breach of the contract by the plaintiff.

[1] The testimony of the witnesses as to the effect upon a rice crop of the delay in furnishing water was clearly admissible for the purpose of showing that such delay was the proximate cause of defendant's loss. As stated, the jury were instructed that the obligation of the plaintiff to furnish water dated from May 9th, and, under such instruction, if any damage resulted from a failure to furnish water before that time, defendant was not entitled to recover therefor. The objection to this line of testimony was properly overruled.

[2] The appellant contends that the evidence is insufficient to sustain the verdict because there is no evidence that the defendant was ready to receive the water before May 24th, when such water was available. The evidence on this question is conflicting. Mr. Yoakum, the defendant's superintendent, testified that on May 9, 1914, the 400 acres was ready for the first application of water; that within two days thereafter 160 acres of the 560-acre tract were ready for water; that by May 14th all but 60 acres of the 560-acre tract were ready for the first application of water; and that the 60 acres were ready for water May 16th at 10 o'clock. The witness further testified that he made use of all the water furnished by the plaintiff, and that using all such water it required 20 days to complete the first flooding, which should have been done in 8 days if there had been sufficient water. In view of this and other evidence to the same effect, it cannot be said that the verdict in this regard is not supported by the evidence. The appellant complains that under the instructions the court assumed that there had in fact been a breach of contract by the plaintiff. Two instructions were given covering substantially the same ground in almost the same language. In the first the court, after stating in a general way the nature of the case and that the defendant alleged and the plaintiff denied damages by reason of the failure to furnish water, instructed the jury as follows:

"The plain issues before you and which you, gentlemen of the jury, have been sworn to determine the facts upon the evidence adduced on the trial and under the instruction of the court as to the law of the case, are:

"First, whether there is anything due the plaintiff for the furnishing of the water in the year 1914, and

"Second, whether there is anything due defendant for the breach of the two contracts, *that is, if you find there has been a breach,* for the furnishing of the water to the 400-acre and the 560-acre tracts in the year 1914." (Italics ours.)

In the next instruction the issues are again stated in a somewhat different language, and the court concluded the instruction as follows:

"By stipulation of counsel, the issues you are to determine are: First, whether there is any sum due to the plaintiff for the furnishing of water in the year 1914; second, whether there is anything due to the defendant for the breach of the two contracts for the furnishing of water to the 400-acre tract and the 560-acre tract in the year 1914."

[3, 4] It is as to this latter portion of the instruction that the appellant objects. It is proper to say in this connection that there is a conflict between the clerk and the reporter's record (both certified to by the trial judge) as to the first instruction. The phrase, "that is, if you find that there has been a breach," is interpolated in the instruction as given in the reporter's transcript, but is not contained in the clerk's transcript. Appellant apparently does not dispute the correctness of the instruction as set forth in the reporter's transcript and printed in respondent's brief. There is nothing, however, in either transcript to show whether or not this instruction was given by the court of its own motion or at the request of the plaintiff or the defendant. As to the other instructions, each indicates whether or not it is given at the request of the plaintiff or defendant as set forth in the clerk's transcript. It is important for the record to show whether or not instructions complained of are given at the request of the party complaining, and this should be made clear by the judge. Section 609, Code Civ. Proc. In default of such explanation, a party complaining of such an instruction may find its objection precluded by the rule which favors the regularity of the proceedings in the trial court. Gray v. Eschen, 125 Cal. 5, 57 Pac. 664. We are satisfied, however, that the jury were not misled by the assumption in the instruction of which appellant complains. It must have been apparent to the jury that the main contention in the case was as to whether there had been a breach of the contract. The opening statement of counsel, the course of the evidence, and no doubt the argument of counsel before the jury, were largely directed to that question, nor does a consideration of the instructions as a whole lead to the conclusion that this issue was withdrawn from the jury. The jury was instructed that the defendant was required to prove its allegation that water was not received until a date so late in the season that it became and was impossible for the rice crop to mature in order to recover from

the plaintiff; and, again, it was instructed that, if the plaintiff had water available for the defendant before defendant had its land in condition to use the same, then the plaintiff was not in fault, and the verdict must be in favor of the plaintiff. It is clear from these and other instructions that the jury could not have been misled by the instructions complained of into believing that they were instructed as a matter of law that the plaintiff was guilty of a breach of its contract.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

182 Cal. 642

In re JOHNSON'S ESTATE. (L. A. 6226.)

(Supreme Court of California. April 7, 1920.)

1. Executors and administrators ⟸17(3)—Husband entitled to preference as administrator.

A surviving husband is entitled to preference as to letters of administration on the estate of his wife, unless incompetent on some statutory ground.

2. Appeal and error ⟸1010(1)—Finding of fact supported by evidence not disturbed.

A finding of fact by trial court supported by sufficient evidence will not be disturbed on the ground that it was contrary to the preponderance of the evidence.

3. Appeal and error ⟸1010(1)—Executors and administrators ⟸20(7) — Presumption of capacity merely throws on party asserting incapacity burden of proving same.

The presumption of capacity merely throws on one asserting the incompetency of the surviving husband to act as administrator the burden of showing such husband's want of capacity, and does not change the rule that the appellate court will not disturb the finding of the trial court on question of want of capacity if supported by sufficient evidence.

4. Executors and administrators ⟸20(7)—Evidence held to warrant finding of surviving husband's want of capacity.

On appeal by a surviving husband from an order refusing his application for letters of administration, evidence *held* sufficient to warrant the finding of his want of capacity.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Mary Jane Webster Johnson, deceased. From an order of the superior court appointing Mary T. Hiatt as administratrix with will annexed, the surviving husband appeals. Affirmed.

Hutton, Fogel & Coffin, Hutton & Fogel and Kennicott & Williams, all of Los Angeles, for appellant.

Manning, Thompson & Hoover, of Los Angeles, for respondent.

OLNEY, J. [1] This is an appeal from an order appointing one Mary T. Hiatt as the administratrix with the will annexed of the estate of the decedent. The appeal is taken by the surviving husband of the decedent, who himself had petitioned for letters, and whose petition was denied. As the surviving husband of the decedent he was entitled to letters in preference to any one else, unless he were incompetent on a statutory ground of incompetency. One such statutory ground is a "want of understanding," and the lower court found that the appellant was incompetent on this ground. The sole point presented on appeal is as to the sufficiency of the evidence to sustain this finding.

[2, 3] We have stated that the sole question is as to the sufficiency of the evidence to sustain the finding mentioned. This perhaps is not an exactly accurate statement of the position of appellant's counsel. That position, as stated by counsel, is that the sole question is as to whether or not appellant's lack of understanding was established by a preponderance of the evidence. But the question of preponderance of evidence is one exclusively for the tribunal whose function it is to try and to determine the question of fact. It is not a question for the appellate tribunal. If there was sufficient evidence to justify the finding, it cannot be overturned on appeal, no matter what the views of the appellate court may be as to what conclusion it would have reached as to the preponderance of evidence if it had been trying the fact. Counsel for appellant seem to have the impression that this is changed by the circumstance that there exists a prima facie presumption of mental capacity. But this presumption merely operates to throw on the party claiming that mental capacity is lacking the burden of proving that fact. It does not change the rule that if the trial tribunal, court, or jury, as the case may be, finds that the fact is proven, such finding cannot be disturbed on appeal unless there is no evidence to support it, or it is plainly contrary to the evidence.

[4] Looking at the matter as one of the sufficiency of the evidence there can be but little question. It appears that at the time of the hearing the appellant was some 83 years of age. About a year before he had had a severe fall, and according to his own testimony for some time thereafter was subject to hallucinations. Several witnesses, whose association with him was sufficient to warrant them in forming an opinion as to his mental capacity, testified that he was subject to hal-

lucinations; that he was exceedingly forgetful; that his mind wandered; that he was apt to be imposed upon. It is objected that the observations of all the witnesses so testifying had entirely ceased three months before the date of the trial, and that for this reason their testimony should not be accepted. A situation could easily be imagined where observations as to a person's mental condition, made three months before, would be of little value, but such is not the case where, as here, the person whose capacity is in question is of exceedingly advanced years, so that his mentality is naturally growing weaker rather than stronger, and where the observations have extended over a considerable period and there is nothing to indicate that the lack of capacity observed was of a temporary character. In addition to the testimony mentioned is the fact that the appellant himself was on the stand, and was carefully examined by the court at length. His testimony is a little wandering and uncertain at times. For example, the appellant had been married twice, but did not seem to be certain whether he was married the second time in 1893 or 1903. It would not be fair to say, however, that the written record of his examination affirmatively shows mental weakness. But, on the other hand, it does not negative it, and the trial court had the very great advantage of actually seeing and observing the appellant. Estate of Munroe, 161 Cal. 10, 118 Pac. 242, Ann. Cas. 1913B, 1161; Estate of Wright, 177 Cal. 274, 170 Pac. 610. His appearance, his demeanor, his manner of answering questions, all the small but significant indicia of rationality or its lack, may have made it quite apparent to the trial court that he was genuinely mentally incompetent, and yet not appear in the written record at all. In view of the direct testimony mentioned and the advantage which the trial court had of personal observation of the appellant, it is impossible for us to say that its conclusion was not justified.

Order affirmed.

We concur: SHAW, J.; LAWLOR, J.

182 Cal. 609

CHUNG SING v. SOUTHERN PAC. CO. et al.
(L. A. 5293.)

(Supreme Court of California. April 6, 1920.)

1. Railroads ⊂=310—Kicking of car uncontrolled across street negligence.

The kicking of a car uncontrolled across a public traveled street in a large city when it is dusk permits a justifiable inference of negligence.

2. Railroads ⊂=348(6) — Contributory negligence of traveler not shown.

In an action for injuries to a wagon driver struck by a car kicked uncontrolled across the street, evidence *held* to warrant finding that he was not guilty of contributory negligence.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Chung Sing against the Southern Pacific Company and others and William D. O'Hare. From a judgment for plaintiff, defendants first named appeal. Affirmed.

See, also, 178 Cal. 261, 172 Pac. 1103.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

Waldo M. York and Harry M. Irwin, both of Los Angeles, and William D. O'Hare, for respondent.

OLNEY, J. This is an appeal from a judgment for the plaintiff for $13,000 for personal injuries found to have been suffered by the plaintiff because of the negligence of the appealing defendants. The sole point urged for reversal is that the verdict and consequent judgment for the plaintiff are not supported by the evidence. There are a number of contentions made by the respondent to the point that the verdict and judgment are not open to review in the particular urged by the appellants; but, since we are of the opinion that the appellants' contention must in any case be overruled, there is no occasion for considering these contentions of the respondent.

The defendant railroad corporation operates a railroad having tracks on Violet street in Los Angeles crossing Santa Fé street. The other defendants were members of a switching crew employed by the railroad company. At the time of the accident they were engaged in switching freight cars across Santa Fé street and one of the cars struck the plaintiff, who was coming along the street, and severely injured him. It is evident that the evidence is sufficient to sustain the verdict, unless: (a) It fails to show any negligence on the part of the defendants toward the plaintiff contributing to the accident; or (b) shows affirmatively that the plaintiff was himself guilty of contributory negligence.

[1] As to the first point, there was evidence showing that the car which struck the plaintiff had been "kicked" across the street; that is, given a strong push by the locomotive, and then uncoupled and allowed to proceed under the impetus so given it. There was evidence also to show that there was no one on the car to stop or control it. It hardly needs argument to the point that if these were the facts, as the jury was upon the evidence entitled to find them to be, the jury was justified in concluding that the conduct of the defendants was negligent. Kicking a car uncontrolled across a public and traveled street in a large city at least permits a

justifiable inference of negligence, if nothing more.

[2] As to the second point, that of contributory negligence, it appears that the accident occurred on an evening in November when it was beginning to get dusk. The train crew already had their lanterns lit. The plaintiff was coming along Santa Fé street, driving a two-horse wagon. The contention of the defendants is that the plaintiff could and should have seen the car coming as he approached the crossing in ample time to stop, and that one of the switchmen was protecting the crossing and signaling to traffic to stop. The testimony of the plaintiff is, however, direct that he approached the crossing slowly, and saw the car standing still, at least as he supposed, and then suddenly it came at him from across the street. If this be true, and the jury was entitled to believe it, there was no negligence on his part in attempting to cross, unless he disregarded the warning of the switchman. But as to such warning there is a decided conflict, and the jury were entitled to find against the defendants on this point as well. It follows that it cannot be said that the verdict is not sustained by the evidence. Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

182 Cal. 575

BARLOTTI v. LYONS, Registrar of Voters. (L. A. 6219.)

(Supreme Court of California. April 1, 1920.)

1. Constitutional law ⇐10—Provisions of federal Constitution relating to amendments thereof controlling.

In so far as the Constitution of the United States provides for the amending thereof, it controls, and any provision of a state Constitution in conflict therewith must be held as naught.

2. Constitutional law ⇐10 — "Legislatures" which ratify federal constitutional amendments are the representative bodies.

Within Const. U. S. art. 5, requiring proposed amendments thereof to be ratified by the Legislatures of three-fourths of the states, the word "Legislatures" is used in its ordinary meaning as the representative body invested with the lawmaking power of the state, as is its obvious meaning in other provisions of both state and federal Constitutions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislature.]

3. Constitutional law ⇐10—Provisions of federal Constitution as to amendments have same meaning as when adopted.

The provision of the federal Constitution requiring ratification of proposed amendment by the Legislatures of three-fourths of the state has the same meaning at the present time as when it was adopted, notwithstanding changes introduced by referendum provisions in the lawmaking bodies of the states.

In Bank.

Petition by J. A. Barlotti for writ of mandate against D. B. Lyons, as Registrar of Voters of the County of Los Angeles. Alternative writ discharged, and proceeding dismissed.

Theodore A. Bell and Sloss, Ackerman & Bradley, all of San Francisco, for petitioner.

A. J. Hill and Robert B. Murphey, both of Los Angeles, U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandamus, the object being to procure a writ requiring respondent to file in his office for examination and transmission to the secretary of state a referendum petition for the submission to the electors of the state, for their approval or rejection, of the joint resolution of the Senate and Assembly ratifying for the state of California what is known as the Eighteenth Amendment to the Constitution of the United States, relating to intoxicating liquors. Two questions are presented; one being whether, in view of the provisions of article 5 of the Constitution of the United States, the question of the ratification of the proposed amendment by the state was not finally and conclusively determined by the adoption of the joint resolution of ratification by the Legislature, utterly regardless of the construction to be given to the provisions of our own Constitution, and the other being, whether the referendum provisions of our state Constitution (section 1, art. 4) may be construed as intended to be applicable in the case of a resolution of the character of the one here involved.

[1] With reference to the former of these questions, it is conceded, as necessarily it must be conceded, that in so far as the Constitution of the United States speaks upon the matter of amendments thereto, it controls, and any provision of a state Constitution in conflict therewith must be held as naught. Article 5 of that Constitution, relative to amendments, in so far as is material here, provides:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification*

may be proposed by the Congress. * * *" The italics are ours.

In the case at bar the amendment was proposed by the Congress of the United States, and the joint resolution of proposal declared that the amendment would "become valid as a part of the Constitution when ratified by the Legislatures of the several states as provided by the Constitution." The effective words of ratification of the joint resolution of our Legislature were:

"Resolved by the Senate and the Assembly of the Legislature of the state of California, jointly, at its forty-third session, * * * that the said proposed amendment be and the same is hereby ratified by the Legislature of the state of California."

[2] The question we have in this connection is a very narrow one, being simply one as to the meaning of the word "Legislatures" as used in the clause "when ratified by *the Legislatures* of three-fourths of the several states" of article 5 of the Constitution of the United States. If by those words was meant the representative bodies invested with the lawmaking power of the several states, which existed at the time of the adoption of the Constitution, under one name or another, in each of the several states, and which have ever since so existed, as distinguished from the lawmaking power of the respective states, there is nothing left to discuss; for with that meaning attributed to the term "the Legislatures" the constitutional provision is so plain and unambiguous as not to admit of different constructions. The situation would then be that the people of the United States, in framing and ratifying the Constitution in the manner provided therein—

"have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or where the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other modes of ratification may be proposed by Congress." Dodge v. Woolsey, 18 How. 331, 348 (15 L. Ed. 401).

As further suggested in this connection in the case just cited, the Constitution of the United States is supreme in the matter of amendments, regardless of whether or not the method prescribed thereby "be right or wrong politically."

It certainly is not in consonance with the ordinary acceptation of the term "Legislature" to take it as meaning otherwise than a representative body selected by the people of a state and invested with the power of lawmaking for the state, whatever be the power reserved to the people themselves to review the action of that body or to initiate and adopt laws. Our own Constitution, notwithstanding its provisions in regard to the initiative and referendum, could not be more explicit than it is in its use of the term as meaning such a representative body, and while, in view of the initiative and referendum provisions, the people of the state may constitute a part of the lawmaking power of the state, they certainly are not a part of "the Legislature" within the meaning of that term as used in our Constitution. By section 1 of article 4 of the Constitution it is declared that the representative bodies designated as the Senate and Assembly, concerning the membership of which and the method of selecting the members article 4 makes provision, shall be designated "the Legislature of the state of California," and over and over again, wherever in the Constitution the Legislature is referred to, it obviously and necessarily means this representative body provided for therein, which is made up of the Senate and Assembly, designated as above stated. The initiative and referendum provisions constitute simply a reservation of power in the people to propose and enact laws independent of "the Legislature," and to adopt or reject any act of "the Legislature." This has always been the meaning ordinarily attributed to the term in this country, and it is difficult indeed to conceive that the makers of the Constitution of the United States, in providing for ratification "*by the Legislatures* of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress," intended by the words "the Legislatures" anything other than the representative lawmaking bodies of the several states. At the time of the adoption of the federal Constitution, as is shown by the brief of learned counsel for petitioner, every state had such a body, existing under one name or another, and, of course, it was to be assumed that, in accord with our guaranteed republican form of government, each state would always have such a body. Just what this body should be, what called, how constituted, whether bicameral in form or not, was a matter for each state to determine, but the essential characteristic of the thing was that it was a representative official body invested with the functions of lawmaking, the legislative official body of the state. That this conception of the meaning of the term was in the minds of the framers of the Constitution is shown by other provisions. Section 2 of article 1, providing that the House of Representatives shall be composed of members chosen by the people of the several states, provided that the electors thereof in each state "shall have the quali-

fications requisite for electors of the most numerous branch of the *state Legislature*." Obviously there can be no question as to the meaning of the term as here used. Section 3 of article 1 provided that the Senate of the United States "shall be composed of two Senators from each state, chosen by the *Legislature thereof*," etc., and in subdivision 2 of the section it was provided that, "if vacancies happen, by resignation or otherwise, during *the recess of the Legislature* of any state, the executive thereof may make temporary appointments until the *next meeting of the Legislature*, which shall then fill such vacancies." Obviously here again the term meant the official representative lawmaking body. In article 4, § 4, it is provided the United States shall, "on application of *the Legislature*, or of the executive (when *the Legislature* cannot be convened)," protect any state against domestic violence. Subdivision 3 of section 1 of article 6 provides that the Senators and Representatives, "and the members of the several state Legislatures," etc., shall be bound, by oath or affirmation, to support the Constitution. In all these five instances it indubitably appears that by the term "the Legislature" was meant this representative body. In various other instances, exclusive of its use in article 5, was the term used by the framers in the Constitution with apparently no other meaning, and it has never been held by the United States Supreme Court that in any case where used in the Constitution does it mean anything other than this representative body. In subdivision 2, § 1, art. 2, it was provided that "each state shall appoint, in such manner as *the Legislature* thereof may direct," electors of president and vice president. The word "Legislature" here has been universally recognized to mean this representative body, and we have sustaining this construction the decision of the United States Supreme Court in McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869. In the course of his exhaustive opinion in that case Chief Justice Fuller said:

"The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act *through their representatives in the Legislature*, and leaves it to the Legislature exclusively to define the method of effecting the object."

The one exception, in so far as any state courts are concerned (we are speaking of its use outside of article 5) appears to be with reference to the words "the Legislature thereof" in subdivision 1 of section 4 of article 1 which provides:

"The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The decision of State v. Polley, 26 S. D. 5, 127 N. W. 848, was put upon two grounds, the first being based upon the theory that this provision of the Constitution did not delegate power to the Legislature or the state to provide for the election of representatives, this power being one reserved by necessary implication to the various states, and that the whole purpose of the provision was simply to grant to the Congress the power to supersede by law enacted by Congress any state regulations on the subject. The second ground was, however, that the words "the Legislature thereof" did not mean simply the representative body we have spoken of, but the "lawmaking power" of the state as established by the state Constitution, and including the people of the state when authorized to act in view of referendum provisions contained in the state Constitution. The same conclusion was reached by the Supreme Court of Ohio in State v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, but the decision in that case was also based on another ground, viz. the supremacy of an act of Congress which made the old districting act in Ohio the only effective method of electing members of Congress "until such state shall be redistricted *in the manner provided by the laws thereof*." It was held that the Congress in enacting its paramount law on the subject (subdivision 1, § 4, art. 1) intended to provide that the old districting act of the state should remain in force until a redistricting was had in all respects as contemplated by the laws of Ohio, and that the insertion of the words we have italicized was for the very purpose of authorizing a resort to the referendum which was provided for in the Constitution of Ohio, as seemed apparent from the debates in Congress on the adoption of the act. It was on this ground alone that the decision of the Ohio court was affirmed by the Supreme Court of the United States. State v. Hildebrant, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. That, in view of that part of subdivision 1 of section 4 of article 1, clothing the Congress with paramount power to make regulations in this matter, the act of that body was a valid enactment unless to include the referendum in the scope of legislative power was a violation of the guaranty of a republican form of government, appears to have been conceded, and the suggestion that it was beyond the power of the Congress in that it disregarded this constitutional guaranty was disposed of under the settled rule that such a question presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution.

Pacific States Telephone Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377.

The alternative method of ratification which the Congress was given power by article 5 to provide implies that in the use of the words "the Legislatures," etc., in the same article, these representative bodies were meant. The ratification was to be "by the Legislatures," etc., or "by conventions [necessarily representative bodies] in three-fourths," etc., "as the one or the other mode of ratification may be proposed by the Congress." In each case it was a ratification by a representative body which, it was assumed, would correctly express the desire of the people of the state as to approval or rejection of the proposed amendment, that was apparently contemplated. The use of the words "by the Legislatures of three-fourths," etc., itself implies this meaning. The words imply some official body of a state as distinguished from the state itself or the people of the state or the whole lawmaking power of the state. If anything differing from the ordinary conception of the term had been intended, or anything different from its plain and obvious meaning as used elsewhere in the Constitution in many instances, and so far as we can see in every other instance, it seems fair to assume that words indicating that meaning would have been used. It was said in McPherson v. Blacker, 146 U. S. at page 27, 13 Sup. Ct. at page 7, 36 L. Ed. 869:

"The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text."

It is true enough that with regard to proposed amendments the idea was that each state should speak for itself in the matter of ratification by voting yea or nay thereon. But the further question considered by the framers of the Constitution was in what manner the state should give its vote, for that, after all, is what the state is doing when it joins in the ratification of a proposed amendment to the federal Constitution, and, as in the case of the selection of Senators from each state, the people of the United States saw fit to provide that the vote should be given by "the Legislature" of the state, doubtless concluding, whether correctly or not, that in this way the real desire of the people of the state would be correctly expressed. The adoption during recent years in many states of the initiative and referendum of course implies, as did the amendment of the federal Constitution with relation to the selection of United States Senators, a conclusion on the part of very many people that the representative body known as the Legislature cannot always be relied on to express the real desire of the people of a state, but this view, in so far as it finds expression in Constitutions or statutes, is certainly a matter of comparatively recent origin. We must continually bear in mind that our sole question in this connection is: What did the framers of the Constitution intend by the term "the Legislatures of * * * the several states" in article 5?—and that if by the term they intended the representative official bodies to which we have referred, as we think must be held, a state has no power to prescribe for itself a different ratifying power. All questions as to the good policy of such a provision, or whether it is in accord with the view entertained by very many to-day that the people of a state should have a vote on such a matter, are beside the question. The people of the United States in framing and enacting the Constitution have ordained in article 5 thereof, in language that we think admits of only one reasonable construction, that in the matter of ratifying a proposed amendment the people of the respective states shall speak on the question of ratification solely and finally through their official representative legislative bodies, where the Congress in submitting the amendment proposes that method of ratification.

Our conclusion in this matter is in accord with that reached by the Supreme Court of Maine on this very question. See In re Opinion of the Justices (Me.) 107 Atl. 673. It is opposed to the conclusion of the Supreme Courts of Washington and Ohio. State v. Howell (Wash.) 181 Pac. 920; Hawke v. Smith (Ohio) 126 N. E. 400. In each of these cases there was a dissenting opinion. In the Washington case the prevailing opinion, written by Mr. Chief Justice Chadwick, exhaustively and forcefully presents the argument for a contrary conclusion. It seems to us, and we say it with the utmost respect for the learned judges who have reached a conclusion differing from ours, that the argument in support of their conclusion is, in the final analysis, based more upon some present day conceptions of what the law in this regard ought to be than upon the intention of the framers of the Constitution as expressed therein, and, to our mind, expressed so clearly as to preclude any other conclusion than the one we have reached.

[3] Of course, all will admit that, in so far as the question before us is concerned, the words of article 5 here involved must be taken to-day to mean exactly what they meant when originally written into the Constitution, regardless of any change in view as to the wisdom of the policy of such a provision. In other words, if they then meant the official representative lawmaking body of the state, they mean the same thing to-day, with the result that a change in the method can properly be accomplished only by amending the law.

In view of our conclusion on the question we have discussed, we deem it unnecessary to discuss the other question presented.

The alternative writ heretofore issued is discharged, and the proceeding dismissed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

46 Cal. App. 250

SUMMERS v. L. F. S. SYNDICATE et al.

(Civ. 2693.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1920.)

1. Limitation of actions ⟸24(1)—Action on contractor's bond held not barred by limitations.

An owner's action on a contractor's bond commenced within four years from the time when the cause of action accrued was not barred by limitations under Code Civ. Proc. § 339, being an action founded upon a contract in writing.

2. Principal and surety ⟸155—Complaint on contractor's bond held to allege damages with sufficient particularity.

In owner's action on contractor's bond, complaint fixing the total amount of damages without segregating the various items of damage according to the amounts of damage severally caused by the items stated, constituting the various imperfections in the buildings, *held* to allege damages with sufficient particularity.

3. Principal and surety ⟸155—Complaint in action on contractor's bond held to allege immediate notice to sureties.

In owner's action on contractor's bond requiring owner to immediately notify sureties of contractor's default, complaint alleging that owner notified sureties of the default of the contractor concerning the matters in question, and that owner has performed all of the conditions of the bond to be performed by her, *held* to sufficiently allege that immediate notice of contractor's default was given as provided in bond, in view of Code Civ. Proc. § 457.

4. Principal and surety ⟸118—Contracts ⟸304(2)—Notice of completion held not to release contractor and sureties from liability as to certain defects.

The filing of notice of completion by owner under Code Civ. Proc. § 1187, with the distinct understanding that there was no acceptance as to certain defects, *held* not to release contractor and his sureties from liability for such defects or defects not then apparent.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Susan S. Summers against the L. F. S. Syndicate and others. Judgment of dismissal, and plaintiff appeals. Reversed.

M. M. Meyers, of Los Angeles, for appellant.

Frank Bryant and R. L. Horton, both of Los Angeles, for respondents.

CONREY, P. J. Following an order which sustained the demurrer of defendants to the second amended complaint without leave to amend, the court entered judgment dismissing the action, from which judgment the plaintiff has appealed.

On the 4th day of February, 1914, the plaintiff, Summers, as owner, and the defendant L. F. S. Syndicate, as contractor, entered into a contract for the construction of a two-story residence building and a cottage on two adjoining lots of the plaintiff in the county of Los Angeles. On the same day the contractor, as principal, and the defendants McLeod and Elliott, as sureties, executed a contractor's bond to secure the faithful performance of its agreement by the contractor. It was provided in the bond:

"That if said principal shall in any manner default in the performance of any matter or thing in said contract specified to be by said principal performed, or in the event of said principal abandoning the work provided by said contract to be done by said principal, the obligee shall immediately so notify the sureties, and thereafter the sureties shall have the right at their option to assume and sublet said contract and to proceed thereunder as if no default or abandonment had occurred."

In this action the plaintiff seeks to recover on the bond in the sum of $1,800 damages suffered by plaintiff by reason of failure of the contractor to comply with the terms of the contract. The complaint duly sets forth the execution of the contract and undertaking. It is then alleged that in constructing said buildings the contractor did not furnish the quality and quantity of material provided for, and did not construct the buildings in a good, substantial, and workmanlike manner, and did not perform the contract according to agreement in sundry particulars which are set forth in detail. These details include many items which amount to more than trifling imperfections in the structure and which necessarily imply substantial defects in the buildings as constructed. It is then alleged that on or about April 27, 1914, the contractor represented to the plaintiff that the buildings were completed and requested the plaintiff to file the notice of completion provided for in section 1187, Code of Civil Procedure; that plaintiff informed the defendant that there appeared to be some imperfections and some things lacking of the completing of said buildings, and the defendant thereupon represented that said imperfections were but trivial, and agreed that the said imperfections should and would be corrected by the defendant with due diligence, and that the filing of such notice of completion would not be deemed an acceptance of the buildings as to such trivial imperfections, nor as to any defects or imperfections which might thereafter appear; that plaintiff relied upon such representa-

tions by the defendant and the agreement aforesaid, and did on the 1st day of May, 1914, cause the notice of completion to be filed of record; that all of the imperfections and defects set forth in the complaint appeared after the filing of the notice of completion; that by reason of these facts the defendants are estopped from claiming or asserting that the filing of the notice of completion was an acknowledgment of the full performance of the contract or that plaintiff had accepted said buildings as fully completed according to the terms and conditions of the contract; that none of the imperfections and defects above set forth have been corrected and the same continue to exist. The contract provided that if, at any time, the owner shall be dissatified with any particular feature of the work done upon the buildings, "she shall report the same to the contractor, and any payment thereafter due and paid under the terms hereof to said contractor shall not be construed as an acceptance of such portion of said structures, or either of them, as may not conform to the plans and specifications." It is alleged that from time to time plaintiff was dissatisfied with the portions of said work as specified in the complaint, and did report the same to the contractor. Paragraph X alleges:

"That plaintiff notified the defendants H. W. McLeod and W. H. Elliott, sureties upon the said bond, of the default of the defendant L. F. S. Syndicate concerning the matters and things in said paragraph V hereof, set forth as provided in said bond, and has done and performed all of the terms and conditions of the said bond upon her part to be done and performed."

Finally it is alleged that there is $1,800 difference between the value of said buildings as actually constructed and as they should have been constructed pursuant to said contract and the drawings and specifications aforesaid, and that by reason of the failure of the contractor to comply with the terms of the contract as set forth in the complaint the plaintiff has suffered loss and damage in said sum of $1,800, no part of which has been paid.

The demurrer was upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, that the action appears to be barred by section 339 of the Code of Civil Procedure, and that the complaint is uncertain in certain particulars to which we shall refer.

[1] The action is founded upon a contract in writing and therefore is not barred by the provisions of said section 339, Code of Civil Procedure, since it was commenced within four years from the time when the cause of action accrued.

[2, 3] Respondents claim that the complaint is uncertain in that it does not attempt to segregate the various items of damage according to the amounts of damage severally caused by the items stated constituting the various alleged imperfections in the buildings; that it merely fixes the total amount of damages without indicating the process by which the plaintiff arrives at that amount of damages. We think that the damages are alleged with sufficient particularity. In Long Beach, etc., District v. Dodge, 135 Cal. 401, 67 Pac. 499, the action was to recover on a bond given by the contractor for the construction of a high school building. The court held that it was not necessary to state in the complaint a cause of action as to each of the defects in the building on account of which the plaintiff sought to recover; that the Code of Civil Procedure, in section 454, has provided against surprise by requiring the plaintiff to furnish, when demanded in writing, a copy of the account; that the words "the account" in that section include such damages as those stated in the case. See, also, Jensen v. Dorr, 159 Cal. 742, 746, 116 Pac. 553. Another ground of demurrer for uncertainty upon which respondents rely is that the undertaking required that upon any default by the contractor in the performance of the contract the owner must immediately notify the sureties thereof, and that the complaint does not show that sufficient notice was given to the sureties of the alleged defects and imperfections when they occurred. But it will be noted that the complaint alleged not only that the plaintiff notified the sureties of the default of the defendant concerning the matters in question, but also alleged that the plaintiff "has done and performed all of the terms and conditions of the said bond upon her part to be done and performed." This was a sufficient allegation to carry the necessary implication that immediate notice was given as provided in the bond. Code Civ. Proc. § 457.

[4] Respondents further claim that, by accepting the buildings, the plaintiff released them from further liability upon the contract or undertaking. That the filing of the notice of completion, if voluntarily and unconditionally done, would have constituted an acceptance of the buildings and would have operated to release defendants from liability, may be conceded. Sirch E. & T. Laboratories v. Garbutt, 13 Cal. App. 435, 110 Pac. 140, was an action by a contractor to recover on a construction contract, in which action the defendant sought to establish a counterclaim which included items for loss occasioned by delay in the work and by failure to complete some parts of the contracted work. There had been an acceptance, and, on account of such acceptance, the defendant's claim was disallowed. The judgment was affirmed, the court saying:

"The defendant, with full knowledge of all the defects in the work, accepted and paid for it, and he thereby waived his claim for damages."

So in Mannix v. Wilson, 18 Cal. App. 595, 601, 123 Pac. 981, 983, it was said:

"Moreover, the acceptance of the building, in the absence of fraud or mistake, neither of which is urged, implies a waiver of any claim for damages on account of nonperformance in any particular."

But, under the allegations of the complaint in the case at bar, it appears that at least some of the defects in question were not apparent at the time when the notice of completion was filed, and that the notice of completion was given under a distinct understanding that, as to the defects referred to in the complaint, there was no acceptance. This is sufficient to take the case out of the general rule above stated. According to various authorities cited in 9 Corpus Juris, p. 802:

"A mere acceptance, without more, does not preclude the owner from showing that the work was done in an unworkmanlike manner and from maintaining an action for damages or recouping damages therefor, especially where the defects were latent, or where the owner could not reasonably do otherwise than accept the situation in which the contractor had placed him; and in such cases the owner may recover notwithstanding he has paid the contract price; and of course, if the acceptance of the work is expressly on condition that the builder remedy certain defects therein, the owner is not precluded from claiming damages for such defects."

The brief for respondents is incumbered by sundry references to another action said to have been prosecuted by the plaintiff against the defendants and on account of which respondents claim that the plaintiff is bound by her election of remedies and should not be permitted to maintain this action. Since none of these matters appear in the record of this action, counsel have only succeeded in creating difficulties for the court in the consideration of their argument. Necessarily these impertinent matters have to be disregarded, except for the purpose of criticizing counsel for presenting them.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 347

GORDON v. TEJUNGA WATER & POWER CO. (Civ. 2069.)

(District Court of Appeal, Third District, California. Feb. 26, 1920.)

1. Master and servant ⊂⊃80(4)—Complaint for wages held to allege employment at agreed compensation.

Complaint, alleging that defendant employed plaintiff to do certain work at a salary of $5 per day, that he began work under said employment on a certain day, and continued to work up to a certain other day, is a sufficient allegation of employment at an agreed compensation of $5 per day.

2. Master and servant ⊂⊃80(4)—Complaint for wages held to aver nonpayment.

Allegation of complaint to recover agreed compensation under contract of employment that there is now unpaid from defendant to plaintiff for the labor performed the sum of $1,900, is a direct averment that the amount is unpaid.

3. Sales ⊂⊃353(1)—Complaint in action for price of goods held good against general demurrer.

Complaint, averring that between certain dates plaintiff furnished material for repair of a water system to the extent of $187.48 at the special instance and request of defendant, no part of which has been paid, though defendant has often been requested so to do, is good against a general demurrer.

4. Trial ⊂⊃397(1)—Finding of certain amount due disposes of answer that all claims were paid.

Finding that there is unpaid a certain amount disposes of allegation of answer that all the claims sued on were paid prior to the beginning of the action.

5. Appeal and error ⊂⊃1071(6)—Failure to find on unsupported defense immaterial.

Failure to find on a defense, in support of which no evidence was given, was not harmful to defendant.

6. Appeal and error ⊂⊃1071(6) — Defendant not prejudiced by failure to find on a cause of action in complaint.

Defendant is not injured by failure to find on a cause of action in the complaint on which no recovery was granted.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by J. R. M. Gordon against the Tejunga Water & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.
James Donovan, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. The complaint is in four counts. In the first count, after stating the corporate capacity of the defendant, it is alleged:

"That the defendant employed the plaintiff to superintend and take charge of the management of the irrigation plant of the defendant at a salary of $5 per day, and the plaintiff began under said employment on February 23, 1914, and continued to work for the defendant up to and including May 1, 1915.

"That for said labor so performed by the plaintiff for the defendant, the defendant has

failed and neglected to pay any part thereof, though requested often so to do.

"That there is now due, owing, and unpaid from the defendant to the plaintiff for the labor performed as aforesaid by the plaintiff for the defendant the sum of $1,980, less $70 credit thereon for 14 days absence from said work."

In the second count it is alleged:

"That for a period of 90 days between the dates of February 23, 1914, and May 1, 1915, the plaintiff furnished a team and wagon for hauling pipe materials and other supplies used in the care and management of the defendant's water system, and that the reasonable value of the services of said team is $2 per day.

"That no part of said sum has been paid, though the plaintiff has repeatedly requested the defendant to pay the same, and that the sum of $180 is now due, owing, and unpaid from the defendant to the plaintiff for said services."

In the third count it is alleged:

"That between July 9, 1914, and May 1, 1915, the plaintiff furnished the defendant tires, oils, and grease for machines, amounting to $226.30, which said sum was the reasonable price for the tires, oils and grease so furnished, and that the same was furnished at the special instance and request of the defendant.

"That no part of said sum has been paid, though the plaintiff has repeatedly requested the defendant to pay the same, and that the sum of $226.30 is now due, owing, and unpaid from the defendant to the plaintiff for said materials aforesaid."

And, in the fourth count it is alleged:

"That between February 23, 1914, and May 1, 1915, the plaintiff furnished other materials and supplies for the repair and improvement of the conduits of the water system, taps, and meters, to the extent of $187.48 at the special instance and request of the defendant, no part of which has been paid, though the defendant has been often requested so to do."

There was a general demurrer filed to the complaint, which was overruled, and the defendant answered, denying all the allegations of the complaint, except the incorporation of the defendant. And by amendment to the answer it was alleged that each, all, and every of the claims sued upon in said action and set forth in plaintiff's complaint were fully paid, satisfied, and discharged by the defendant. It is also alleged in the said amendment that at the time of the commencement of the alleged services set forth in the plaintiff's complaint the plaintiff was, and had been, indebted to the defendant in excess of the total amount sued for in the complaint for money loaned, water sold and delivered by the defendant to the plaintiff, money had and received by plaintiff belonging to defendant, goods, wares, and merchandise sold and delivered by defendant to plaintiff, and notes and mortgage held by defendant against plaintiff. And that, at the time of the commencement of said services, it was understood and agreed that, with the exception of small amounts to be paid in cash from time to time, the earnings of the plaintiff under said employment were to be applied by the defendant in payment and liquidation of the said indebtedness of plaintiff to defendant. It was then alleged that the defendant did, from time to time, credit said plaintiff on said indebtedness with various sums of money as earned by, or that for any reason become due, the plaintiff for services or any other reason, and that by reason of such application of payments and credits any and all claims of the plaintiff against the defendant had prior to the commencement of the action been liquidated, paid, satisfied, and discharged.

As to the first cause of action stated in the complaint, the court found, as alleged in the complaint, that the defendant employed plaintiff to superintend and take charge of the management of its irrigation plant at a salary of $5 per day; that he began work February 23, 1914, and continued to May 1, 1915; that the defendant had failed and neglected to pay any part thereof; and that there is due and unpaid for said labor the sum of $1,910.

On the second cause of action the court found, as alleged in the complaint, that the plaintiff furnished a team and wagon that was used in the service of the defendant, and that the reasonable value thereof was $2 per day, and that there was due and unpaid to the plaintiff for the use of said team the sum of $180.

The court failed to make any finding upon the third cause of action alleged in the plaintiff's complaint.

Upon the fourth cause of action the court found that the plaintiff furnished supplies and materials for the repair and improvement of the conduits of the water system, taps, and meters to the extent of $187.48, and that no part of it had been paid, and that it was all now due and unpaid.

And the court ordered judgment entered in favor of the plaintiff for $2,277.48. From this judgment the defendant appeals.

The points raised upon the appeal are mainly technical, and attack the sufficiency of the complaint to state a cause of action and assign as error that the court failed to find upon some material allegations of the complaint and also of the answer.

[1] The defendant claims that the first cause of action does not state a cause of action because there was no allegation of promise or agreement on the part of the defendant to pay the plaintiff $5 per day for his work, and no allegation that such was the reasonable value thereof; that it does not allege when the salary was to become due and payable, nor that the same was done within the time agreed upon.

We think there is no merit in any of these contentions. The action is not upon a quantum meruit, but the complaint alleges the defendant employed the plaintiff to do certain work for it at a salary of $5 per day, and that he began work under said employment on February 23, 1914, and continued to work up to the 1st day of May, 1915. This is a sufficient allegation of employment at an agreed compensation of $5 per day.

[2] It is next claimed that there is no allegation that the amount due for the work under said employment has not been paid, and in support of this position counsel cites the case of Poetker v. Lowry, 25 Cal. App. 617, 144 Pac. 981. The only allegation of nonpayment in that case was "that the defendant has failed and neglected to pay any part thereof, though often requested." But in the complaint in this case there is the direct allegation in paragraph 4 thereof that "there is now unpaid from the defendant to the plaintiff for the labor performed the sum of $1,900." This is a direct averment that the amount is unpaid.

The same criticisms are aimed at the second count of the complaint, but, we think, for the reasons stated, that said count states a cause of action.

We need not consider the sufficiency of the third count to state a cause of action, because the court failed to make any finding thereon.

[3] We think the fourth count of the complaint is good as against a general demurrer.

[4] The findings are attacked because they follow the language of the complaint, and, as contended by counsel, the complaint not stating a cause of action, the findings are insufficient. This objection is disposed of by what we have already said as to the sufficiency of the complaint. Complaint is made because the court failed to find upon the allegation in the answer to the effect that each and all and every claim sued upon in this action, and set forth in the plaintiff's complaint, were paid prior to the beginning of the action. The finding of the court that there is unpaid a certain amount of money disposes of the allegation in the answer.

[5] Complaint is made that the court failed to find upon the special matters alleged in the answer that at the time of the commencement of the alleged services the plaintiff was indebted to the defendant in excess of the amount sued for, and at the time of the commencement of the services it was understood and agreed between the plaintiff and the defendant that with the exception of small amounts to be paid in cash from time to time, the earnings of the plaintiff under said employment were to be applied by the defendant in payment and liquidation of said indebtedness; and for failure to find that, pursuant to said understanding and agreement, the defendant did, from time to time, credit the plaintiff with money due him upon his salary on the indebtedness due by him to the defendant. There was some evidence introduced in the record to the effect that such an agreement was made, which evidence, however, was denied by the plaintiff.

As to this omission to find, it is sufficient to say that there was no evidence introduced tending to show or to the effect that the defendant had ever given the plaintiff credit upon any indebtedness that he may have owed it, and it certainly was not entitled to a credit in this action unless the credits had been given; there being no counterclaim or cross-complaint set up in the pleadings.

"When a defense is tendered by a party upon which no evidence is offered at the trial, and upon which there is no finding, the issue will be deemed immaterial, and the cause will not be reversed for want of * * * a finding which * * * must have been adverse to appellant." Senter v. Senter, 70 Cal. 628, 11 Pac. 786.

[6] The defendant complains that the court did not find on the third cause of action set forth in plaintiff's complaint that he had sold and delivered tires, oils, and grease in the sum of $226.30. For this omission the defendant cannot complain. The court has not found that it owes anything upon that cause of action, and, therefore, it is not injured by the failure to find upon it.

The findings of the court are fully sustained by the evidence, and the failure to find upon certain allegations of the complaint and answer in no wise injured the defendant.

Finding no reversible errors in the record, the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 370

EDDY v. HUNTER. (Civ. 2757.)

(District Court of Appeal, Second District, Division 1, California. Feb. 27, 1920.)

1. Appeal and error ⊜417(1)—Notice of appeal held insufficient.

The notice filed by appellant with the clerk of the superior court entitled "Notice of Appeal and Request for Transcript under Section 953a of the Code of Civil Procedure," stating that appellant "has appealed," etc., from the judgment and requesting a transcript of the evidence, *held* not to constitute a notice of appeal under Code Civ. Proc. § 941b, since such notice must be in words expressive of a present act.

2. Appeal and error ⊜417(1)—Notice of intention to move for new trial not notice of appeal.

Plaintiff by serving and filing a notice of intention to move for new trial, which proceeding ended by operation of law under Code Civ. Proc. § 660, did not give the notice of appeal required by section 941b.

3. Appeal and error ⊜417(1)—Notice filed in lower court held not notice of appeal.

Notice filed in the office of the clerk of the lower court entitled "Notice of Appeal," and stating that "plaintiff will appeal," *held* not to constitute a notice of appeal required by Code Civ. Proc. § 941b, requiring a notice that appellant "does hereby appeal," since the required notice of appeal must be in words expressive of a present act.

4. Appeal and error ⊜430(1)—Filing of notice of appeal jurisdictional.

The filing of the notice of appeal required by Code Civ. Proc. § 941b, is jurisdictional.

Action by Laura S. Eddy against Ben S. Hunter. On motion to dismiss plaintiff's appeal from judgment rendered. Appeal dismissed.

Henry K. Norton and Roy V. Rhodes, both of Los Angeles, for appellant.

Oliver O. Clark, of Los Angeles, for respondent.

CONREY, P. J. Respondent objects to the consideration of plaintiff's appeal from the judgment herein, and suggests that the appeal should be dismissed upon the ground that no notice of appeal was ever served or filed. The judgment was entered on the 4th day of February, 1918. On the 7th day of March, 1918, the plaintiff filed in the office of the clerk of the court below a document addressed to H. J. Lelande, county clerk, entitled "Notice of Appeal," the terms of which notice were in the following language:

"You will please take notice that the plaintiff will appeal to the District Court of Appeal of the state of California from the judgment"—describing the judgment.

At the same time the plaintiff served and filed a notice of intention to move for a new trial, which proceeding is conceded to have ended by operation of law (Code Civ. Proc. § 660) on the 8th day of June, 1918, the same having never been acted upon by the court. On the 14th day of June, 1918, the plaintiff filed with the clerk of the superior court a document entitled "Notice of Appeal and Request for Transcript under Section 953a of the Code of Civil Procedure." This notice stated that the plaintiff "has appealed," etc., from the judgment, and requested a transcript of the evidence.

[1, 2] As we understand the decisions of the Supreme Court upon the point in question, it must be held that neither of said notices constitutes a notice of appeal within the terms of section 941b of the Code of Civil Procedure, by which the point in question is controlled. That section requires that a notice of appeal given thereunder "shall state that the person giving the same does thereby appeal" from the judgment or order. Section 953a of the Code of Civil Procedure, under which an appellant requests the preparation of a typewritten transcript of the evidence, etc., does not provide for a notice of appeal. Its purpose is to provide a method of preparing the record on appeal. The proceedings therein prescribed are not jurisdictional to the appeal. A notice given under it in the form there prescribed, reciting that the person giving the notice desires to appeal, or that he intends to appeal, or that he has appealed from the judgment, is not a good notice of appeal. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430.

"We do not think that a notice which is a literal and proper compliance with section 953a, and which merely initiates the statutory proceeding there prescribed for making up the record, should be turned by construction into a notice of appeal and held to be good, as such, under a section with which it does not comply." Boling v. Alton, 162 Cal. 297, 122 Pac. 461.

In Lent v. California Fruit Growers' Association of Los Angeles, 161 Cal. 719, 121 Pac. 1002, it was ordered that the appeal be dismissed for failure to give the notice contemplated by section 941b of the Code of Civil Procedure. The court made no statement of facts, but we have examined the record in the office of the clerk of the Supreme Court. It there appears that the only notice given was a notice for transcript under section 953a, in which it was recited that defendants "intend to appeal" from the judgment. In Michelson v. City of Sacramento, 173 Cal. 108, 159 Pac. 431, the appeal was dismissed because the only notice of appeal was a notice to prepare a record under section 953a, Code of Civil Procedure, wherein it was stated that the defendant "desires to appeal," but nowhere declares that it does appeal.

It thus clearly appears that no appeal has been taken in this case, unless it was taken by virtue of the notice filed on March 7, 1918. In Estate of Faber, 168 Cal. 491, 143 Pac. 737, it was held that a notice purporting to be given under section 953a, Code of Civil Procedure, might serve the dual purpose of a notice to prepare transcript under section 953a, Code of Civil Procedure, and a notice of appeal under section 941b, Code of Civil Procedure, where apt words were used to constitute a notice of appeal. The language there used in the notice was that the person giving the notice "desires to appeal and does hereby appeal" to the Supreme Court from the order. Referring to Lent v. California, etc., Association, supra, Boling v. Alton, supra, and Marcucci v. Vowinckel, supra, the court said that this notice differed from the notices of appeal held insufficient in those cases in this, that it expressly stated that the party "does hereby appeal" from the order, etc., describing it with sufficient accuracy. "The fact that it is drawn so as to serve the double office of a notice of appeal and a notice to the clerk, under section 953a, as appears from the subsequent parts of the notice (not above quoted), does not destroy its effect as a notice of appeal, nor is the statement that it is given 'pursuant to section 953a' fatal to its sufficiency as a notice of appeal."

[3] If a notice that the losing party to an action intends to appeal or that he desires to appeal or that he has appealed from a judgment is not sufficient to constitute a notice of appeal, and if, therefore, it is not sufficient to give this court jurisdiction of the appeal, we are unable to see that a notice stating that such party "will appeal" can be of any greater effect. All of the decisions to which we have referred go upon the theory that there must be an actual compliance, in the statutory language or its equivalent, with the requirement contained in section 941b that the notice "shall state that the person giving the same does thereby appeal," etc., before such notice will be held to constitute a notice of appeal within the terms of that section. This actual compliance must be in words expressive of a present act, since the giving of the notice is the very act of taking the appeal.

There is one decision of the Supreme Court which possibly is inconsistent with those to which we have referred. In the case of In re Nutt's Estate (Sup.) 181 Pac. 661, there was a motion to dismiss an appeal upon the ground that the appeal was not taken within 60 days after the entry of judgment, and upon the further ground that no sufficient notice of appeal was ever filed. After disposing of the first contention adversely to the respondent, the opinion of the Supreme Court closes as follows:

"The other ground of the motion to dismiss was that no sufficient notice of appeal was ever filed. As to this ground we orally stated our views from the bench at the time of the hearing of the motion to the effect that the notice should be held to be sufficient. No useful purpose would be subserved by further discussion of this point."

[4] The motion to dismiss the appeal was denied. There being in the opinion no statement of facts concerning the point last mentioned, we have examined the record in that action. We find that the only notice given was a notice to the clerk to prepare transcript, which notice was headed, "Notice of Appeal and Instructions to Clerk," and in the body of the notice it was stated that the person giving the notice "desires to appeal" from the judgment. We further find that the court had before it, in addition to said notice, a certain affidavit of the attorney for appellant and a counter affidavit of attorney for respondent referring to certain negotiations and stipulations entered into between said attorneys, by virtue of which stipulations apparently the attorney for appellant was contending either that he should not be bound by the usual construction of the notice given or that he should be relieved from his default incurred by reason of having given such insufficient notice. We recognize that this is a jurisdictional matter, and that probably the Supreme Court would have held that, if there was not a notice of appeal, the failure to give such notice could not be overcome by proof of waiver by the adverse party. If this was the opinion of the court, then its refusal to dismiss the appeal must have been based upon the opinion that the notice of appeal was sufficient. But, if that case can be held to constitute a decision that the notice of appeal there before the court was sufficient, its effect was to overrule the previous decisions to which we have referred. However that may be, we feel bound by the decisions which repeatedly have passed upon the question and which have not been directly overruled.

The appeal is dismissed.

We concur: SHAW, J.; JAMES, J.

46 Cal. App. 401

ROSS et al. v. FLYNN et al. (Civ. 3219.)

(District Court of Appeal, First District, Division 1, California. March 2, 1920.)

1. Pleading ⟸252(2)—Amended complaint supersedes original.

Where an amended complaint is filed, it supersedes the original; hence, where the original complaint was one in claim and delivery and the amended complaint one in conversion, the action after amendment became strictly one of conversion.

2. Appeal and error ⟸870(5)—Order striking amended complaint and directing judgment reviewable on appeal from judgment.

Under Code Civ. Proc. § 956, an order striking the amended complaint from the files and directing judgment for plaintiff as prayed in the original is one affecting the rights of the parties and subject to review on appeal from judgment entered.

3. Pleading ⟸238(2) — Court not authorized without notice to strike amended complaint filed under leave.

Under Code Civ. Proc. § 937, the trial court has no power without notice to strike an amended complaint filed under order of court duly made, though such order was inadvertent.

4. Pleading ⟸356(1) — Discretionary power does not authorize striking amended complaint filed with leave.

The discretionary power of the trial court over amendments does not authorize it of its own motion without notice to strike plaintiff's amended complaint filed with the court's permission and enter judgment in accordance with the prayer of the original complaint.

5. Appeal and error ⟸151(2)—Plaintiffs held aggrieved by striking amended complaint and entry of judgment.

Where plaintiffs' original complaint in claim and delivery was superseded by one asserting conversion, the distinction between the two actions, and relief to be granted, is so distinct that plaintiffs must be deemed aggrieved by an order striking from the files the amended complaint and directing entry of judgment in accordance with the prayer of the original.

6. Appeal and error ⟸277—Plaintiffs deemed to have excepted to striking of amended complaint.

Under Code Civ. Proc. § 647, an order striking the amended complaint from the files and directing judgment in accordance with the prayer of the original must be deemed excepted to.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by John C. Ross and Linus M. Burr, copartners doing business under the firm name and style of the Ross-Burr Laundry Machinery Company, against John H. Flynn, Wisnon Company, a corporation, and another. From a judgment in their favor, plaintiffs appeal. Reversed.

Courtney L. Moore, of San Francisco, for appellants.

Joseph J. Bullock, of Redwood City, for respondents.

WASTE, P. J. The plaintiff has appealed from a judgment in its own favor, seeking a review of an order of the lower court striking its amended complaint from the files, and directing the entry of judgment as prayed for in the original complaint.

The plaintiff first filed a complaint in claim and delivery, and the defendants answer separately. Thereafter the plaintiff gave notice of motion for permission to file an amended complaint changing its cause of action to one in conversion, and praying for damages therefor. On the hearing the court, over the objection of the defendants, granted the motion. Counsel for the respective parties then stipulated that the answers on file be considered as answers to the complaint as amended, and on the issues thus presented the action was tried. Both oral and documentary evidence was introduced in support of the allegations of the amended complaint, and the cause was submitted for decision. Thereupon the court, by an order entered on the minutes, directed that judgment be entered in favor of the plaintiff.

Before any findings were filed, and judgment thereon entered, the court, of its own motion, and without notice to the plaintiff, struck the amended complaint from the files and ordered the cause to stand submitted upon the original complaint and answers thereto. Judgment was thereupon ordered, and subsequently entered, for plaintiff, for the return of the property, or, in case delivery could not be had, for its value, found to be the sum of $1,242. No damages were awarded for the detention.

[1-3] The action of the lower court was clearly erroneous. Whether or not it was wrong in permitting the amended complaint to be filed in the first instance does not enter as an element in considering the question. When the amended complaint was filed, in pursuance of the permission granted by the trial court, the original complaint in claim and delivery ceased to be the complaint in the case, and the action became strictly one in conversion. Kelly v. McKibben, 54 Cal. 192, 195; Miles v. Woodward, 115 Cal. 308, 316, 46 Pac. 1076. The amended complaint superseded the original and thereby completely disposed of it. Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 558, 87 Pac. 19. The ruling of the court, embodied in the order permitting the amended complaint to be filed, was the judgment or conclusion of the court upon the matter then before it. In re Rose, 80 Cal. 166, 170, 22 Pac. 86; In re Smith, 98 Cal. 636, 641, 33 Pac. 744. It was one affecting the rights of the parties, and the judg-

ment, subject to review on appeal from the judgment in the case. Code Civ. Proc. § 956. Even if the ruling was inadvertently made, and although, as the court stated in its written order, filed with the clerk, it was "convinced from the evidence that the amended complaint should not have been filed," the parties interested had a right to be heard on the question and were entitled to notice before the court struck it from the files. Wunderlin v. Cadogan, 75 Cal. 617, 619, 17 Pac. 713. The power of the court to vacate, without notice, an order previously made in an action, is limited by section 937 of the Code of Civil Procedure to such orders as the judge has made without notice in the first instance. To allow a court to give directions or make orders and then, after the parties have acted thereon, to permit it, without statutory power or implied authority, to change its rulings or vacate its orders, would lead to great uncertainty, inconvenience, and in some cases, perhaps, to wrong and injustice. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 228, 22 Pac. 594, 15 Am. St. Rep. 50.

[4, 5] The situation is not in the least clarified by the liberal discretion vested in trial courts in the matter of allowing amendments to pleadings. Respondents' theory that the court's action in this case amounted to no more than an amendment to the complaint is not sound. Perhaps, as was suggested in Riciotto v. Clement, 94 Cal. 105, 108, 29 Pac. 414, the plaintiff might have been allowed, on application after notice to the defendants, if the evidence warranted, to amend after trial and before judgment, so as to again claim a return of its property. But permission to do so was not asked, and the court had no jurisdiction to endeavor to effect that result on its own motion. Parrish v. Pensacola & A. R. Co., 28 Fla. 251, 9 South. 696. The plaintiff had the right to choose whether it would content itself with damages for the conversion of its property or seek to recover it in claim and delivery. There is a marked distinction between the two actions and the remedies are very different. Kelly v. McKibben, 54 Cal. 192, 195; Richards v. Morey, 133 Cal. 437, 439, 65 Pac. 886. If the plaintiff chose the wrong action, or if upon the trial the court was convinced from the evidence that it was not entitled to the remedy sought, the responsibility rested upon plaintiff and its counsel. It was not the province of the court to order a correction of error or the removal of defects of its own motion although it might have done so on timely application for the exercise of its discretion. Ten Broeck v. Orchard, 79 N. C. 518. The relief actually awarded plaintiff under the original count is so radically different from that which should have been awarded under the amended complaint that we feel the plaintiff was aggrieved thereby. Estate of Colton, 164 Cal. 1, 5, 127 Pac. 643; Quint v. McMullen, 103 Cal. 381, 383, 37 Pac. 381.

[6] The order striking the amended complaint from the files was one deemed excepted to under section 647, Code of Civil Procedure. It necessarily affected the judgment and may be reviewed upon this appeal from the judgment. Code Civ. Proc. § 956; Alpers v. Bliss, 145 Cal. 565, 569, 79 Pac. 171.

The judgment is reversed.

We concur: GOSBEY, Judge pro tem.; RICHARDS, J.

46 Cal. App. 374

R. H. HERRON CO. v. FLACK. (Civ. 3268.)

(District Court of Appeal, First District, Division 2, California. Feb. 28, 1920.)

1. Appeal and error ⟸1010(1)—Findings supported by evidence conclusive.

The findings of the trial court which are sustained by substantial evidence are binding on appeal.

2. Guaranty ⟸25(3)—Evidence held to support finding that goods were furnished on credit of guaranty.

Evidence that plaintiff refused to sell goods on credit to a corporation until it received the guaranty of defendant, who was the corporation's vice president, and that thereafter it delivered goods on credit, as admitted by defendant, *held* sufficient to show the sale and delivery of the goods on the faith of the guaranty.

3. Guaranty ⟸6, 16(2)—Extension of credit on faith of guaranty is consideration.

A written guaranty of payment for goods to be sold to a corporation, waiving notice of acceptance thereof, is an offer of guaranty, which is accepted by delivery of the goods on the faith thereof, and such delivery is sufficient consideration to support the guaranty.

4. Guaranty ⟸6—Ordinary rules of offer and acceptance govern.

A contract of guaranty is governed by the usual rules applicable to contracts in general, with reference to an offer and acceptance thereof.

5. Guaranty ⟸25(1)—Written guaranty presumed to be based on consideration.

A written guaranty is presumed to have been based on sufficient consideration, and the burden is on defendant seeking to avoid liability thereon to show want of consideration.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the R. H. Herron Company against C. L. Flack. Judgment for plaintiff, and defendant appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Dockweiler & Mott, of Los Angeles (G. C. O'Connell and Albert M. Cross, both of Los Angeles, of counsel), for appellant.

Geo. E. Whitaker, of Bakersfield, and Davis, Kemp & Post, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $2,334.75. The judgment was upon a written guaranty of the indebtedness of the Gate City Oil Company (a corporation in which defendant was a large stockholder) to the plaintiff, which indebtedness arose from the purchase of goods, wares, and merchandise used by the oil company in its business.

The guaranty signed by Flack was as follows:

"Los Angeles, Cal., Aug. 9, 1911.

"R. H. Herron Co., Los Angeles, Cal.—Gentlemen: In consideration of your extending credit at our request to Gate City Oil Co., in which company we are interested and for value received, we hereby jointly and severally guarantee the full payment to you when due of all its indebtedness. Notes or other evidence of indebtedness or securities may be received by you on account, or in adjustment of said indebtedness, and may be renewed and extended as you think advisable without notice and without impairing the liability under this guarantee and are hereby expressly included hereunder until finally paid,

"Notice of acceptance of this guarantee and of sales made or of any default is waived. This guarantee is to be a continuing one and remain in full force until written revocation is received by you. C. L. Flack. [Seal.]

"Witness: Don H. Petty."

It appears from the testimony that goods were delivered after the execution of the guaranty, and in payment therefor, the corporation through Flack, its vice president, and one J. H. Lindsey, its secretary, executed and delivered to the plaintiff a promissory note of the corporation for the amount recovered in this action. The corporation failed to pay its note at maturity, and defendant was sued upon his guaranty. The defendant set up as a defense that he had never legally executed and delivered the guaranty, because, as he alleges, he signed said guaranty upon the express condition that it was not to become operative until it had been signed jointly by W. R. Jacobs, another stockholder of the company.

[1] Upon this appeal the defendant urges upon our attention the portions of the record which sustain his contentions upon this question, and contends that the finding of the trial court to the effect that the defendant did not sign said guaranty upon the condition that it should also be signed by Jacobs is unsupported by the evidence. It is true that the defendant testified in accordance with the allegations set up in his answer, and that the bookkeeper in his office corroborated him in this testimony. We have carefully read the record, and we find considerable testimony in aid of defendant's defense; but the record also reveals substantial evidence in favor of the finding of the trial court, and we are accordingly bound thereby. These remarks are also applicable to the objection of the appellant to certain other findings of the trial court.

[2] Appellant is insistent that the evidence is insufficient to support the allegation of the complaint and the finding of the court that goods were furnished to the oil company by the plaintiff to the amount of $2,334.75 on the credit of the guaranty. As to the reliance upon the guaranty by the plaintiff when it furnished the goods, we have the testimony of the various employés of the plaintiff company that the goods were furnished; that they were furnished because of the guaranty and in reliance thereon; and that credit had been refused to the oil company until the guaranty was executed. Upon the question of the delivery of the goods, the record also discloses the testimony of the defendant himself, who was the vice president of the oil company, as follows:

"I know that those goods had been delivered between August, 1911, and November 3, 1911, to the Gate City Oil Company. * * *"

This acknowledgment by the defendant himself would remedy any weakness in the proof of the plaintiff upon this point.

[3, 4] The remaining question to be considered is whether or not the guaranty is supported by a sufficient consideration. The guaranty set out herein was in effect an offer to guarantee the debt incurred if the plaintiff would extend credit to the oil company. Until acted upon by the plaintiff, it constituted a mere offer. But when the plaintiff acted upon it and extended the credit it became a completed contract, the consideration being the extension of the credit according to the terms of the offer. The guaranty expressly waived notice of acceptance of the same. It was a continuing guaranty, and it went into effect immediately upon acceptance by the plaintiff, which was evidenced by the furnishing of goods on credit. A contract of guaranty is governed by the usual rules applicable to contracts in general with reference to an offer and acceptance thereof.

The principle of the present case is discussed in 12 R. C. L. p. 1068, where it is said:

"Contracts of guaranty may fall under that class, as when a person solicits another to employ a particular individual as his agent for a specified period, and engages that if the person addressed will do so, he, the applicant, will be responsible for the moneys the agent shall receive and neglect to pay over during that time. The party indemnified in such a case is not bound to employ the party designated by the guarantor; but if he does employ him in pur-

suance of the promise, the guaranty attaches and becomes binding upon the party who gave it."

Similarly, in the present case, we think the plaintiff was not bound to extend credit to the oil company, but when it did extend credit in reliance upon the offer and promise in the guaranty, it accepted such offer, and the guaranty was binding upon the defendant.

[5] Furthermore, the guaranty is a written instrument. The legal presumption is that such an instrument is based upon a sufficient consideration. The defendant offered no evidence to overcome this presumption. The burden of showing a want of consideration is upon the party attacking the instrument. Rogers v. Schulenburg, 111 Cal. 281, 284, 43 Pac. 899.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

46 Cal. App. 433

JOHNSON v. JOHNSON. (Civ. 3273.)

(District Court of Appeal, First District, Division 2, California. March 4, 1920.)

1. Homestead ⟸84—Homestead cannot be declared on property held in joint tenancy.

Since the adoption of the Codes repealed St. 1867–68, p. 116, enlarging the homestead laws so as to allow filing on an estate held in joint tenancy, the wife of one owning only a small interest in property so held cannot file a homestead declaration thereon.

2. Homestead ⟸47 — Where property was held in joint tenancy, subsequent conveyance of all interests to defendant's husband did not validate her declaration.

Where, at the time defendant filed a homestead declaration, the property was held in joint tenancy, and so not subject to homestead claim, a subsequent conveyance of the other joint tenants to defendant's husband could not validate the homestead declaration.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Joseph Johnson against Grace Johnson. From a judgment for plaintiff, defendant appeals. Affirmed.

George P. Cary and Frank C. Dunham, both of Pasadena, for appellant.

A. G. Allen, of Pasadena, for respondent.

NOURSE, J. Defendant appeals from a judgment rendered against her in an action to quiet title, tried upon an agreed statement of facts.

The sole question to be determined in this action is the validity of a homestead declared upon property held in joint tenancy. At the time of the declaration of homestead, plaintiff and his wife, Minnie Johnson, were the owners of the property in controversy in this action, holding the title thereto as joint tenants. Their son, Chester Johnson, who was also defendant's husband, had an interest in the property to the extent of $700, which he had paid on the purchase price of $5,200. Defendant and Chester Johnson resided upon the property and were in the exclusive possession thereof from about the time of its purchase, on August 25, 1915, until February 24, 1916, at which time Chester Johnson left defendant and went to live with his parents in Pasadena. On May 26, 1916, defendant filed her declaration of homestead upon the property. Thereafter, and on April 19, 1917, Joseph and Minnie Johnson, by grant deed, conveyed the property to Chester Johnson, and on the same day he reconveyed the property by grant deed to his parents. These deeds were recorded June 25, 1917, in the order in which they were executed.

[1, 2] That a homestead in this state cannot be declared on property held in joint tenancy or tenancy in common has been established by a long line of decisions. But a statute adopted by the Legislature in 1868 (Stats. 1867–68, p. 116) enlarged the scope of the homestead law so that whenever a party entitled to a homestead under the laws of the state is in exclusive occupation of a tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, he shall be entitled to such homestead, although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein. Defendant claims that, under the provisions of this statute, she was entitled to declare a homestead upon the property in suit, regardless of the fact that her husband had only about a one-eighth interest in property held by his father and mother jointly.

This precise question was very recently passed upon by the Supreme Court in Estate of Carraghar, 183 Pac. 161, in which it is remarked that the decisions of the courts of this state since the adoption of the Codes in 1872, as well as prior to the adoption of the statute of 1868 (St. 1867–68, p. 116), have been uniform in holding that a valid homestead cannot be declared upon property held in joint tenancy or tenancy in common. For the purpose of showing that that statute has never been recognized by the Supreme Court since the adoption of the Codes in 1872, the opinion in Estate of Carraghar reviews many cases on this subject, decided since then, including those in which the facts were such as to make the act of 1868 applicable if still in force. It discusses the homestead law as embraced in the Civil Code and Code of

Civil Procedure, and, after elaborating upon its reasons therefor, holds that the statute of 1868 was abrogated by the adoption of the Codes. This case finally determines that a homestead cannot be impressed upon property held in joint tenancy or tenancy in common. Neither does it avail defendant that the property was afterwards deeded to her husband.

"Unless the land was impressed with the characteristics of a homestead at the time of making and filing her declaration, it did not become a homestead by any subsequent act of a third party, or by the subsequent conveyance from the cotenant to her husband." Rosenthal v. Merced Bank, 110 Cal. 198, 203, 42 Pac. 640, 641.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 441

DE VILLE v. DE VILLE. (Civ. 3238.)

(District Court of Appeal, First District, Division 1, California. March 5, 1920.)

1. Appeal and error ⟸1011(1)—Decision on conflicting evidence conclusive.

Where the evidence is conflicting, the appellate court will not disturb the trial court's decision.

2. Divorce ⟸133(1)—Evidence held to sustain judgment for divorce for desertion.

In an action for divorce, testimony both of plaintiff and defendant, as well as letters introduced in evidence *held* to sustain the trial court's finding that defendant had deserted plaintiff within the meaning of Civ. Code, §§ 96, 107.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Ernest P. De Ville against Lola De Ville. From an interlocutory decree of divorce granted to the plaintiff, the defendant appeals. Affirmed.

John L. Richardson and Nathan Newby, both of Los Angeles, for appellant.

Stahl & Sayles, of Los Angeles, for respondent.

GASBEY, Judge pro tem. This is an appeal by the defendant from an interlocutory decree of divorce granted to the plaintiff in this action.

The plaintiff sought by his complaint herein, filed on the 14th day of November, 1916, to obtain a divorce from the defendant upon the ground of desertion. The defendant in her answer denied that she had deserted the plaintiff, but set up in a cross-complaint that the plaintiff had deserted her, had failed to supply her with the common necessaries of life, and had been guilty of treating her with extreme cruelty. The plaintiff denied these allegations of the cross-complaint.

The appellant's contentions are that the evidence produced at the trial of the action was insufficient to sustain the findings, or to justify the decision, that the decision is against law, and that errors in law were committed by the court.

The record in this case discloses the following facts: The plaintiff is a druggist. He was living with his wife on the 22d day of May, 1915, at Redondo Beach, Cal. His place of business was located at No. 336 South Main street in the city of Los Angeles. On the above date he told his wife that for business reasons they should remove to Los Angeles. He packed up and removed his personal effects to that city and there took up his abode. He consented that his wife might remain at Redondo Beach for a short time. Soon after he had become settled in his new home, his wife called on him; but he saw her for only a few minutes. He did not see her again for several months. He wrote her several letters asking her to come to the store to talk over their affairs. She paid no attention to his requests. He was unable to make an appointment with her. She removed to another dwelling place, which he could not locate and the address of which she did not give to him. He had a conversation with her over the telephone and endeavored to get her to meet him at some place in Redondo Beach, but this she absolutely refused to do. In the months of June and July, 1915, the plaintiff sent several letters to his wife. In these letters he addressed her in endearing terms and sought by earnest appeals to persuade her to come to Los Angeles, take up her abode with him, and live as husband and wife. To his entreaties she paid no heed. Several checks were introduced in evidence showing that during the months of June and July, 1915, the plaintiff had supplied his wife with money. He testified he had paid her $65 a month from May 22, to July 22, 1915. About August 15, 1915, the plaintiff met his wife at Redondo Beach, when they talked matters over. He again requested her to live with him in Los Angeles, but she would not consent. He did not talk with her after this. He published a notice that he would not be responsible for her bills.

These parties had been married before and were divorced. They remarried on the 23d day of December, 1914.

The wife testified that their troubles began about two weeks after their second marriage. To support her allegations she testified that her husband had called her vile names, accused her of being intimate with a man not her husband, had threatened to kill her, and in his marital relations was a de-

generate; that he did not pay her bills for the necessaries of life. To corroborate her testimony some witnesses were produced in her behalf, who said they had heard Mr. De Ville and his wife quarreling. One witness testified that he had heard the plaintiff call his wife a vile name, and threatened to kill her on account of some other man. The plaintiff denied that he had called his wife the name in question, or that he had threatened to kill her, or was a degenerate in his conduct towards her. He did not, however, pay her bills after she had repeatedly refused to live with him.

The trial court considered this conflicting testimony, made its finding in favor of the plaintiff thereon, and refused to grant an interlocutory decree to the defendant.

[1] Where the evidence is conflicting, we will not disturb the decision of the trial court. Baucom v. Baucom, 25 Cal. App. 108, 142 Pac. 902; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582.

[2] We are satisfied from the testimony of both the plaintiff and the defendant, as well as from the letters which were introduced in evidence, that the trial court committed no error in finding in favor of the plaintiff that the defendant had deserted him within the meaning of sections 96 and 107 of the Civil Code.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 512

ENGELKEN v. JUSTICE COURT OF EDEN TP. et al. (Civ. 3348.)

(District Court of Appeal, First District, Division 2. California. March 10, 1920.)

Appeal and error ⊜436—Motion to dismiss appeal must be made in appellate court.

A motion to dismiss an appeal can be made only in the appellate court.

Application by F. W. Engelken for supersedeas, directed against W. J. Gannon, Justice of the Peace of Eden Township, Alameda County, to restrain him from proceeding further with a motion to dismiss an appeal. Writ granted.

J. C. Thomas, of Oakland, for petitioner.

Charles Quayle, of Oakland, for respondents.

PER CURIAM. This is an application for a writ of supersedeas to restrain the respondent from proceeding further with a motion (dated February 5, 1920) to dismiss an appeal which has been taken to this court. Said motion, made in the trial court, was based upon the ground that the undertaking which was filed by appellant was not properly filed.

It is not necessary at this time to pass upon the question of the propriety of the filing of the undertaking. But a motion to dismiss an appeal can be made in this court only, and such motion must be denied if a proper undertaking, approved by a justice of this court, is filed.

It is ordered that a writ of supersedeas issue, commanding the respondent to proceed no further with the hearing or determination of said motion, and, to avoid question as to the sufficiency of the undertaking, it is ordered that the same may be presented to a justice of this court for approval.

46 Cal. App. 508

McGEE v. HOFFMAN. (Civ. 3278.)

(District Court of Appeal, First District, Division 2, California. March 10, 1920. Hearing Denied by Supreme Court May 6, 1920.)

1. Appeal and error ⊜761—Statement in brief that evidence does not support findings does not require consideration.

A recital in the brief that certain findings of the trial court are not supported by the evidence, which is not accompanied by any citation of authority or argument, does not require consideration.

2. Judgment ⊜518—Divorce decree, allotting community property standing in fictitious name, held not collateral attack on decree quieting title.

Where in divorce proceedings the court found that the person in whom title to land had been quieted as against the husband and wife was in fact the husband, the decree allotting the land to the wife as community property was not a collateral attack on the decree quieting the title.

3. Judgment ⊜951(1)—Findings necessary to support default decree must be assumed.

Where a decree of divorce, adjudicating rights to property, was rendered on default of the defendants, so that findings were not required, it must be assumed that the court found in favor of the plaintiff all facts essential to support the judgment.

4. Divorce ⊜156—Interlocutory decree after time for appeal is notice to subsequent purchaser.

An interlocutory decree of divorce, awarding property to the wife, becomes final after the expiration of the time for appeal, and is notice to a subsequent purchaser of the property.

5. Appeal and error ⊜1078(1)—Point not argued on appeal will be deemed abandoned.

A question decided adversely to appellant in the trial court, and not urged on appeal, so that no argument thereon was presented by either side, is deemed to have been abandoned by appellant.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action to quiet title by Hugh J. McGee against Carrie Hoffman. Judgment for defendant, and plaintiff appeals. Affirmed.

J. H. Ryckman, of Los Angeles, for appellant.

Halsey W. Allen, of Redlands, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant in an action to quiet title to certain real property situate in the county of Orange in this state.

The facts material to the opinion are that defendant and one J. W. Hoffman intermarried in February, 1909, and that soon thereafter Hoffman purchased the property in controversy, taking the deed thereto in the name of W. S. Jones. In June, 1911, defendant, while still the wife of the said Hoffman, recorded her declaration of homestead upon the property. In February, 1913, at the instance of J. W. Hoffman, an action was brought in the superior court of Orange county in the name of W. S. Jones against this defendant, Carrie Hoffman, and her husband, J. W. Hoffman, to quiet title to this property. Personal service of process was had therein upon said Carrie Hoffman, and she suffered her default to be entered. J. W. Hoffman filed a disclaimer, and in August, 1913, judgment was entered, quieting title in the name of W. S. Jones. In July, 1914, the said Carrie Hoffman instituted proceedings in Orange county for a divorce from her husband, J. W. Hoffman, alleging in her complaint that the said J. W. Hoffman and W. S. Jones were one and the same person, and that the property in controversy was the community property of the parties involved in the action for divorce. Service of process in the divorce action was obtained by publication only, and in January, 1915, the default of the defendant in that action was entered. In March of that year an interlocutory decree of divorce was rendered in favor of Carrie Hoffman, wherein all the property was awarded to her. In September, 1915, J. W. Hoffman, under the name of Jones, executed the deed to plaintiff upon which he bases his claim of title to the land. Upon the trial plaintiff rested upon proof of title under this deed. Defendant rested upon her claim of title, based upon the award contained in the interlocutory decree of divorce, the showing that J. W. Hoffman and Jones were one and the same, and that plaintiff was fully aware of all the facts above stated, that he paid no consideration for the property, and that the deed from Jones to him was in fact made to him by J. W. Hoffman without actual transfer of title, and for the purpose of defeating the award to plaintiff under the interlocutory decree. The trial court found in favor of the contentions of defendant upon all these disputed points. Having specially rejected the testimony of McGee and J. W. Hoffman as given upon the stand, and having found that J. W. Hoffman and Jones were the same person, the court was justified in disregarding the written evidence contained in the deed from Jones to plaintiff as being discredited by the testimony given at the trial. It fully appears from the record that in this respect the trial court committed no error

[1] The brief filed by appellant contains a recital that a number of the findings of the trial court are not supported by the evidence, without any citation of authority or argument beyond the bare statement that error was made. This court is not required to consider points so presented. Scott v. Times-Mirror Co., 184 Pac. 672. The appeal is taken under the alternative method, and no portion of the evidence is printed in appellant's brief. As the only evidence on the part of appellant was disregarded by the trial court as unreliable, and as the evidence on the part of respondent was apparently accepted by the trial court as true, an examination of the record fails to disclose any merit in appellant's contentions.

[2] The only point of law discussed by appellant is the elementary one that a judgment of a court having jurisdiction of the parties and of the subject-matter cannot be collaterally attacked. This argument is urged in support of appellant's claim that the judgment of the superior court in favor of W. S. Jones rendered in August, 1913, quieting title in him to the property in controversy, was conclusive upon the trial court in this proceeding, and rendered ineffectual the judgment of the superior court entered in March, 1915, awarding the property to Mrs. Hoffman. Inasmuch as the trial court found upon unimpeached testimony that Jones and J. W. Hoffman were the same person, and as this fact was put in issue in the divorce proceeding, if the process in the divorce proceeding was sufficient to give the court jurisdiction of the persons and of the subject-matter therein, it cannot be doubted that the court had power in that proceeding to adjudicate the rights of the parties to the community property.

[3] The defendant in the divorce proceeding having defaulted, thereby doing away with the necessity of findings, it must be assumed that the court there found all facts in favor of the plaintiff which would be essential to support the judgment. Therefore, it must be assumed that the court in the divorce proceeding found that Jones and J. W. Hoffman were the same person, and that the property was community property, as alleged in the complaint therein, and that the record title stood in the name of W. S. Jones, although the property was in fact the community property of J. W. Hoffman and Carrie Hoffman. There was therefore no

collateral attack upon the judgment in favor of Jones. The interlocutory decree of March, 1915, merely accepted that judgment, and awarded the property to Mrs. Hoffman upon the theory that J. W. Hoffman was in fact the plaintiff in the judgment obtained under the name of Jones.

[4] The time for appeal from the interlocutory decree having expired before the trial of this action, that judgment became final and conclusive as to J. W. Hoffman, and was notice to the appellant in this proceeding. This interlocutory decree cannot be attacked in this proceeding unless its invalidity is apparent upon its face.

[5] Although it appears from the written opinion of the learned trial judge that, in the argument before him, the interlocutory decree in the divorce proceeding was attacked upon jurisdictional grounds, appellant has not urged this point upon this appeal, and consequently respondent has made no argument in support of her claim that the court had jurisdiction to award her the property in the interlocutory decree. This court, therefore, has not had the assistance of counsel for either party in the determination of this question, and appellant will be deemed to have abandoned it. Hibernia Savings & Loan Society v. Farnham, 153 Cal. 578, 584, 96 Pac. 9, 126 Am. St. Rep. 129.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J

46 Cal. App. 385

GAFFEY v. WELK. (Civ. 2107.)

(District Court of Appeal, Third District, California. March 1, 1920.)

1. Covenants ⟸14—Vendor and purchaser ⟸343(3)—Failure of title through no fault of grantor not within covenants implied from word "grant"; no right of recovery under conveyance without general warranty.

Where property is conveyed by deed of grant, bargain, and sale, which imports only the covenants implied by the word "grant," the grantee cannot recover from the grantor a proportion of the consideration because of failure of title to an undivided interest in the property through no fault of the grantor; for neither would the covenant so implied cover any defect or failure of title not due to the grantor's acts, nor, in the absence of fraud, would the grantor be liable in damages for defect in or failure of title.

2. Vendor and purchaser ⟸343(3) — Failure of consideration authorizing recovery of payment for deed without warranty must be entire.

The failure of consideration which would entitle the grantee in a deed of grant, bargain, and sale without warranty to recover the amount paid must be an entire failure of consideration, for the payment and failure of title to an undivided interest in the property does not authorize any recovery, at least without rescission and tender of reconveyance.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Philip M. Gaffey against Theodore J. Welk. Judgment for plaintiff, and defendant appeals. Reversed.

Drew Pruitt, of Los Angeles, for appellant.
Jesse E. Stephens and Anderson & Anderson, all of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. This is an action for money had and received, based upon the failure of title to an undivided three-fourths interest in and to a parcel of land sold and conveyed by the defendant to the plaintiff.

We take the following from the defendant's brief as giving a general impression of the case:

"In April, 1910, one H. H. McCord owned an undivided one-fourth interest in the land, J. A. Crandall owned an undivided one-fourth interest, and Alex. Moncrieff owned an undivided half interest therein. In that month McCord forged a deed from Crandall and Moncrieff and their wives, purporting to convey their interest in the property to himself, which deed was duly recorded. The apparent title was vested in McCord as to the entire property. In May, 1910, McCord executed a deed to the defendant, Theodore J. Welk, purporting to convey the entire property. On August 7, 1911, the defendant herein executed a grant, bargain, and sale deed to the plaintiff, Philip M. Gaffey, without any covenant warranting the title or any other express covenants therein, purporting to convey the property for the consideration of $3,500, which was at that time paid by the plaintiff to the defendant. Neither the plaintiff nor the defendant knew of said forgeries. This was not ascertained until about two years later, when the plaintiff for the first time discovered that there was a forged deed in the chain of title, and that he only acquired an undivided one-fourth interest in the land, being the original interest owned by McCord. The property consisted of 42 lots and one block of land situated in the city of San Pedro in Los Angeles county. The property was vacant and unimproved and remained in that condition."

[1] The plaintiff, upon discovering that he had no title to three-fourths of the property, without rescinding or offering to reconvey the title he had obtained by the deed, brought this action against the defendant to recover three-fourths of the $3,500 he had paid for the land, with interest thereon, and costs. After trial the court rendered a judgment for that amount, to wit, $2,625, with interest thereon at the rate of 7 per cent. per annum from the date of sale, aggregating $3,865. The defendant appeals from such judgment.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

His position, broadly stated, is that, where there is a partial failure of consideration for a deed, having no other covenants in it than those implied by the use of the word "grant," the grantee cannot, without restoring the consideration, and offering to reconvey, recover from the vendor any part of the money which he has paid for the property; that he is bound by the deed as the final contract of the parties, and if it contains no warranty, a partial failure of title gives him no right to bring an action for all or a part of the purchase money paid.

The decisions rendered by the Supreme Court of California seem to be in harmony with the position taken by appellant. Thus, in Peabody v. Phelps, 9 Cal. 213, it is said:

" 'In the usual course of business, men insert covenants in their conveyances of real estate, when it is intended that the vendor shall answer for the goodness of the title, and it is easy to see that bad consequences may follow if the vendee shall be allowed to lay aside his deed, and have an action founded upon the conversations about the title pending the bargain.' * * * When by the express terms of his conveyance, the vendor has fixed the extent of his liability, upon the failure of title, and the conveyance is accompanied with the delivery of possession of the premises sold, and there have been no false representations as to their quality, quantity, or condition, or as to the incumbrances upon them, or the rights or privileges appurtenant to them, or rents or profits arising from them, we cannot perceive any just ground upon which the purchaser, for a defect of title, instead of seeking his remedy upon the covenants of his deed, should be permitted to maintain an action for representations respecting such title, made in the negotiation for the purchase."

In Bryan v. Swain, 56 Cal. 616, it appeared that the plaintiff had sold to the defendant a certain piece of real estate, and in part payment thereof had taken a note from the vendee secured by a mortgage upon the property. The same not having been paid, he brought a suit to foreclose his mortgage, and the defendant set up as a defense to the action on the note and mortgage that the title had wholly failed as to one of the tracts of land conveyed to him. In deciding the case the Supreme Court used this language:

"This deed was in form a grant, bargain, and sale deed, and contained an express covenant, viz. for quiet and peaceable enjoyment. At the time of the execution of this deed, defendants gave plaintiff their note, which was secured by a mortgage on the land conveyed; and, the defendants failing to pay an installment that fell due upon the note, this suit was brought to foreclose the mortgage. * * * The defense is that the title to one of the tracts of land embraced in the deed was, and still is, in the government of the United States, and the only question before us is, Did that fact constitute any defense to this suit?

"The evidence shows that there was no fraudulent concealment or misrepresentation respecting the plaintiff's title. * * *

"There can be no doubt that the plaintiff was obliged, under the agreement, to execute a good and sufficient deed, conveying the title; and if this case depended upon such agreement, the matter pleaded would be a good defense to the action. But the finding of the court is that the deed was taken and accepted in execution of the contract of August 10th. * * * The rights of the defendants, therefore, depend upon the deed, and not upon the agreement—the latter being merged in and extinguished by the former. * * *

" 'The deed is deemed to express the final and entire contract between the parties.' * * * Therefore the defendants must look to its covenants for a defense to this action. The deed executed by plaintiff to defendants contains the covenants implied from the use of the words 'grant, bargain, and sale,' contained therein. From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself, and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

" '(1) That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

" '(2) That such estate is, at the time of the execution of such conveyance, free from all incumbrances done, made, or suffered by the grantor, or any person claiming under him.' * * *

"The case fails to show a breach of any of these implied covenants; and it is not pretended that there was any breach of the express covenant for quiet enjoyment."

And the defendant was denied any relief. See, also, Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Rhorer v. Bila, 83 Cal. 54, 23 Pac. 274; Worley v. Nethercott, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209; Marshall v. Caldwell, 41 Cal. 611.

In other jurisdictions the decisions are to the same effect, thus: In Hawkins v. Wells, 17 Tex. Civ. App. 360, 43 S. W. 816, it is said:

"The deed expressed the contract between the parties; and the presumption of law is that Hawkins acted upon his own knowledge of the title, and he will not be heard to complain that he did not receive a perfect title, unless some misrepresentation was made, upon which he was authorized to, and did, rely in making the contract, that will entitle him to relief. * * * Even where there are no covenants as to title, none will be implied in this state, except as to a prior conveyance by the grantor, and that such estate is free from incumbrances, 'which include taxes, assessments and all liens upon real property.' * * * 'Where there has been no fraud, mistake, or accident, a purchaser who has taken a deed without covenants has no right, for a defect in his title, * * * to detain the purchase money, or to recover it in case of payment.' "

In Wheat v. Dotson, 12 Ark. 699, it is said:

"In this class of cases, both upon principle and authority, no defect of title that does not amount to a total failure of consideration can be set up as a defense to the suit for the purchase money."

[2] Respondent, in his brief, apparently concedes the position that where there is only a partial failure of consideration the vendee cannot recover back a part of the money paid, but must rely upon the covenants of his deed, but, his position in this case is that—

"There was a total failure of consideration as to a distinct and obviously and easily severable part of the property which the defendant purported and attempted to convey to plaintiff."

And, again he states:

"It is an action for a total failure of consideration as to a definite, distinct, and several property interest, the ascertainment of which is a mere matter of mathematical computation."

There are some cases holding that where a contract relates to personal property a partial want or failure of consideration of title may be shown in reduction of damages, but we have found no well-considered case, and certainly none in this state, holding that the same rule applies as to real estate conveyed by an ordinary grant deed. The distinction is clearly stated in Bowley v. Holway, 124 Mass. 395, wherein it is said:

"In an action for the price of land sold and conveyed by a deed with the usual covenants of title, the defendant cannot, in the absence of fraud, avail himself, in defense, of a partial failure of title by way of recoupment or in reduction of damages, but his only remedy is on the covenants of the deed. * * *

"In suits to recover the price of personal property sold, it is well settled that a partial want or failure of the consideration, or a breach of the warranty of title or quality, may be shown in defense, in reduction of damages. This rule is adopted to avoid circuity of action, because all the rights of the parties growing out of the same transaction can be justly and conveniently settled in one suit."

The error, it seems to us, in the plaintiff's position, is found in the erroneous application of the phrase, "a total failure of consideration." There are cases holding that where there is a total failure of consideration no rescission is necessary before bringing an action to recover back the money paid. The consideration for what? The answer must be the consideration for the contract existing between the parties. Thus, in Richter v. Union Land & Oil Stock Co., 129 Cal. 367, 62 Pac. 39, the expression is used:

"Nor, where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit."

The consideration referred to is the consideration for the contract—in this case the deed. There was not a total failure of consideration for the deed which the plaintiff received from the defendant. It conveyed to him an undivided one-fourth interest in the property which he still retains, and does not offer to surrender.

Counsel's argument is based upon the theory that there must have been a consideration for the three-fourths of the money which he paid, and that, not having received any consideration for that part of the money, there was a total failure of consideration, but, as stated, the consideration referred to is the consideration for the delivery to him of the deed, and by no process of reasoning can it be held that the deed was without consideration.

The opening sentence of respondent's brief states his position, wherein it is said:

"This is an action for money had and received, and is based upon the total (not as stated by appellant's counsel a partial) failure of title to a distinct and severable interest in real property which defendant attempted to, but failed to, convey to plaintiff."

The error in plaintiff's position, running all through his argument, is in assuming that the expression "total failure of title to a distinct and severable interest in real property" is the equivalent of the expression "a total failure of consideration for the deed." They are not the same in meaning, and bear little resemblance to each other.

We have examined all the cases cited by counsel, but do not find any sustaining his position when the facts are carefully considered. Some of them relate to sales of personal property (as to which the rule seems to be different) and some of them were cases where there was a total failure of consideration. We deem it unnecessary to review them. The law in California seems to be settled that where there is a partial failure of consideration for a grant deed without other covenants the vendee cannot maintain assumpsit for the money paid. He is restricted to his remedy on the covenants of the deed.

Whether, under the facts disclosed by this record, the plaintiff could have rescinded the whole transaction and maintained an action to recover back the money paid, we need not consider, as it is not claimed there has been a rescission. On the record before us, we are of opinion the plaintiff was not entitled to recover anything, and therefore the judgment is reversed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 502

KILFOIL v. WARDEN et al. (Civ. 3157.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1920.)

1. Quieting title ⟸10(1)—Plaintiff must succeed on strength of his own title.

The plaintiff in an action to quiet title must succeed on the strength of his own title, and not on the weakness of that of his adversary.

2. Quieting title ⟸10(2)—Plaintiff must prove paper title from patentee or grantor in possession.

Where plaintiff in an action to quiet title relies solely on a paper title, the chain must be from the original patentee or some grantor in possession; and, where plaintiff merely introduced the deed to himself from M. and a deed to M. from persons not shown to have had possession or anything to do with the property at the date of their deed, the proof was insufficient.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by John F. Kilfoil against Julia P. Warden and others. From a judgment for plaintiff, defendants appeal. Reversed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants.

Joseph W. Mowell, Alex W. Davis, and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

THOMAS, J. This is an action to quiet title. The complaint is in the usual form. The answer denies all the material allegations of the complaint, except that it is asserted that defendant Julia P. Warden "claims and asserts some right, title, or interest in and to said property adverse to plaintiff, and denies that the same are without any right, and alleges that the defendant Julia P. Warden acquired said property under and by virtue of a conveyance from the city tax and license collector of the city of Los Angeles for a delinquent assessment for the improvement of Alhambra avenue from the east boundary line of the city of Los Angeles to the southeasterly line of Mission road and other streets, as will more fully appear in the attached copy of said conveyance, and marked 'Exhibit A,' and by reference thereto made a part of this answer." Defendants asked that the title be quieted in them.

On the trial, in addition to oral testimony, the plaintiff introduced in evidence a deed to the property in question, dated January 11, 1916, and recorded with the county recorder on January 21, 1916. The grantor in this deed was one Mary Myers, a widow, and the plaintiff here was the grantee. Plaintiff then introduced a certified copy of deed executed by G. A. Dobinson and Giacomo Tononi to said Mary Myers, which deed was dated August 1, 1888, and recorded August 16, 1888. Defendants offered no evidence at the close of plaintiff's case in chief, but relied entirely on "Exhibit A," attached to their answer, and moved the court for a judgment on the following grounds:

"We have set up our deed in full and have pleaded it, and no affidavit has been filed denying it; and on the face of the pleadings we have a prima facie case."

The motion was denied, whereupon defendants rested. On rebuttal plaintiff introduced an affidavit of defendant C. D. Warden, as agent "of the owner of the certificate of sale referred to in the attached notice to redeem," showing the posting of the notice to redeem on the property, etc. In view of the record before us we think it unnecessary to quote such affidavit here. The court found in favor of the plaintiff and against defendants on all the issues, judgment was entered accordingly, and this appeal is taken therefrom.

[1, 2] Many points are urged by appellants, but under the circumstances we think it unnecessary to consider any of them. Plaintiff must succeed only on the strength of his own title, and not on the weakness of his adversary. Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84. When reliance is placed solely upon a paper title, the chain thereof must be from the original patentee or some grantor in possession. 32 Cyc. 1331. The plaintiff here has failed to furnish such proof. The deed offered in evidence by him, dated August 1, 1888, does not show how the grantors therein came to have anything to do with the property, and there is no evidence that they were in possession of the land so pretended to be conveyed by them at the time of the execution and delivery of such deed. Failing in these essentials, plaintiff must fail in this case. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Heney v. Pesoli, 109 Cal. 53, 111 Pac. 819; Di Nola v. Allison, supra; Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234.

With the record before us it is legally impossible for this court to direct judgment for defendants.

Judgment reversed.

We concur: FINLAYSON, P. J; SLOANE, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 446

EWING v. EWING. (Civ. 3172.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1920.)

Divorce ⊂⊃303(3)—Evidence held to sustain order granting custody of child to father.

On appeal by a mother from an order in divorce proceedings taking from her the custody of her four year old daughter and giving it to the father, conflicting evidence *held* to support an order granting the custody of the child to the father.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Ople Marie Ewing against Harry Elmar Ewing. From decree awarding defendant the custody of a child in divorce proceedings, plaintiff appeals. Affirmed.

Arthur L. Dorn, of San Diego, for appellant.

Frederick A. Preston, of Los Angeles, and Clarence S. Preston, of San Diego, for respondent.

SLOANE, J. Plaintiff has appealed from an order of court in divorce proceedings taking from her the custody of her four year old daughter and giving it to the defendant, her husband.

Plaintiff was granted an interlocutory decree of divorce upon default of the defendant, and the order giving her the custody of the child was made in such interlocutory decree. Subsequently, on application by the defendant, and upon a hearing of the matter in which the claims of the respective parties were supported by numerous affidavits, the trial court changed the original order as above indicated by transferring the custody from the mother to the father. The only question raised is as to the sufficiency of the evidence to justify the order appealed from.

The facts shown on the hearing without dispute indicate that the plaintiff and her little girl, prior to and after the interlocutory decree of divorce, lived with plaintiff's parents, who had chiefly supported and cared for the child. The evidence also tended to show that subsequent to the interlocutory decree, and before the hearing, the plaintiff had spent the night in a hotel in Pasadena with a man not her husband, and that the couple had registered as husband and wife. There is no denial of this circumstance by the plaintiff. In the proceedings she petitions the court in the event that she is deprived of the custody of the child that it be given to the grandparents. She also, by affidavits, attacks the reputation of the defendant, by charging that he is dissipated, shiftless, and a confirmed thief, and alleges that he is arranging to take the child to Hollywood and place her in a boarding house frequented by motion picture actresses, a prizefighter, and other characters who the plaintiff thinks are unfit associates for a young child. Defendant, by his own and other affidavits, disputes the aspersions upon his own reputation and that of the boarding house in question, and, in turn, charges the grandparents with intemperate use of liquor and indulgence in vile language in the presence of the child, and as being generally unfit to be intrusted with her care and custody. On the other hand, several affidavits on behalf of the plaintiff give the grandparents a most excellent reputation.

If all that is said to the discredit of the various parties concerned could be credited, none of them would be fit to have the custody of a little girl. If all that is said in their favor is accepted as truth, either the father or the grandparents would be acceptable, and the mother seems to have only the serious indiscretion at the Pasadena hotel to her charge. Although we have the same affidavits before us as did the trial court on the hearing, it was the province of that court to pass upon the evidence, and it had some, at least, of the parties before it. Where there is such a glaring conflict in the evidence, particularly in view of the undisputed misconduct of the plaintiff, we cannot undertake to overrule the decision of the trial court.

There was no appearance for respondent on this appeal, and we are informed, outside the record, that respondent has paid no attention to the child since the order in his favor, and that she is now in the custody of the mother, who is again married. These are matters properly to be brought to the attention of the trial court, if a further change of custody is desired. We feel bound by the record as we find it.

Order affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 425

CARTER et ux. v. BLENKIRON. (Civ. 3150.)

(District Court of Appeal, Second District, Division 1, California. March 4, 1920. Hearing Denied by Supreme Court May 3, 1920.)

1. Trusts ⇐110—Evidence held insufficient to establish a constructive trust.

Evidence *held* to show that, when defendant purchased premises without consideration, other than an agreement to pay off the mortgage, he practiced no fraud or deceit, that the transfer was voluntary on plaintiffs' part, to prevent a purchaser of first mortgage from securing the property, on which plaintiffs had foreclosed a junior mortgage by sale, and wholly insufficient to establish a constructive trust.

2. Appeal and error ⇐843(2)—Matters not necessary to decision not considered.

Where, in an action to establish a parol trust and for accounting by alleged trustee, where a judgment for defendant should be affirmed because no trust could have been created, it becomes unnecessary to discuss other technical grounds urged to support affirmance of judgment.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by J. H. Carter and wife against J. E. Blenkiron. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. L. Albert, of Los Angeles, for appellants.

James P. Clark, of Los Angeles, for respondent.

SHAW, J. Action to establish a parol trust in real estate, and in connection therewith to compel an accounting by the alleged trustee. Judgment went for defendant, from which plaintiffs appeal.

As appears from the complaint, the action is founded upon the alleged fact that plaintiffs, relying upon defendant's promises, did, by unconditional grant deed, convey the land to defendant upon his oral agreement to pay certain indebtedness against the property, secured by a trust deed thereon, after which he would sell the same and pay to plaintiffs the purchase money received therefor, less the sum paid in satisfaction of the deed of trust and reasonable expenses in effecting such sale, all of which allegations were denied by the answer.

The court, in substance, found that, while plaintiffs made the deed to defendant, the making thereof was not accompanied, preceded, or followed by any agreement between plaintiffs and defendant, or promises made by defendant, either verbal or written, that plaintiffs, or either of them, should have or retain any interest in said land or the proceeds of the sale thereof; that said deed was not made or delivered in trust for the benefit of plaintiffs or either of them, and that defendant never agreed that he would protect plaintiffs from the indebtedness so secured by deed of trust upon said land and under which it was to be sold, or that he would sell said property and pay to plaintiffs any sum of money in excess of the mortgage debt, less the reasonable expenses of effecting such sale; that plaintiffs did not believe or rely upon any promises or agreements alleged in the complaint to have been made by defendant when they made the deed to him, and did not convey the property to defendant in trust or for the benefit of plaintiffs or either of them; and that defendant did not deceive or mislead plaintiffs in any matter or thing connected with the making of said deed, and did not practice any fraud or deceit upon plaintiffs to procure the making thereof, but that said deed was voluntarily made by plaintiffs, without consideration, "and because plaintiffs would rather that defendant should own said property than that the same should be entirely lost to them by sale" under said first deed of trust.

As disclosed by the record, these findings are based upon the following facts clearly established by ample evidence: The land in question, prior to the transactions here involved, was subject to four deeds of trust given to secure the payment of promissory notes. The first deed of trust, for some $23,000, was for the benefit of one Haas, the second and third were for the benefit of these plaintiffs, and the fourth was for the benefit of Ordway. Plaintiffs caused the property to be advertised for sale under the terms of the second and third deeds of trust, which sale took place a few days prior to October 1, 1912, at which time they as purchasers under said deeds of trust acquired title to the lands, subject, however, to the prior deed of trust given to secure payment of the note for $23,000 payable to said Haas. Realizing the effect which this sale would have upon his rights under the fourth deed of trust, Ordway acquired the note secured by the first deed of trust and proceeded to advertise the property for sale under the terms thereof, which sale, as advertised, was to be made at 11 o'clock a. m. on October 1, 1912. For the purpose of raising money to protect their interest in the property, and after futile efforts to procure a loan elsewhere, plaintiff J. H. Carter, on September 30, 1912, in company with a broker, went to an office, where he for the first time met defendant, and from whom he solicited a loan of money wherewith to pay the indebtedness for which the property was about to be sold. Defendant declined to consider the making of the loan, and thereupon Carter proposed to sell to him plaintiffs' interest in the land for $500. The representations as to the condition and character of the land were such that defendant caused Charles Nowlin to go to Imperial

county, where the land was located, to examine the same and verify plaintiffs' representations. In the forenoon of October 1, 1912, plaintiffs went to the office of defendant, where they caused a grant deed to be prepared, which they signed and acknowledged, leaving it with defendant for his acceptance, subject to a favorable report by Nowlin. On the morning of October 1st the sale was postponed to 11 o'clock a. m. the next day, prior to which time, and on October 1st, Nowlin made an adverse report as to the character and condition of the land, in addition to which defendant learned the acreage of the land was considerably less than as represented by plaintiffs, and as a means of obtaining water for irrigation it carried no water stock, contrary to Mr. Carter's representations.

By reason of these facts defendant declined to purchase the property, or have anything further to do with the matter, and returned the deed to said plaintiff. During the negotiations Carter repeatedly expressed a feeling of bitterness towards Ordway, saying in substance that the land was worth more than the debt, and that Ordway, whom he designated as "that skinner," had gone over his head and bought the first trust deed, to beat him out of the property, due to which fact he said he would rather anybody other than Ordway should have the land, and that he would rather defendant take it as a gift than that Ordway should profit by the sale. Apparently with no purpose other than curiosity, the parties, with their respective friends, proceeded to the place where the land was to be sold, and on the way Carter tendered the deed to defendant, who said, "Now, Mr. Carter, I tell you right now, if I take hold of this deal, I want it distinctly understood I am under no obligations to you whatever," to which Carter replied, "All right;" the making of which statement is not denied by Carter, but in substance admitted. On their arrival, the trustee was preparing to call the sale, and Ordway, who was the owner of the water stock attached to the property, was present, ready to bid the sum due him under his deed of trust. Not only plaintiff Carter and his friends, but friends of defendant, were expressing and had theretofore expressed the opinion that the land was worth more than the indebtedness, even without the water stock; and, thus urged, defendant inquired of Ordway what he would take for the water stock, and, the price fixed being satisfactory to him, he then concluded to and did agree to pay some $24,000 in liquidation of the indebtedness, as a result of which the making of the sale was abandoned, and defendant acquired title to the property through the deed given him by plaintiffs, subject, however, to certain amounts due for taxes.

These and other minor facts which the evidence tends to prove justified the court in concluding that plaintiffs, since they were unable to protect the land from the sale, and prompted by a desire at all events to circumvent the supposed design of Ordway in buying the note secured by the deed of trust and procuring a sale of the property as a means of acquiring title thereto, gave the deed to defendant knowingly and intentionally, making their interest in the property the subject of a gift to him, who, when the deed thereto was tendered, and in order to prevent any misunderstandings due to the former negotiations, admittedly told plaintiffs that, if he took hold of the deal, he wanted it distinctly understood that he was under no obligation whatever to them.

[1] As found by the court, there were no promises made by defendant for plaintiffs' benefit, and he practiced no fraud or deceit whereby they were induced to convey the property to him. Their act in so doing was voluntary and prompted by the desire and for the avowed purpose of circumventing Ordway in deriving any benefit or profit from acts which they felt were unwarranted and oppressive towards them. Hence there is no ground for appellants' claim that a constructive trust in favor of plaintiffs was created.

[2] There are other technical grounds urged by respondent, upon which it is claimed the judgment should be affirmed; but since, upon our view of the findings, no trust of any kind could be deemed to have been created, it is unnecessary to discuss the same.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

46 Cal. App. 443

NELSON v. LONDON GUARANTEE & ACCIDENT CO., Limited. (Civ. 3102.)

(District Court of Appeal, First District, Division 2, California. March 5, 1920.)

Master and servant ⟸382—Compensation insurer's settlement, based on mistake of law and fact, held without consideration.

Settlement agreement of insurance carrier with dependent of deceased employé, that payment of a certain amount per week in accordance with the Workmen's Compensation Act should be made so long as required by that act, not being based on consideration of forbearance to sue, but on mutual mistake that the employé, though injured while engaged in interstate commerce, was within the scope of the act, was without consideration.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Josephine W. Nelson against the London Guarantee & Accident Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

A. D. Schaffer, of San Francisco (Anthony Podesta, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, and Carroll S. Bucher, of Salt Lake City, Utah, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant after an order of the trial court sustaining its demurrer to plaintiff's complaint without leave to amend.

The allegations of the complaint are that on the 12th day of May, 1914, plaintiff's husband, during the course of his employment as a stevedore for the Matson Navigation Company, was killed while loading a vessel of that company in the port of San Francisco, that his average weekly wage at that time was $20, and that plaintiff was his sole dependent. It is also alleged:

That prior to that time the defendant had entered into an agreement with the Matson Navigation Company, promising to pay to the dependents of employés of that company all sums of money due under the "Workmen's Compensation, Insurance and Safety Act" arising out of personal injuries, including death, sustained by such employés in the course of their employment. That for a period of 20 weeks subsequent to May 12, 1914, defendant paid to plaintiff the sum of $13 a week, or a total of $260, and that on the 30th day of September, 1914, plaintiff and defendant entered into an agreement in writing respecting the further payment of compensation to plaintiff, and adjusting the amount and manner of payment thereof. That such agreement provided in part as follows:

"The payment of $13 each week in accordance with Workmen's Compensation, Insurance and Safety Act [Laws 1913, p. 279] will be made so long as required by said act."

That said agreement was approved by the Industrial Accident Commission of the state of California, and for a period of 139 weeks subsequent to the 30th day of September, 1914, defendant paid to plaintiff $13 per week, or a total sum of $1,807, and that on the 29th day of May, 1917, defendant notified plaintiff that it had abandoned and repudiated said agreement and that no further payments would be made thereunder. It is then alleged that the sum of $1,053 is still due under the agreement by reason of the terms of the Workmen's Compensation, Insurance and Safety Act, which called for the payment of three times the average annual earnings of the decedent, and demand was made for judgment in that amount.

Respondent justifies its repudiation of the agreement upon the ground that subsequent to its execution the Supreme Court of the United States ruled that the Industrial Accident Commission of the state had no jurisdiction over accidents occurring upon vessels engaged in interstate commerce in navigable waters. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. It is conceded that appellant's husband was employed in interstate commerce at the time of the injury. From this it is argued that no liability attached to the respondent for the payment of compensation under the Workmen's Compensation, Insurance and Safety Act of this state, and that therefore there was no consideration for the settlement agreement made in 1914. The purpose of the settlement agreement undoubtedly was to fix the amount of compensation to be paid on account of the accident and the time and manner of payment. It was not a settlement of any disputed claim or a compromise of a doubtful right, both parties at the time having assumed that the provisions of the Workmen's Compensation, Insurance and Safety Act applied to accidents of this nature, and that the liability of the respondent to pay was fixed by the terms of that act. The liability of the respondent was not disputed at that time, and the right of the appellant to receive compensation in accordance with the terms of the said act was not doubted until after the decision of the Supreme Court of the United States holding that the state commission had no jurisdiction over accidents of that nature.

But it appears from the allegations of the complaint that respondent never contracted to make any payments, except of such sums as the Matson Navigation Company might be obligated to pay under the Workmen's Compensation, Insurance and Safety Act. Under the decision of the United States Supreme Court in the Jensen Case, that company was not obligated to pay under the act for injuries to its employés sustained while engaged in interstate commerce; but its liability, if any, was a common-law liability only, which was not covered by respondent's insurance contract. Thus neither the appellant nor the Matson Navigation Company could have maintained an action on the insurance contract for compensation for such injury. The settlement agreement was therefore without consideration. It was in no sense a contract based on the consideration of forbearance to sue, but was based upon a mistake of both law and fact. City Street Improvement Co. v. Pearson, 185 Pac. 962.

For these reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 411

GALLENTINE v. HICKEY et al. (Civ. 3269.)

(District Court of Appeal, First District, Division 2, California. March 4, 1920.)

1. Adverse possession ⊂=66(2) — Judgment ⊂=256(3)—Five years' possession and payment of taxes held to ripen into title even if possession of strip was by mistake.

Where a building erected by plaintiff's husband, from whom she traced title, covered the small strip in controversy and the deed under which plaintiff's husband took was at least color of title, five years' possession and payment of taxes entitled plaintiff to the premises, regardless of whether the building had been located by plaintiff's husband on an agreed line, and hence, in suit to quiet title, a finding that the building was located on the agreed line, etc., could be rejected as surplusage without affecting judgment for plaintiff.

2. Appeal and error ⊂=1042(1)—Striking of cross-complaint harmless error, where facts were provable under answer.

Where defendants might under their answer have proven any facts which they could have proven under the cross-complaint and could have been afforded the same relief, the granting of plaintiff's motion to strike out the cross-complaint, if technically erroneous, was harmless.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Mahalla Gallentine against F. J. Hickey and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argabrite & Drapeau, of Ventura, for appellants.

Bowker & Sheridan, of Ventura, for respondent.

BRITTAIN, J. The defendants appeal from a decree quieting the plaintiff's title to a lot of land in the principal business block in the town of Ojai, formerly known as Nordhoff, in Ventura county. The decree also required the removal of a wall built within the exterior boundaries of the plaintiff's lot.

The dispute concerned a strip of land 1.67 feet wide along the division line between the lots of the plaintiff and the defendants. According to an old map, these lots were near the middle of a block shown on the map to have a frontage of 472 feet, but by actual measurement it was only 470.33 feet long. Early deeds called for measurements from the southeast corner of the block to the nearest corners of lots conveyed, or boundary lines of earlier conveyed lots so located. The descriptions used in the deeds in the plaintiff's chain of title all related directly or indirectly to the southeast corner of the block. So, also, did the earlier deeds in the defendants' chain of title; but in a deed containing such a reference a predecessor of the defendants added a recital calling for a distance from the southwest corner of the block computed from the erroneous map call, and therefore 1.67 feet too long. Subsequent grantees reversed the old descriptions, using the erroneous call from the southwest corner of the block and thereby causing an apparent overlapping of the western lot 1.67 feet on the eastern lot.

The plaintiff's husband, from whom she derived title and possession, in 1911, acquired his lot by the ancient description. There was then a store building on the lot afterwards acquired by the defendants. The plaintiff's husband caused a survey to be made in accordance with his deed and with the plaintiff in that year built a store on his lot. In the erection of his building two things were done which have a direct bearing on the questions involved in this suit: A concrete foundation was built for the Gallentine store, and overhanging eaves of the older store were cut away to permit the erection of the Gallentine building on the west line of the plaintiff's lot. At that time there was some talk between Mrs. Gallentine, acting on behalf of herself and her husband, with one of the predecessors in interest of the defendants, then a record owner of the land and an occupant of the old store, concerning the cost of the survey, and he said he made no claim against the Gallentines. One of the defendants testified, in effect, that when they bought they had a survey made and got their full frontage without considering any part of the land covered by the Gallentine building. Both buildings were destroyed by fire in 1917, but the concrete foundation built by Gallentine remained in place. Thereafter, and shortly before the commencement of this suit, the defendants started to build a new east wall 1.67 feet east of the old division line, marked by the old buildings, as shown by the remaining concrete foundation. The plaintiff testified that, from 1911 until her building was burned in 1917, it was occupied by tenants from whom she collected all rents, and that for the same period, and thereafter until the time of the trial, she had paid all taxes on the lot to which she claimed title.

The findings were in favor of the plaintiff as to ownership and against the claims of the defendants. The court also found the facts concerning the construction of the concrete foundation; that at that time there was a dispute in regard to the true location of the division line which was settled by the agreement of the then owners; and that the plaintiff had been in open, peaceable, notorious, and continuous occupation of the property for more than five years paying taxes. Conclusions of law and judgment followed the findings.

[1] The appellants' chief contention is in relation to the finding concerning the agreement locating the true line between the lots. The finding may be entirely disregarded as surplusage without affecting the judgment. The ultimate finding of ownership is supported by the deeds, as well as by the evidence that the plaintiff and her husband entered at least under color of title and remained in complete domination of the land under a claim of right openly, notoriously, and peaceably, paying taxes for the full period which would have given the plaintiff title by prescription. Under the deeds, if there was no dispute in regard to the location of the division line, there was no basis for an agreement concerning what both parties recognized as the fact, namely, that the plaintiff's west lot line was where both her predecessor's deed and the survey showed it to be. That line was marked on the ground by the foundation, and the trial court was correct in determining in effect that there is no more reason now for a dispute on the subject than there was in 1911.

There are numerous contentions concerning claimed errors in rulings on evidence. Counsel for the appellants have contented themselves largely in asserting that the trial court erred. The entire record has been carefully examined, and it does not appear that any of the rulings was erroneous or injurious to the appellants. It is wholly unnecessary to set forth the evidence in detail or to discuss at length the contentions on the part of the appellants in this regard.

It is contended that the defendants' motion for nonsuit should have been granted and that their motion for a new trial should not have been denied. The same argument was made under each of these contentions as that made concerning the claimed insufficiency of the evidence, and on the motion for a new trial the rulings on evidence were no doubt considered. In view of what has been said, it does not appear that there was error in either matter.

[2] It is also contended that the trial court erred in granting the plaintiff's motion to strike out a cross-complaint filed with the answer. In their answer the defendants affirmatively alleged that they owned the lot described in such a manner as to overlap the plaintiff's lot. In the cross-complaint the same allegations were made. The defendants were afforded an opportunity under their answer to prove any facts they might have proved under the cross-complaint. If the judgment had been against the plaintiff, the defendants would have been as completely protected as by a judgment in their favor. If there was technical error, after the trial in such a case as this, judgment for the plaintiff will not be reversed on that ground alone. This exact question has heretofore been decided by the Supreme Court adversely to the claim of the appellants. Hanson v. Goldsmith, 170 Cal. 512–518, 150 Pac. 364.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 451

RAMIREZ v. UNITED FIREMEN'S INS. CO. OF PHILADELPHIA et al.

(Civ. 2751.)

(District Court of Appeal, Second District, Division 1, California. March 6, 1920. Hearing Denied by Supreme Court May 3, 1920.)

1. Insurance ⊜282(8)—Condition of ownership in fire policy not breached by one in possession under contract to purchase.

There was no breach of the policy condition of ownership of the property in insured, because he was in possession merely under a contract to purchase the property on monthly installments, though, owing to its informal character, he and the seller later entered into a more formal and complete contract in reference to the sale.

2. Insurance ⊜558(2)—Preliminary proof of loss within 60 days held waived by fire insurer.

Statement of fire insurer's agent, after loss to insured, that he would attend to giving notice to company, followed by appearance of adjuster, who instructed insured as to making plat of rooms, with inventory of contents, *held* a waiver of policy provision insured should render preliminary proof of loss within 60 days, though adjuster later induced insured to sign stipulation, which he did not understand, on representation it was act necessary in effecting settlement.

Appeal from Superior Court; San Bernardino County; J. W. Curtis, Judge.

Action by A. C. Ramirez against the United Firemen's Insurance Company and the British America Assurance Company. From a judgment for plaintiff, defendants appeal. Affirmed.

W. W. Hindman, of Los Angeles, for appellants.

A. S. Maloney and Fred A. Wilson, both of San Bernardino, for respondent.

SHAW, J. On June 16 and 17, 1915, the defendant United Firemen's Insurance company of Philadelphia issued to plaintiff two policies of fire insurance, one in the sum of $350 upon his dwelling house, and one for $1,000 on the furniture therein. Thereafter, by a contract of reinsurance, the defendant British America Assurance Company entered into a contract whereby it assumed the obligations of said first-named company. Nearly two years thereafter, to wit, May 2, 1917, the

house and contents were destroyed by fire, and, in an action brought by plaintiff upon the policies, judgment was rendered in his favor for $1,000, from which defendants appeal.

[1] Appellants base their position upon two clauses of the policy; one relating to the title of the insured, and the other to the furnishing by him of sworn proofs of loss within a certain time. The policy contained, among other provisions, the following:

"This entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership."

Following the allegation of the complaint, the court found:

"That at the time of the issuance of said policies of insurance the plaintiff was, and continuously thereafter up to the time of the destruction thereof by fire on the 2d day of May, 1917," was the unconditional and sole owner of the property insured.

This finding is attacked upon the ground that the evidence is insufficient to support the same. While there is some conflict in the testimony, it appears from that produced by plaintiff that, while not the record owner of the property, he was at the time of the issuance of the policies in possession thereof under a contract to purchase the same upon monthly payments therefor, which agreement or contract was entered into and possession of the property taken prior to the issuance of the policies. This agreement was destroyed in the fire, but plaintiff's testimony tends to show that under the memorandum he entered into possession of the property, and was thereby obligated to pay $1,150 for the same, $50 of which was paid in cash and the remainder thereof to be paid at the rate of $10 per month, in consideration of which the vendor obligated himself, upon the completion of such payments, to convey the property to plaintiff. The fact that, owing to its informal character, the vendor and vendee, at a later date, entered into a more formal and complete contract in reference to the sale, in no wise detracts from the legal effect of the first contract under which, as appears from plaintiff's testimony, such mutual obligations were assumed by the parties, and, upon the authority of McCollough v. Home Insurance Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862, and cases there cited, this must be deemed sufficient to justify the finding of the court that there was no breach of the condition of ownership of the property in plaintiff.

[2] The policies contained a provision that—

"Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth: (a) His knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property."

This condition was not complied with, but the court found, in substance, that defendants and each of them had actual knowledge and notice of said loss and actual knowledge of the extent thereof, and that defendants and their agents, by reason of their conduct and statements to plaintiff, misled him as to the necessity of furnishing such proofs, and their acts, statements, and conduct constituted a waiver of the performance by plaintiff of the condition of said policies as to the making of such proofs. These findings are likewise attacked upon the ground of insufficiency of the evidence to support them. The evidence bearing upon this issue shows that immediately after the fire plaintiff saw Mr. Poole, the agent through whom he had procured the insurance policies, and had a conversation with him in regard to the giving and making of proof, wherein Poole told him "the company had by law 60 days, and he said, 'You will hear from them,'" and that Poole said he would attend to giving the notice; and in response to the question, "Did you rely upon him to inform the company?" answered, "I did; I relied upon him all the time." Mr. Poole did notify the company of the loss, in response to which Mr. Cote, the company's adjuster, appeared on the scene two or three days after the fire, and, ascertaining that the result of the fire was a total loss of the property, drew a plan of the rooms in the house and told plaintiff to list the articles in each room, with the value thereof, and give it to him, or send it to the company, with which demand plaintiff, after making the inventory in the manner required by the adjuster, complied. Thereafter the adjuster met plaintiff while he was engaged in driving a delivery wagon, and presented to him a document which, upon representation that it was necessary that he sign it in order "to get this thing straightened up, fire insurance straightened up," he signed. Thereupon Mr. Cote left, and plaintiff did not see him again.

This paper which plaintiff signed was a stipulation to the effect that no step or measure taken and no act of the company or its agents should be deemed a waiver upon the part of the company of any of the conditions of the policies, unless the same were waived in writing by the president of the company. This agreement has no bearing upon the question before us. It has no reference to representations, acts, or conduct of the company or its agents calculated to lead the insured into the belief that such proofs were not required; indeed, to so hold would be in effect to sustain what might be the very means of accomplishing an intentional fraud

upon plaintiff. In Joyce on Insurance, vol. 5, § 3354, it is said:

"The general rule seems to be, however, that any act or series of acts upon the part of the insurer which tend to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver, and release such claimant from a compliance with the provision."

And in Cooley's Briefs on Insurance, vol. 4, p. 3526, it is said:

"If the company investigates the loss on its own account, and so conducts itself with relation thereto as to show a satisfaction with the knowledge thus obtained, or to induce reasonable belief in insured that it is so satisfied, and does not desire formal notice or proofs, it will amount to a waiver of such formalities."

To the same effect see Ætna Insurance Co. v. Shryer et al., 85 Ind. 364, Massock v. Royal Insurance Co., 196 Ill. App. 394, and Sidebotham v. Merchants' Fire Association, 41 Wash. 436, 83 Pac. 1028.

That the statement of the insurance agent to the effect that he would attend to the matter of giving notice to the company, followed a few days thereafter by the appearance of the adjuster, who instructed plaintiff as to the making of a plat of the rooms, and directed him to make out an inventory showing the articles in each room, together with the value thereof, and to either give it to him or send it to the company, with which demand plaintiff complied, was well calculated to and did lead him to believe that a settlement would be made without further notice or proof, there can be no doubt; indeed, it is a fair inference that such was the purpose of the adjuster. The subsequent act of the adjuster in having plaintiff sign the stipulation, the words of which he says he did not understand, upon the representation that it was an act necessary in effecting the settlement, led him to believe that the company was demanding all that he was to do in order to obtain compensation for the loss of his property. Thus misled, he took no further steps until the expiration of the 60 days, when, hearing nothing further from the company, he wrote them, in response to which letter Mr. Cote, the adjuster, tersely stated that the "company denies all liability under the policies."

Where the question of the waiver of such provision is involved, an appellate court should not, in order to reverse the judgment, scan too closely the evidence upon which the trial court refused to declare a technical forfeiture. This is especially true where, as in the instant case, the plaintiff, due to the acts and conduct of defendants and their agents in assuming a duty toward him not devolving upon them, was thereby led to believe they had directed his attention to the doing of all that was required to entitle him to compensation for the loss sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

46 Cal. App. 448

SEELYE v. HARVEY. (Civ. 2555.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1920.)

1. Assault and battery ⟸35—Evidence in civil action held to sustain findings for plaintiff.

Evidence in civil action *held* amply sufficient to support findings of an unprovoked, willful, and malicious assault and battery to plaintiff, resulting in his injury.

2. Assault and battery ⟸35—Evidence that plaintiff was abusive and threatening held insufficient.

That plaintiff, in civil action for assault and battery, entered a room where defendant was at work, although it was placarded "no admission," even though plaintiff was a trespasser, though he testifies he did not know such notice was posted, where the evidence showed that he promptly tried to leave and to escape defendant on being told to get out, the claim that he was abusive and threatening in his manner is not substantiated.

3. Appeal and error ⟸1050(2)—Testimony in assault case that injury affected plaintiff's business, and that his disposition was good, held harmless.

In a civil action for assault and battery, testimony that plaintiff's business was affected by his injuries, and that his natural disposition for peace and quiet was good, *held* immaterial and harmless in the light of all the facts.

4. Depositions ⟸13—Admission upon showing that witness unable to attend is within court's discretion.

The admission of a deposition of a witness on the showing made of her being unable to attend court was well within the discretion of the trial court.

5. Assault and battery ⟸40—$815 held excessive, where injuries slight and testimony of financial loss vague.

In a civil action for assault and battery, where the testimony of plaintiff's physician did not present a serious condition—some bruises and contusions, no bones broken, no fractures or dislocations, no permanent injuries, but some mental suffering—and plaintiff's own testimony as to amount of financial loss was vague and indefinite, an allowance of $815 as actual damages *held* excessive.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by O. L. Seelye against A. C. Harvey. Judgment for plaintiff, and defendant appeals. Affirmed if plaintiff within 30 days

files a remittitur; otherwise reversed, and new trial granted.

Paul W. Schenck, and Richard Kittrelle, both of Los Angeles, for appellant.

E. H. Jolliffee and Archie D. Mitchell, both of Ontario, for respondent.

SLOANE, J. This appeal is upon a judgment for damages from assault and battery. The court on the trial found that the assault and battery had been committed by defendant upon the plaintiff, that the acts complained of were without cause or provocation, and that they were done maliciously and with intent to humiliate, vex, annoy, and injure the plaintiff. Judgment was for $815 actual damages, and $500 exemplary damages.

[1] The evidence is amply sufficient to support the findings of an unprovoked, willful, and malicious assault and battery. According to plaintiff's testimony, he visited the fruit-canning establishment of which the defendant was manager to see him regarding some peaches consigned to the cannery by plaintiff, which had been rejected. Not finding defendant in the office, he hunted him up on the grounds, and was told by defendant that he (defendant) was busy, and to wait for him. After waiting a considerable time, plaintiff again sought the defendant, and this time was directed to the workroom of the cannery. He again approached defendant and asked to see him in the office, whereupon, as plaintiff testifies, "he went into a rage; he says, 'Damn you; get out of here or I will kill you;' and commenced working his fists." Plaintiff turned away and started for the door, the defendant following him, striking him in the back with his fist; and his wife, who was present, having caught him by the arm, told him not to make a fool of himself. He continued, however, to pursue plaintiff, kicking and striking at him. The evidence further shows that plaintiff was bruised and injured, suffered humiliation and nervous shock, was confined to his bed a number of days under the care of a physician, and was for a long period more or less incapacitated for his work as manager of a fruit ranch. Plaintiff's own narrative is substantially corroborated by other witnesses, and the rebuttal is not very complete or convincing.

[2] The claim that plaintiff was abusive and threatening in his manner is not substantiated. It is alleged that the room where the assault occurred was placarded "No Admission," and that plaintiff was a trespasser. Even so, he testifies that he did not know it was so posted, and the evidence shows that he promptly tried to leave and to escape defendant on being told to get out.

[3, 4] There was no prejudicial error in the admission of evidence. The testimony that plaintiff's business was affected by his injuries, and that his natural disposition for peace and quiet was good, was immaterial and harmless, in the light of all the facts of the case. The admission of the deposition of the witness Edna Bennett Allen, on the showing made of her being unable to attend in court, was well within the discretion of the court.

[5] We are of the opinion that the court was justified in its judgment of $500 as exemplary damages. Our only doubt as to the correctness of the judgment is with regard to the allowance of $815 as actual damages. The testimony of plaintiff's physician did not present a very serious condition—some bruises and contusions; no bones broken; no fractures or dislocations; no permanent injuries; some mental suffering. The plaintiff's own testimony as to the amount of financial loss occasioned is rather vague and indefinite. His claim that he paid out about $800 for extra help in excess of that which would have been necessary had he been personally fit is rather conjectural. Our conclusion is that the judgment is excessive.

The judgment is reversed, and a new trial granted, unless plaintiff, within 30 days after filing of remittitur, remits from his judgment the sum of $500. If such amount be so remitted, the judgment as so reduced will stand affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 465

BOTWIN v. WISE et al. (Civ. 3239.)

(District Court of Appeal, First District, Division 1, California. March 9, 1920.)

1. Estoppel ⟸68(5)—Contest of government land claim by purchaser from claimant no defense to specific performance.

Where grantee, under a contract for transfer of land after payment of pre-emption money to the government, contested grantor's right on the ground that he was not a citizen, and the contest was settled in grantor's favor, purchaser had cleared grantor's title, and such contest is not a defense to an action for specific performance of the sale contract.

2. Public lands ⟸139—Contract to sell homestead land claim after receiving patent not void.

A contract to sell an undivided one-half interest in a homestead claim which grantor was holding in good faith, transfer to be made after grantor had exercised his right of pre-emption and secured government patent, is not illegal and void, and not in violation of United States statutes.

3. Costs ⟸260(4)—Damages allowed for appeal without merit, made for delay.

Where appellant filed no briefs replying to respondent's brief, and no stipulation was en-

tered that the matter should be submitted on the briefs as filed, and respondent diligently defended the appeal in which the court found there was no merit and no reason except for delay, the respondent may be allowed damages on account of the appeal.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Ray Botwin, administratrix of the estate of Israel Botwin, deceased, against Nathan Wise and another, for specific performance of an agreement to convey land. Judgment for plaintiff, and defendants appeal. Affirmed.

B. P. Welch, of Los Angeles, for appellants.
F. D. R. Moote, of Los Angeles, for respondent.

GOSBEY, Judge pro tem. Appeal by defendants from a judgment in plaintiff's favor. The action was submitted to the trial court and to this court upon agreed and stipulated facts as follows:

On the 20th day of March, 1913, the defendant Nathan Wise was the entryman upon a homestead of the United States government consisting of 160 acres, located in the county of Los Angeles, state of California, and particularly described as follows, to wit: The northwest one-quarter of section 5, township 1 S., range 18 W., S. B. M. Said Nathan Wise (to be designated hereinafter as defendant) as such entryman then and there was and continued to be in possession of said property until the 24th day of April, 1916, when a patent was issued to defendant for said land by the government of the United States; that ever since the last-mentioned date said defendant continued to be the owner in fee of said property. On said 20th day of March, 1913, plaintiff made and entered into a written agreement with said defendant and said Alfora Wise in substance as follows: That whereas defendant had been in possession of said property under an entry of homestead from the United States government, had made certain improvements thereon, and was about to commute the said homestead and receive patent thereon; in consideration of the sum of $1,100 paid by plaintiff to defendant, the receipt whereof was acknowledged, said defendant agreed that when he had completed the commutation with the said United States government and had received his final receipt therefor, he would grant to plaintiff an undivided one-half interest in and to said property, together with the improvements thereon. It was further provided in said agreement that should defendant fail to procure or receive said patent the parties thereto would make a settlement, which has no concern in this appeal and need not be considered.

On the 17th day of February, 1913, defendant offered commutation proof in the land office of the United States at Los Angeles, Cal., of his homestead entry of the above-described property; on the 17th day of January, 1916, he completed said commutation proof, and on the 24th day of April, 1916, the United States land office granted a patent to said land to defendant, which was received by him on the 15th day of May, 1916.

The defendant having failed to execute said grant to the plaintiff, he has brought this action for the specific performance of said agreement, and that said defendant be adjudged to sell and convey an undivided one-half interest in and to said premises and improvements thereon unto plaintiff, and to execute a good and sufficient deed of said interest to plaintiff.

While the answer of the defendant herein contains certain denials of the averments of the complaint, it was stipulated upon the trial that all the allegations of the complaint are true.

The only defenses urged by the defendant to this action were: First. The plaintiff is estopped from enforcing the specific performance of said contract for the reason that Israel Botwin had filed a contest against the defendant for the homestead right, upon the ground that Nathan Wise was not a citizen of the United States, and hence not entitled to a homestead; and second, the contract which plaintiff seeks to enforce is in contravention of the United States statutes.

[1] Upon the first ground of defense the evidence established the fact that said Israel Botwin did file the contest above referred to, said contest was decided adversely to Botwin. The patent to the land was granted to Wise, which is conclusive proof that said contest was unfounded and of no merit. This contest, we now hold, was not prejudicial to the rights of Israel Botwin to maintain this action, for it established the legal right of Wise to the patent, did the latter no harm, but cleared his title to the land which he had contracted to sell to Botwin. This ground of defense is therefore unavailing to defendant.

[2] Upon the second ground of defense the defendant has neither presented nor cited any statutes of the United States declaring that a contract, such as that set out in the complaint, was illegal and void. We find, however, that the courts have very carefully considered such contracts and have established their validity. In the case of Myers v. Croft, 13 Wall. 291, 20 L. Ed. 562, the court said:

"The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. * * * The legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor

free to sell his land after the entry, if at that time he was, in good faith, the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject."

See, also, Merrill v. Clark, 103 Cal. 367, 37 Pac. 238. These decisions clearly determine the present controversy. There is no merit in this appeal.

[3] In the present case the appellant has manifested a spirit of indifference which invites the criticism of this court. No reply brief was filed by appellant in response to respondent's brief. No stipulation was entered into between the parties that the matter should be submitted upon the briefs on file. Counsel for respondent, having traveled from Los Angeles to San Francisco, appeared before the court and argued his cause. The court, finding there was no merit in the appeal, now concludes that there was no reason for such appeal, except for delay.

It is therefore ordered that, in addition to the costs of this appeal, respondent recover from appellant the sum of $100 as damages on account of the appeal herein having been "made for delay."

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 363

In re SEICK et al. (Civ. 2559.)

(District Court of Appeal, Second District, Division 2, California. Feb. 26, 1920.)

1. Statutes ⟸227—Whether statute is mandatory or directory depends on object and consequences of different construction.

Whether a particular statutory provision is mandatory or directory depends upon the intention of the Legislature, to be ascertained from a consideration of the object of the statute and the consequences that would result from construing it one way or the other.

2. Taxation ⟸726—Sale only starts running the five years allowed for redemption.

The only practical effect of a sale of property under Pol. Code, § 3771, relating to tax sales, is to start running the five years within which redemption can be effected and at the expiration of which a deed may be issued to the state, as provided by section 3785.

3. Taxation ⟸699—Five-year redemption period is not postponed until filing of notice under land title law.

The commencement of the five-year redemption period provided under Pol. Code, § 3771, relating to tax sales, is not postponed until the filing of the notice that Land Title Law, § 77, required to be filed in all cases where property brought under the provisions of the Torrens law is sold.

4. Records ⟸9(3)—Prime purpose of Torrens law stated.

The prime purpose of Land Title Law, § 77, is that there shall be in the registrar's office in the book known as the "register of titles" a leaf or folium to which any person dealing with any particular piece of land that has been brought under the act may look in order to ascertain the exact condition of the title before purchasing, leasing, or loaning money secured by a mortgage.

5. Records ⟸9(13¼)—Tax sale of property registered under Torrens law is nullified by failure to file statutory notice within five days.

A tax sale under Pol. Code, § 3771, of property brought under the provisions of the Torrens law is nullified where notice of the sale is not filed within five days, as required by Land Title Law, § 77, producing a situation such as would exist had no tax sale ever been made or attempted.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the application of Julius Seick and others for initial registration of title to land. From an order directing the register of titles to enter memorial of tax sale as prior lien to a new mortgage on certificate of title, owner and mortgagee appeal. Order reversed, with directions.

Earl Newmire, of Los Angeles, for appellants.

A. J. Hill, Co. Counsel, and J. Allen Davis, Deputy Co. Counsel, both of Los Angeles, for respondents.

FINLAYSON, P. J. Prior to June 27, 1917, Xenophon Bouris was, and is, the "registered owner" of a lot in Los Angeles county, registered under the Land Title Law, an initiative measure adopted by the people at the election of November 3, 1915 (Stats. 1915, p. 1932), whereby a system for the registration of land titles is provided. This law is of the class commonly known as Torrens laws, the designation being taken from the name of Sir Robert Torrens, by whom the first Torrens law, enacted in South Australia in 1858, was drawn. On June 27, 1917, the county tax collector sold the lot in question to the state by declaring it sold and making on the delinquent assessment list the entry "Sold to the State," as provided by section 3771 of the Political Code. He did not, however, file with the county register of titles any notice of such sale within five days thereafter, as required by section 77 of the Land Title Law.

The Torrens law provides a complete scheme of procedure whereby, as the result of a decree of court in a proceeding inaugurated by petition filed by the owner, any land may be brought under the operation of the act. The purpose of the law is that there shall be in the county register's office a book, known as the "register of titles," the leaves or folio

of which are certificates of title, each "certificate of title" containing the facts relative to the title of the particular piece of property described therein, and which has been brought under the act. Each leaf or folium is evidence of the title to the property therein described. So that an intending purchaser, lessee, or mortgagee, or other person having dealings with the property, may go to the register's office, examine the leaf whereon the title to that property is registered, and at once, with safety, take a deed, lease, or mortgage from the owner of the property, file it, and have himself accordingly registered upon the leaf or folium as owner, lessee, or mortgagee. The title is to be set down on the leaf, or certificate of title, and is to be registered in the name of the owner. It is to be stated to be subject to such liens, etc., as are specified. The system involves, in the first place, the initial registration of title, or, as it is called, "bringing the land under the act," and, secondly, all subsequent matters. Such subsequent matters as leases, mortgages, or other charges upon the land, are shown by "memorials," noted upon the folium or certificate by the register of titles. For an interesting note upon the Torrens system of land-title registration reference may be had to L. R. A. 1916D, 14 et seq.

Section 77 of the Land Title Law of this state, after providing that if any land registered under the act shall be sold to any private individual for any tax or assessment, such purchaser, within five days thereafter, shall file in the office of the register of titles a written notice of such purchase, and the register shall thereupon enter a "memorial" thereof upon the certificate of title, further provides for the filing of a similar notice by the county tax collector in all cases where land registered under the act has been sold to the state for delinquent tax or assessment. The language of this part of the section is:

"In case the state or a municipal corporation becomes the purchaser of land sold for any tax or assessment, the tax collector or other officer attending to such purchase, shall, within five days thereafter, file with the registrar a notice to that effect. And thereupon the registrar shall enter a memorial thereof upon the register, and shall mail notices to interested parties, as in the case of an individual purchaser. Unless such notice is filed as herein provided, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance thereof." Stats. 1915, p. 1945.

In the instant case the tax collector neglected to present to the registrar of titles notice of the tax sale until the eighth day thereafter. Because the notice was not presented within the five days provided by the act, the registrar refused to receive it. It was not filed by the registrar until January 14, 1918, on which day he filed it pursuant to the order of court from which this appeal is taken. Meanwhile, viz., on January 10, 1918, a release of a mortgage that had been a prior lien on the property, and a new mortgage, executed by the registered owner, Xenophon Bouris, to one Thomas H. Stafford, were presented to the county registrar of titles for registration and for "memorials" thereof on the owner's certificate of title. The registrar refused to accept this release and likewise the new mortgage to Stafford. Instead, being in doubt as to the proper memorials to make respecting the tax sale, the release of the old mortgage and the making of the new one, he referred the question, by certificate in due form, to the superior court for its decision. This he is expressly authorized to do by section 99 of the Land Title Law. Stats. 1915, p. 1948. On January 14, 1918, the court decided the question so referred to it, and made its order whereby, after finding the facts to be substantially as we have stated them, ordered that—

"The registrar of titles be, and he hereby is, instructed and authorized to accept said above first-mentioned notice of sale for delinquent taxes for registration, and to enter same as a memorial upon certificate of title No. 1871, Xenophon Bouris, registered owner, and to show same as a prior lien to the above-mentioned mortgage."

As we construe this order, it is more than a direction to the registrar to enter a memorial showing the tax lien to be superior to the mortgage. It is tantamount to a direction that he note on the owner's certificate a memorial showing a valid and subsisting tax sale to the state, made prior to the execution of the new mortgage to Stafford. At any rate, appellants and respondents have placed this construction upon the order, and we, therefore, shall adopt their interpretation as correct, and shall decide accordingly the one question presented by the briefs for our determination.

From the order of the court so made on January 14, 1918, the registered owner and the mortgagee under the new mortgage, Thomas H. Stafford, have taken this appeal claiming that the release of the old mortgage and the lien of the new mortgage should, by appropriate "memorials," be shown on the owner's certificate of title as prior to the tax sale to the state.

As we have shown, the Land Title Law, in section 77, specifically declares that unless the notice of tax sale be filed "as herein provided"—which, of course, means within the five days therein prescribed—"the land shall be forever released from the effect of such sale." Respondents argue that the provision of the act fixing the time within which the notice shall be filed is not mandatory, but directory only. We cannot accede to this construction of the plain and unambiguous language of the law.

[1] Whether a particular statutory provision is mandatory or directory depends upon the intention of the Legislature, to be ascertained from a consideration of the object of the statute and the consequences that would result from construing it one way or the other. 36 Cyc. 1157. In Black, Interpretation of Laws, p. 343, the rule is stated as follows:

"When a statute specifies a time at or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority or right."

Here, not only does the language of the statute show that the designation of time was intended as a limitation upon the authority to file the notice of tax sale—the language is that unless the notice be filed "as herein provided," i. e., within the five days, the land "shall be forever released from the effect of such sale"—but it may readily be seen that time is of the essence of the thing to be done. It is a matter of substance, vitally affecting the rights of the owner of the registered land, and the rights of subsequent purchasers or incumbrancers.

[2, 3] During the five-year period allowed for redemption from a tax sale—the period intermediate the sale of the property to the state under section 3771 of the Political Code and the issuance of a deed to the state as provided by section 3785 of the same Code—the title to the property continues in the taxpayer subject to the lien in favor of the state created by the assessment and tax levy. The only practical effect of a sale of property under section 3771 is to start running the five years within which redemption can be effected and at the expiration of which a deed may be issued to the state. Crocker v. Scott, 149 Cal. 596, 87 Pac. 102. But this period within which the taxpayer may redeem commences running from the date of the sale to the state, not from the date of the notice of sale. That is, the commencement of the five-year redemption period is not postponed until the filing of the notice that section 77 of the Land Title Law requires to be filed in all cases where the property that has been sold for taxes is property that has been brought under the provisions of the act.

[4] It is of the utmost importance to one about to loan money secured by a mortgage on real property that he shall know whether the land has been sold for taxes, and, if it has, how long he may safely wait before effecting a redemption in the event that it shall become necessary for him to redeem in order to protect his mortgage security. As we have said, the prime purpose of the Torrens law is that there shall be in the registrar's office, in the book known as the "register of titles," a leaf or folium to which any person dealing with any particular piece of land that has been brought under the act may look in order to ascertain the exact condition of the title before purchasing, leasing, or loaning money secured by a mortgage. If the Code or any statute had provided that, as to land that has been brought under the operation of the Land Title Law, the time to redeem from a tax sale shall commence to run only from the filing of the notice of sale that is required by section 77 of that law, it doubtless would be a matter of indifference to a prospective purchaser, lessee, or mortgagee whether the notice of the tax sale was presented to the registrar and filed within five days, or at a later date. But the Code makes no exception in the case of lands registered under the Torrens law. It does not declare that the time to redeem shall commence to run only from the filing of the notice of sale prescribed by section 77 of the Land Title Law. Without exception, the time for redemption commences to run from the date of the tax sale. Pol. Code, sec. 3780. If, therefore, it were held that the notice required by section 77 of the Land Title Law need not be filed within the five days prescribed therefor, that is, if that provision were held to be directory only and not mandatory, it might happen that the notice of a tax sale would not be filed until shortly before the expiration of the five-year period that the Political Code allows for redemption. In the meantime, a person might purchase the land, or lease it, or take a mortgage on it, without knowing when the time for redemption would expire, unless he looked elsewhere than the registered certificate of title and the memorials thereon. But the principal purpose of the Land Title Law is to obviate the necessity for looking elsewhere than the registered certificate of title and the memorials noted thereon.

[5] For these reasons we think that as declared by the emphatic language of the act itself, the land is "forever released from the effect of such sale" if the notice of tax sale be not filed by the tax collector with the registrar of titles within five days after the sale to the state. The effect of the failure to file the notice of the sale as provided by the act is completely to nullify the sale, and produce a situation such as would exist had no tax sale ever been made or attempted.

We do not mean to say that this necessarily means that another sale may not be made by the tax collector by beginning all over again. As to this, however, it is not necessary to express an opinion; though we may say that, after a cursory examination of the Code sections relative to tax sales, we are inclined to think that the following is substantially a correct view of the situation respecting the tax collector's power to pro-

ceed de novo: The tax lien remains; the Land Title Law expressly declares that the land, if the notice of the tax sale be not filed as in that law provided, "shall be forever released from the effect of such sale." This means that the sale is completely nullified by the failure to file the notice within the prescribed time. The situation is, therefore, precisely what it would have been had no sale ever been attempted.

Though the tax lien continues as a valid incumbrance on this land, the five-year period for redemption before a deed can issue to the state has not commenced. Nor can it commence until a sale shall have been made under section 3771 of the Political Code, after proceedings therefor have been taken de novo —assuming that there is no statutory inhibition against new proceedings looking to a new and enduring tax sale—followed by the filing of the notice of such second sale with the county registrar of titles within the prescribed five days.

For these reasons we think it was error to direct the registrar of titles to enter a memorial showing the tax sale as an existing and valid sale made prior to the mortgage that the registered owner had executed to his mortgagee, Stafford.

The order is reversed, with directions to the trial court to enter an order consonant with the views herein set forth.

We concur: SLOANE, J.; THOMAS, J.

46 Cal. App. 380

GENEREUX et al. v. RICHFIELD OIL CO. (Civ. 2074.)

(District Court of Appeal, Third District, California. March 1, 1920.)

1. Sales ⇐101—Seller's failure to exact strict performance is not waiver of right to enforce another contract.

That defendant, under a contract between plaintiffs and another oil company, delivered oil and received payments without any attempt to rescind the contract because of plaintiffs' failure to pay promptly, will not establish waiver of right to cancel for plaintiffs' failure to pay as stipulated, a later contract whereby defendant in its own name was to furnish plaintiffs with oil.

2. Sales ⇐101—Waiver of right to exact strict performance not implied from other transactions.

While a party who has habitually waived strict compliance with a contract, as one for delivery of oil over a period of years, may not terminate the contract for noncompliance, without notice, acts showing such waiver must arise out of the contract involved, and not out of other transactions.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by E. J. Genereux and another against the Richfield Oil Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

H. E. Barbour, of Fresno, and Walter S. Clayson, of Corona, for appellants.

James, Smith & McCarthy, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. On the 18th day of December, 1915, the plaintiffs and the defendant entered into a written contract in writing by which it was agreed that the defendant would sell, and the plaintiffs would buy, all the gas engine fuel oil of a gravity of 40 to 44 degrees, which plaintiffs might require in their business or pumping plant in Riverside county, Cal., for a period of two years, commencing May 17, 1916, and ending May 16, 1918. The price agreed upon was $1.08 per barrel of 42 gallons each.

The contract provided that payments should be made on the 15th of each month for all goods delivered during the previous calendar month. It also contained the following: "If payments are not made as specified, the seller shall have the option of canceling this contract." Pursuant to the terms of the contract, the defendant delivered to the plaintiffs during the month of June, 1916, oil amounting at the contract price to $401.76. On the 17th day of July, 1916, no payment having been made by the plaintiffs to the defendant for the oil delivered in the month of June, the latter sent a telegram to the plaintiffs, as follows:

"Engine fuel oil contract, dated December 18, 1915, is hereby canceled for failure to make payment on the 15th of July for deliveries for previous calendar month."

Thereafter, though requested by the plaintiffs, the defendant refused to make any further deliveries of oil under the contract. Whereupon the plaintiffs brought this action to secure damages for failure of defendant to furnish them fuel oil. Findings and judgment were in favor of the defendant, and the plaintiffs appeal.

[1] The decision of the court was founded on the express terms of the contract wherein the option was given the defendant to cancel it if payments were not made according to the terms thereof. Appellants claim that defendant was not justified in availing itself of this provision of the contract because by its long-continued course of business with the plaintiffs it had waived it, and before it could avail itself of it defendant should have given plaintiffs notice that they would be held in the future strictly to the terms of the contract in this regard.

It appears that prior to the execution of the contract of December 18, 1915, the plaintiffs had been supplied with oil under a contract between them and the General Petroleum

Company. Under that contract deliveries were to begin on the 15th day of May, 1914, and end on the 15th day of May, 1916. Under that contract much oil was delivered, but, it seems, never paid for when due and payable. By some arrangement, which does not clearly appear, after this contract was executed, the defendant delivered oil to the company and collected the bills for it instead of the General Petroleum Company. What the arrangement was between the defendant and the General Petroleum Company which permitted or authorized these acts by defendant is not made to appear.

The defendant continued after December, 1915, to collect of plaintiffs for oil delivered under the General Petroleum Company contract until May 17, 1916, when deliveries began under its own contract. During this period the plaintiffs were always late in making their payments and the defendant was constantly reminding them of it. Indeed, so remiss were they that in one letter, that of May 8, 1916, the defendant wrote, after referring to a long overdue account:

"We beg to notify you that unless we receive a remittance from you covering the above account by the 15th of this month we shall take whatever steps we consider necessary to enforce collection."

This letter was dated only a week before deliveries were to begin under the present contract.

There are several considerations that lead us to the conclusion that defendant had not waived its right to insist upon the terms of the contract being observed and to cancel it if payments were not made when due. The parties had never done business under any other contract executed between them. As to the General Petroleum Company contract, as observed by the learned trial judge:

"It does not appear that the defendant took an assignment of the contract in question and it is a matter of doubt, under the evidence, whether or not the defendant had a right to exercise the option mentioned in the contract."

Between the date of the contract on which this suit is brought and the time deliveries were to begin under it, the defendant had been put to very much annoyance and trouble in getting payments from plaintiffs, even to the extent of threatening legal proceedings, as appears from the letter above quoted. It was, probably, this unpleasant experience that determined it to insist on prompt payments for all deliveries that might be made under the contract it had entered into, to permit no delays that might thereafter be claimed as a waiver of the terms of the contract as to payment.

Without discussing any other phase of the case, we think it sufficient to hold, as we do, that the accepting by defendant of delayed payment for oil purchased under the former contract (the General Petroleum Company) was not a waiver of any of its rights under the contract it entered into with the plaintiffs in December, 1915.

[2] The cases which hold that a party to a contract, which provides that payments shall be made to him at certain times, waives his right to cancel the contract for failure to pay promptly by accepting delayed payments, all proceed upon the principle that by his course of conduct he has induced the other party to the contract to believe that he will not be held strictly to the terms of the contract as to payments. After such a course to suddenly cancel the contract, without any notice of a change of attitude, is in the nature of a fraud upon the other party. Some cases place it upon the ground of estoppel. The rule is stated in Pomeroy on Contracts, § 294 (quoted with approval in Boone v. Templeman, 158 Cal. 295, 110 Pac. 949, 139 Am. St. Rep. 126), as follows:

"The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default."

And, again, in the same case, it is said:

"Where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendee cannot then suddenly stop short and insist upon a forfeiture for the nonpayment of the arrears remaining unpaid, without any previous notice of the intention to do so if the arrears are not paid."

The conduct of a party that will operate as a waiver of the provision of the contract as to payments is with reference to that particular contract and not to some other transactions. No conduct of the defendant as to this contract "is consistent with a purpose on his (its) part to regard the contract as still subsisting and not ended by the other's default." It never accepted any overdue payments under it, never said or did anything in reference to it to cause the plaintiffs to believe that defendant had or would waive any of the provisions of the contract. We know of no principle of law and have found no decision holding that, because a party by his conduct waives the provisions of one contract, therefore he has waived or will waive the provisions of another and independent contract.

A man's general business character, as being that of one who does not insist upon strict performance of contracts made with him, cannot be invoked to prove that he has waived the provisions of a particular contract.

The facts that it had had trouble in getting payments made on the other contract, that it accepted payments after they were due, that plaintiffs were so remiss that it had to threat-

en legal proceedings, instead of showing an intent not to insist on prompt payments after the contract of December, 1915, became effective, would seem to suggest a good reason for the opposite course, and would seem to suggest the wisdom of its so acting under this contract as to prevent the plaintiffs from ever claiming a waiver of any of its provisions.

The plaintiffs, for some reason, must, at least, have suspected that this would be the attitude of the defendant, else why write in the letter of May 11, 1916: "All future business with you will be done strictly in accordance with the terms of said contract."

A careful reading of the record fails to convince us that defendant by any act waived the right given it by the contract to cancel it for failure to pay for oil at the times fixed by it.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 429

WILKINSON v. GRANT et al. (Civ. 3236.)

(District Court of Appeal, First District, Division 1, California. March 4, 1920.)

1. Judgment ⊂=240—Separate judgments, vacating judgment against defendants sued severally, not objectionable.

Where judgment creditor of a corporation sued several defendants for amounts claimed unpaid on subscriptions, and after judgment was entered for the creditor the court entered judgments for the several defendants on separate motions to vacate, the complaint against each defendant being several, such several judgments were warranted, under Code Civ. Proc. § 578.

2. Pleading ⊂=7—Presumption of continuity is not applicable to pleading.

The presumption that a thing, once proved to exist, continues as long as is usual, declared by Code Civ. Proc. § 1963, subd. 32, is not a rule of pleading, and there is no presumption that a fact alleged as existing on a date preceding commencement of the action continues to exist thereafter.

3. Trial ⊂=395(1)—Presumption of continuity not applicable to findings.

The presumption of continuity, declared by Code Civ. Proc. § 1963, subd. 32, is not applicable to findings of fact.

4. Trial ⊂=396(1)—Findings of fact must follow the essential averments of the complaint.

Findings of fact must follow the essential averments of the complaint in order to support the judgment.

5. Corporations ⊂=244(1), 268(1)—Liability for unpaid subscriptions depends on ownership at commencement of action.

To render one liable for unpaid subscriptions to corporate stock, it must appear that such person was owner at time of commencement of action; hence, where the complaint in an action against alleged stockholders merely showed that they had owned such shares at a time long prior to commencement of the action, and the findings went no further than the complaint, a judgment for the corporate creditor was properly set aside, under Code Civ. Proc. § 663, and judgment entered for the defendants.

6. Judgment ⊂=393—Requirement that court which sets aside the judgment correct findings is only directory.

The provision of Code Civ. Proc. § 663, requiring the court on setting aside a judgment, etc., to correct findings is directory, and where judgment for plaintiff was properly set aside, plaintiff cannot complain that findings were not corrected.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by T. B. Wilkinson against F. F. Grant and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Cates & Robinson, of Los Angeles, for appellant.

Wright & McKee, S. D. O'Neal, Hendee & Rodabaugh, and F. F. Grant, all of San Diego, for respondents.

RICHARDS, J. This is an action by the judgment creditor of a corporation to recover from the defendants as stockholders therein the amount of the plaintiff's judgment out of the unpaid subscriptions of said stockholders. Upon the trial of the cause the action was dismissed as to the defendants other than those who are the respondents herein, but as to these the court made its findings and conclusions of law, in the latter of which it found that the plaintiff was entitled to judgment against these defendants for the amounts which would be applicable out of their unpaid subscriptions, respectively, to the plaintiff's judgment against the corporation. A judgment was entered in accordance with such conclusions of law, whereupon the defendants separately moved the court, under section 663 of the Code of Civil Procedure, to vacate the judgment so entered and enter a judgment in favor of each of said defendants. The court granted each of these motions, and upon each proceeded to enter a judgment in favor of the moving party and against the plaintiff. While there were thus in form two judgments finally entered in the action, they were as to the plaintiff the same. The plaintiff has appealed from both these judgments.

[1] There is no merit in the appellant's first contention based upon the fact that there are two judgments in this case. The complaint against each of these defendants was several, as were also their defenses, which were separately and severally made. In such a case, under section 578 of the Code

of Civil Procedure, several judgments may be entered. Shain v. Forbes, 82 Cal. 577, 23 Pac. 198.

The next and main contention of the appellant is that the trial court was in error in granting the motions of the defendants to set aside the judgment at first entered in the plaintiff's favor, and in entering the judgment or judgments in favor of each of said defendants and against the plaintiff upon the findings in the case. The motions of the defendants to that effect were based upon the fact that there was no averment in the plaintiff's complaint that either of said defendants was a stockholder in said corporation at the time the action was commenced, and upon the further fact that there was no finding that either of said defendants was such stockholder at the time of the commencement of the action. The record discloses this to be the fact as to both the complaint and the findings in the case. In the complaint it is alleged that on or about July 25, 1914, nearly three years before the commencement of this action, each of said defendants subscribed for and had issued to him the shares in the corporation upon which his liability in this action is sought to be predicated. It is also alleged that the cause of action upon which the plaintiff's judgment against the said corporation was founded arose during the ownership by said defendants of their respective shares of stock in said corporation, but it is nowhere averred that said defendants continued to be the owners of their said stock or any portion thereof up to the date of the institution of the action. The findings of the court repeat these averments of the complaint, but embrace no finding of any ownership of the stock of the corporation in question at the time of the institution of the action.

[2-5] It is a rule of evidence expressed in section 1963, subdivision 32, of the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature." It has been frequently held, however, that this is not a rule of pleading, and that there is no presumption that a fact pleaded as existing upon a date preceding the commencement of the action continues to exist thereafter. Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892; Herzog v. Atchison & Topeka R. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Van Alstine v. Whelan, 135 Cal. 232, 67 Pac. 125; Fredericks v. Tracey, 98 Cal. 658, 33 Pac. 750. It has also been held that the rule of evidence above cited has no application to the findings of fact in the case. Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Est. of Benton, 131 Cal. 472, 63 Pac. 775. The findings of fact must follow the essential averments of the complaint in order to support a judgment in the plaintiff's favor, and if, in this case it was essential that the plaintiff should have averred the fact of the ownership by these defendants of their respective shares of stock upon which their liability upon their unpaid subscriptions was to be founded at the time of the commencement of his action, and if it was further essential that the plaintiff should have proved this averment in order to recover a judgment based upon such liability, then it was equally essential that the court should have found the ultimate fact that the ownership of said stock was in the defendants, respectively, at the time of the institution of the action in order to justify a judgment in the plaintiff's favor. This requirement would not be met by a finding that the defendants were the owners of their alleged stock at some date long prior to the commencement of the action, nor even by a finding that the defendants owned said stock at the time the liability of the corporation to the plaintiff arose.

Under the well-established rule of law, ownership by a defendant of the stock upon which it is claimed he is liable for unpaid subscriptions must be alleged and found to exist as a fact at the time of the commencement of the action in which he is sought to be held liable for unpaid subscriptions thereon. People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; Cook on Corporations (7th Ed.) § 255. This general rule is subject only to the exception that the defendants' transfer of stock upon which there are liabilities arising out of unpaid subscriptions may be alleged and shown to have been fraudulent, in which event his liability continues notwithstanding such transfer. In the instant case, however, there is no such averment, proof, or finding, and it follows that in the absence thereof the plaintiff was not entitled to the judgment in his favor which was at first entered in this action, and hence that the defendants were each entitled, upon their motion under section 663 of the Code of Civil Procedure, to have such judgment set aside and a judgment entered upon the findings in favor of each of them.

[6] The appellant's final contention is that, conceding the foregoing views to be correct, the court committed an error of procedure, requiring a reversal of these judgments, since it did not also correct its conclusions of law in the case, as section 663, Code of Civil Procedure, directs. That this requirement of said section is merely directory, however, seems to have been held in the case of Roberts v. Hall, 147 Cal. 434, 82 Pac. 66, in which the Supreme Court said that, "when judgment is given by the court, it is itself the real conclusion of law, and supersedes any conclusion of law embraced in the decision."

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

46 Cal. App. 282

MODOC COUNTY v. BALLARD, County Auditor. (Civ. 2132.)

(District Court of Appeal, Third District, California. Feb. 24, 1920. Hearing Denied by Supreme Court April 16, 1920.)

Counties ⊂=178—Notice of election to issue highway bonds need not describe highways.

The board of supervisor's notice of election for the issuance of highway bonds under Act March 19, 1907, and acts amendatory thereto (Deering's Gen. Acts 1915, Act 1448), is not defective because of failure of the notice to describe the highways to be constructed and repaired, section 7 adopting the provisions of Pol. Code, § 4088, which is the general law as to the issue of county bonds and provides that the board of supervisors must by order specify amount of bonds, rate of interest, etc., and the subsequent provision in section 7 for description of the highways to be described being in the alternative.

Application by the County of Modoc, State of California, for writ of mandate against T. H. Ballard, Auditor of the County. Writ granted.

Lilienthal, McKinstry, Raymond, Haber & Firebaugh, of San Francisco, for petitioner.
C. S. Baldwin, of Alturas, for respondent.

NICOL, Presiding Justice pro tem. This is an application by the county of Modoc for a writ of mandate to compel the respondent, as auditor of said county, to attest certain bonds of the county amounting to $400,000. His refusal to attest the bonds is for the alleged reason that the election, at which the issue of the bonds were authorized, was not called in conformity to the provisions of section 7 of the act of the Legislature of March 19, 1907, and acts amendatory thereof, commonly called the County Highway Commission Act. Deering's General Laws of California (1915 Ed.) p. 516.

The specific ground of his refusal to attest the bonds is set forth in a notice to the board of supervisors of said county, in which he alleges that the notice of election was defective in that:

It "did not describe the highways to be constructed and repaired with the proceeds of such bonds, as required by section 7 of said statute; but on the contrary, said notice merely referred to such highways of the county, as embodied in the report and delineated on the map prepared by the county highway commission, which said report and map have been accepted and approved by the said board of supervisors on the 26th day of May, 1919."

In view of the respondent's objection, it is necessary to consider certain provisions of the act of March 19, 1907, in connection with certain provisions of section 4088 of the Political Code. This section of the Political Code is the general law as to the issue, sale, and payment of county bonds, for all purposes for which a county may issue the same, including bonds "for the purpose of building or constructing roads, bridges or highways."

To institute a bond issue under the provisions of this section the board of supervisors must by order specify the purpose for which the indebtedness is to be incurred, the amount of bonds which they propose to issue, the rate of interest, the number of years, not exceeding 40, the whole or any part of the bonds are to run, and shall further provide for submitting the question of the issuance of said bonds to the electors of the county at the next general election, or at a special election to be called for that purpose.

The section further provides that the notice of election "must contain the time and place or places of holding such election, the names of election officers to conduct the same, the amount and denomination of the bonds, the rate of interest to be paid, and the number of years, not exceeding forty, the whole or any part of such bonds are to run."

The said section does not provide that the notice of election shall contain any particular statement of the purpose of the bond issue. The provision of this section as to a statement of the purpose for which the indebtedness is to be incurred is that the board of supervisors shall specify such purpose in the original initial order.

Section 1 of the act of March 19, 1907, provides that upon receipt of a freeholders' petition the board of supervisors may appoint a highway commission, and section 6 of said act provides that, after ascertaining what improvements should be made and the estimated cost thereof proposed to be covered by a bond issue, the commission shall make and file with the board of supervisors a report setting forth the highways proposed to be improved, by their termini, describing generally the kind of improvements to be made thereon, and stating the estimated cost of the work to be done, and the amount to be raised by bonds therefor, and praying the board of supervisors to call a bond election for the issuance of bonds for the estimated amount.

All of the foregoing was done by the board of supervisors of Modoc county, and in the report filed by the highway commission and adopted by the board the proposed roads to be improved and constructed were described by their proposed termini, and a map was filed by the commission and approved by the board of supervisors on which is delineated the proposed highways.

Section 7 of said act of March 19, 1907, provides as follows:

"If the board approve the report they shall adopt the same, and shall without delay call an election to determine whether bonds of the county shall be issued in the amount recommended by the commission, for the purposes stated in their report. Said election shall be

called and held and said bonds issued, sold and paid under and in accordance with all the provisions of law now or hereafter existing in regard to the issuance, sale and payment of county bonds, and all proceedings had in regard to such bonds shall be in accordance with such provisions of law; * * * and provided further, that it shall be sufficient to set forth the purpose of the bond issue in said proceedings by describing the highways to be improved as the same are described in said report of the highway commission. * * *"

The supervisors, as before stated, did approve the report of the commission and did call an election to be held on July 1, 1919, to determine whether bonds of the county should issue to the amount of $400,000, as recommended by the highway commission for the purposes stated in said report.

The notice of election was duly published, and no objection is made to the sufficiency of the notice, except the objection before stated that it is defective in that it "did not describe the highways to be constructed and repaired with the proceeds of such bonds as required by section 7 of the act of March 19, 1907," etc.

Section 7 of the act of March 19, 1907, provides that the election "shall be called and held and said bonds issued, sold and paid under and in accordance with all the provisions of law now or hereafter existing in regard to the issuance, sale and payment of county bonds, and all proceedings had in regard to such bonds shall be in accordance with such provisions of law." The effect of this language is to make the provisions of section 4088 of the Political Code in reference to the calling of elections for bond issues applicable to an election called under the provisions of section 7 of the act of March 19, 1907. In other words, the provisions of section 4088 of the Political Code as to the notice to be given of such election and its contents are applicable to an election called in pursuance of section 7 of the act of March 19, 1907.

The respondent bases his objection to the sufficiency of the notice upon the second or concluding proviso of section 7 of said act, which is as follows:

"Provided further, that it shall be sufficient to set forth the purpose of the bond issue in said proceedings by describing the highways to be improved as the same are described in said report of the highway commission."

This proviso does not provide that the purpose of the bond issue must be set forth in the notice of election by "describing the highways to be improved as the same are described in said report of the highway commission." It contains merely a general statement that it shall be "sufficient" to set forth the purpose of the bond issue by describing the highways, and there is nothing contained in said proviso requiring the notice of election to contain anything else than what is required by section 4088 of the Political Code. As before stated, section 7 of the act of March 19, 1907, expressly provides that the election shall be called in accordance with all the provisions of law existing in regard to the issuance of county bonds, and such provisions, as stated above, provide for the contents of the notice of election, and do not require that such notice shall contain a statement of the purpose of the bond issue.

Conceding that the concluding proviso of section 7 of said act does apply to the notice of election of a highway bond issue, it follows merely that an alternative method is provided for identifying the bonds in said notice. By such alternative method the notice of election would be sufficient if it described the roads to be constructed and repaired as they are described in the report of the highway commission; but it is nowhere provided that such alternative method must be taken, and there is nothing in said proviso that militates in the least against the proceedings as followed by Modoc county in this matter.

The demurrer interposed by the respondent to the petition is hereby overruled, and it is ordered that the peremptory writ of mandate prayed for be issued.

We concur: BURNETT, J.; HART, J.

46 Cal. App. 460

O'CONNELL et al. v. FOWLER et al.
(Civ. 3176.)

(District Court of Appeal, First District, Division 1, California. March 8, 1920.)

Specific performance ⇐114(2) — Complaint must show fairness of contract.

Where a complaint for a specific performance was amended at the trial by striking therefrom the paragraph alleging that it was fair and equitable and furnished adequate consideration for the conveyance, the complaint thereby became insufficient to state a cause of action.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Daniel S. O'Connell and another against Nellie A. Fowler and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hendee & Rodabaugh, of San Diego (H. C. Ryan, of San Diego, of counsel), for appellants.

Adam Thompson, of San Diego, for respondents.

KNIGHT, Judge pro tem. This is an appeal from a judgment in favor of defendants in an action brought to compel specific performance of an agreement for the exchange

of real properties between plaintiffs and the defendant Fowler.

The following are, in substance, the facts of the case: On February 16, 1917, plaintiffs were the owners of two parcels of real property situate in San Diego county, one parcel being subject to a mortgage of $10,000 and the other to a mortgage of $500 and certain street improvement bonds, which property they agreed to exchange for certain unimproved property situate in the county of Los Angeles belonging to the defendant Fowler. On said 16th day of February, 1917, deeds covering their properties were executed by the respective parties and delivered in escrow to the defendant title company, together with two sets of instructions, one set being signed by plaintiffs and the other by the defendant Fowler. There were no conditions required to be performed by the defendant Fowler prior to the final delivery of the deeds, but plaintiffs were required to adjust the interest on their mortgages to date, and were to obtain a statement from the holder of one of the mortgages that there was not more than $500 due on that mortgage. Plaintiffs also agreed to hand to the escrow holder "sufficient (money) to redeem the Middletown property of the street bonds and to adjust the interest on mortgages." The defendant title company was instructed to prepare certificates of title, and the transaction was to be closed within ten days or the deeds returned to the respective parties. Three days subsequent to the delivery of the deeds in escrow to the title company the defendant Fowler notified said title company, in writing, to proceed no further with the transaction. The reasons given therefor were as follows:

"The ground and reasons for this notification to you is on account of the false and fraudulent representations made to me with reference to the value of the property which I am about to receive under said escrow instructions and transfer of said property. Had I known the value of the property that I was about to receive under the escrow instructions I would not have signed said escrow instructions. This will be your authority for refusing to do anything further in the premises. You are hereby notified to notify Mr. and Mrs. O'Connell of this revocation. Also any other title company interested in bringing down the title for either of the parties mentioned in said escrow instructions."

Accordingly, said title company did nothing further. It thereafter refused to make final delivery of the deeds to the grantees therein named or to return the deeds to the respective grantors. This action was commenced on April 5, 1917, to compel specific performance of the agreement.

Plaintiffs' case was presented and tried upon the theory that the transaction for the exchange of said properties constituted an executory contract, and pursuant to that theory they alleged in paragraph 7 of their complaint that they had performed all of the conditions required of them by said escrow agreement to be performed, and that the transaction was "fair, just and reasonable in all its parts, and the consideration being so paid by such exchange by these plaintiffs to the said defendant, then was and now is and at all times since the execution of said agreement has been an adequate price for said property so agreed to be conveyed to these plaintiffs by the said defendant."

The defendant Fowler denied that plaintiffs had performed the conditions imposed upon them by the escrow agreement, and denied that the agreement for the exchange of said properties was a fair, just, or reasonable one, or that there was adequate consideration therefor. As a further and separate defense, defendant Fowler charged plaintiffs with having made false and fraudulent representations to her concerning the value and character of their properties.

The action was tried by the court without a jury, and the court found that there were no false or fraudulent representations, but found that there was an inadequacy of consideration. The court further found that said plaintiffs had not performed the conditions imposed upon them by the terms of said escrow agreements, and judgment was thereupon rendered in favor of defendants, from which plaintiffs appeal.

It is the contention of appellants on this appeal that, inasmuch as defendant Fowler sought to rescind the agreement upon the single ground of fraud, she ratified the agreement in all other respects, and was afterwards prohibited from urging the defense of inadequacy of consideration, and that since the court found against said defendant upon the issue of fraud, which constituted the ground of rescission, the court was without legal power to annul the agreement on any other ground.

While we do not subscribe to the correctness of appellants' contention in this respect, for the reason that fraud and inadequacy of consideration are separate and distinct doctrines (Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548), the one being a defense which a defendant must allege and prove following a rescission, while the other is a matter for the plaintiff to affirmatively allege and prove before he is entitled to relief (Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; White v. Sage, 149 Cal. 613, 87 Pac. 193), that question becomes quite immaterial in view of the fact that the judgment must ultimately be affirmed upon the ground that plaintiffs' complaint failed to state a cause of action after it had been amended by plaintiffs, in the following manner: After the evidence was closed and prior to the submission of the cause to the court for decision, plaintiffs requested and were granted permission to file an amendment to

their complaint, whereby they struck from the complaint all of paragraph 7, which embodied those essential allegations as to the fairness of the transaction and the adequacy of consideration. Plaintiffs' purpose in striking out said paragraph 7 was doubtless to strengthen their theory that defendant Fowler, by failing to incorporate the ground of inadequacy of consideration in her notice of rescission, had waived her right to avoid the contract on that ground, and plaintiffs sought by such amendment to entirely eliminate that issue from the case. The amendment, however, accomplished just the opposite effect. Instead of strengthening their complaint, they took from it the vital parts that gave it life.

The complaint, by reason of the amendment, was emasculated in such a way as to render it entirely insufficient in stating a cause of action. As the complaint stood when the cause was submitted to the trial court for decision, it was entirely void of any allegations that the transaction was fair, or that the consideration was adequate. Such allegations and the proof in support of them were absolutely essential to plaintiffs' recovery. Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67; White v. Sage, 149 Cal. 613, 87 Pac. 193; Gibbons v. Yosemite Lumber Co., 172 Cal. 714, 158 Pac. 196; Bishop v. Barndt, 184 Pac. 901; Ehrhart v. Mahony, 184 Pac. 1010. This same question arose on demurrer to the complaint in the case of Joyce v. Tomasini, supra, and it was said:

"We think the demurrer should have been sustained. The contract is sued on as an executory agreement to execute a lease, in substance an agreement to grant an estate for years in a parcel of land. The object of the action is to enforce specific performance of this executory agreement. The Civil Code, following the settled doctrine of equity jurisprudence, declares that specific performance of an executory contract cannot be enforced against a party, if he has not received an adequate consideration therefor, or if it is not, as to him, just and reasonable. Section 3391. It is well established as a rule of pleading in such cases that the plaintiff, in order to allege a good cause of action, must set forth facts which show that the consideration provided for in the contract sought to be enforced is adequate, and that the contract is just and reasonable to the defendant. A complaint which fails to state such facts does not state a cause of action to enforce such contract."

And in Gibbons v. Yosemite Lumber Co., supra, it was said:

"A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable and the consideration adequate."

The further question of the necessity of the performance by plaintiffs of the conditions of the escrow agreement is of no importance, in the absence of an averment and proof on the part of plaintiffs of the fairness and reasonableness of the agreement. Porter v. Anderson, 14 Cal. App. 716–724, 113 Pac. 345.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 305

DUVALL et al. v. WHITE et al. (Civ. 2067.)

(District Court of Appeal, Third District, California. Feb. 25, 1920.)

1. Appeal and error ⊂⊃195—Party not asking to amend cannot complain of denial of leave.

Appellants cannot complain that the trial court, in sustaining a demurrer to the complaint, abused its discretion by refusing leave to amend, where they did not ask for permission to amend, or indicate how the complaint could be amended so as to meet the objections raised by the demurrer.

2. Mines and minerals ⊂⊃52—Complaint for impounding oil of stated value does not entitle to injunction.

A complaint to restrain defendants from impounding on their property oil flowing down a water course to plaintiffs' property, which alleged the value of the oil which flowed each day, does not show a right to an injunction, since it does not show irreparable injury, especially in absence of any allegation that defendants were insolvent.

3. Mines and minerals ⊂⊃83—Purchaser of oil discharged into stream cannot prevent diversion of stream.

The purchasers from the owners of oil wells of the oil which escaped into a stream cannot deprive a riparian owner whose land lay between the oil wells and the purchasers' impounding works of the right to divert the water of the stream, including the oil mingled therewith.

4. Mines and minerals ⊂⊃83—Owner abandons oil by permitting it to leave land.

The owner of oil abandoned it and lost all rights to it by permitting it to flow from his land in a natural water course, so that a purchaser from him cannot prevent the impounding of the oil by a riparian owner along the water course.

5. Waters and water courses ⊂⊃39—Occupant of public land is a riparian owner as against one having no claim.

An occupant of land under claim of right has the right of a riparian owner as against one having no claim to the land occupied, even though the occupant has no title as against government.

6. Waters and water courses ⊂⊃138—User of stream to carry oil not shown to have been adverse confers no rights.

The fact that the stream across defendant's land had been used for five years for convey-

ing oil to plaintiff's works below gives plaintiff no right against the riparian owner, in the absence of a showing that the use was adverse, since without showing it is presumed to have been permissive.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by S. A. Duvall and another against C. N. White and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Alfred Siemon, of Bakersfield, for appellants.

George E. Whitaker and Foster & Barnhart, all of Bakersfield, for respondents.

BURNETT, J. Respondents have made a fair statement of the case, which we substantially adopt. From the complaint it appears that certain oil companies were operating in Kern county, and that waste oil escaped from their works and flowed down a water course adjoining their lands. This oil was carried by the water beyond the lands operated by said companies, across lands claimed and occupied by defendants, then beyond these and across other land until it was carried into a lake known as Buena Vista Lake. In consequence of the danger of the oil contaminating the waters of the lake, the operators constructed a dam below their lands and near the lake for the purpose of preventing said contamination. The operators then orally agreed with the plaintiffs that if they would maintain the dam and construct other works to prevent the oil from flowing into the lake they should be entitled to the waste oil escaping from the operators' property that was saved by means of the dam. The plaintiffs thereupon constructed said works for saving said oil. These works were constructed on the lands of the Kern Trading & Oil Company with the consent of that company. Afterwards the defendants herein began the construction of works on lands occupied by them lying below the lands of the oil companies and above the lands of the Kern Trading & Oil Company with the alleged intention of diverting the escaping oil ordinarily flowing down on the waters of the stream to the dams of the plaintiffs. The plaintiffs thereupon brought this suit to enjoin the defendants "from obstructing, diverting, or in any way interfering with the flow of said oil and water to plaintiffs herein." The defendants demurred on the general ground, and on the special grounds that the complaint was uncertain and ambiguous and unintelligible in certain respects and that there was a misjoinder of parties plaintiff. The demurrer was sustained without leave to amend, and the appeal is from the judgment entered thereupon.

[1] 1. It is quite apparent that appellants are in no position to complain that the trial court abused its discretion in sustaining the demurrer without leave to amend. This follows for the reason that it does not appear that they asked permission to amend, or indicated in any manner how the complaint could be amended so as to meet the objections raised by the demurrer. The rule is well settled in this state, and among the many decisions it is sufficient to specify Stewart v. Douglass, 148 Cal. 511, 83 Pac. 699; Varni v. Devoto, 10 Cal. App. 304, 101 Pac. 934; Carley v. Vallecita Mining Co., 16 Cal. App. 781, 117 Pac. 1037.

[2] 2. It is equally apparent that the complaint fails to state a cause of action for an injunction. It does not appear therein that plaintiffs would be irreparably damaged by the threatened acts of defendants. To the contrary, the complaint shows that plaintiffs will lose oil every day of the value of $15. Mere monetary loss is not ordinarily irreparable in the contemplation of the remedy by injunction. At least, it should not be considered so in the absence of any averment or showing that the parties causing the loss are insolvent or in any manner unable to respond in damages. Nothing in the complaint herein is inconsistent with the view that an action at law would afford a complete remedy for any injury that has been or may be suffered by plaintiffs; and hence it does not appear to be a case for the equitable remedy of injunction. In this connection the cases of Mechanics Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703, and California, etc., Co. v. Union etc., Co., 122 Cal. 641, 55 Pac. 591, are quite instructive.

[3] 3. Moreover, as to respondents, said agreement between plaintiffs and the oil companies is entirely ineffective and inoperative. Otherwise the situation would be this, that plaintiffs would have a right to impound all the oil flowing down the stream miles below the works of the operatives, and thereby prevent any interevning landowner from diverting a single drop of water from the stream for any purpose, as any diversion of the water, however small, would deprive the purchaser of the floating oil of a portion of his right. It would necessarily follow, as pointed out by respondents, "that the stream must continue to flow in the same manner for time immemorial in order that the plaintiffs may collect their oil, and that no intermediate owner can divert it from its natural channel for fear of depriving the plaintiffs of their oil." It is manifest that the riparian rights of those dwelling upon a natural water course cannot be so easily destroyed by an agreement between third parties. If the intermediate riparian owners have the right—as must be conceded—to divert the water for domestic purposes, it would be absurd, of course, to contend that they must separate from it the oil, and permit the latter to flow on down the stream. The two elements are inseparable and the right to the use of one

carries the other as an incident. The foregoing is stated to indicate to what unreasonable results the contention of appellants would lead, although in the case before us there is no allegation as to the diversion and appropriation of the water but only of the oil.

[4] We are satisfied that the operators had no such interest in the oil after it left their premises that they could bind intervening landowners by such a contract as the one involved herein. The true position, as we conceive it, is that after the oil was carried beyond said premises it became what may be designated abandoned property, and it was entirely beyond the control of said operators. While the oil remained on their land they could have impounded it or authorized another to do so, but, having been allowed to escape, it became subject to disposition with the water. In 18 R. C. L. 1205, it is said:

"Both petroleum and gas, as long as they remain in the ground, are a part of the realty. They belong to the owner of the land and are a part of it as long as they are on it, or in it, or subject to his control. When they escape and go into other hands or come under another's control, the title of the former owner is gone."

A large number of cases is cited in support of the text, including decisions from the United States Supreme Court, and they justify said statement of the rule.

We may add that other authorities affirm the same doctrine, but they need not be specifically noticed.

Appellants, in support of their contention, cite Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; but it is not inconsistent with the position of respondents herein. That case involved a controversy among the tenants in common, and related to the diversion on their own property of water and gold-bearing earth conducted by flumes from the mining claim. The rights of third parties were not litigated, but the diversion was made, as found by the court, for the benefit of the owners of the said mining claim. It is true though that the court said:

"So long as the miners of the basin and the Blue Point Mining Company abandoned the water and tailings which passed from their mining grounds, the Cheek & Ackley Flume Company had the right to take and appropriate the same to its own use, and upon the passage of the water and earth through that flume the Side Hill Flume had the right to take and appropriate what so passed through the Cheek & Ackley Flume to its own use."

This is in line with the contention of respondents that when the oil left the land of the operators it became abandoned property. However, in the Dougherty Case the court proceeded to state that the owner need not continue to abandon the "tailings," but he may change his purpose and reclaim it himself if he chooses. But this must mean that he may reclaim it while it is under his control; that is, before it has passed beyond his possession. So, in the case at bar, no doubt the operators could impound the oil on their own property, and thereby prevent its diversion by a third party, to the extent at least that it did not interfere with the riparian rights of others; but the case is different where they claim the right to recover it after it has escaped from their own possession and been appropriated by lower riparian owners.

[5] 4. There is some contention that the claim of respondents is based upon an unlawful occupation of government land and that they are not even riparian owners. As to the first of these contentions it is clear that plaintiffs are in no position to raise the point. They claim no interest in the land, and the occupancy of the defendants constitutes sufficient title as against one claiming no interest whatever in the property. The character of the possession of defendants is a matter to be settled between them and the government. Woodbury v. Dorman, 15 Minn. 338 (Gil. 272); McMillen v. Gerstle, 19 Colo. 98, 34 Pac. 681; Tidwell v. Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192.

Occupying, under a claim of right, lands adjoining said water courses, defendants must also be considered riparian owners, at least as far as plaintiffs are concerned.

[6] 5. There is no merit in the claim as to user. That the streams may have been used for five years for the purpose of conveying the oil can avail plaintiffs nothing. There is no allegation of any of the elements that characterize a use as adverse. We must presume that said use was permissive rather than hostile in the absence of any showing to the contrary.

We think there is no substantial merit in the appeal, and the judgment is affirmed.

We concur: ELLISON, P. J., pro tem.; HART, J.

46 Cal. App. 405

FORSLAND v. FORSLAND et al.
(Civ. 3213.)

(District Court of Appeal, First District, Division 1, California. March 3, 1920. Rehearing Denied April 2, 1920. Hearing Denied by Supreme Court April 29, 1920.)

1. Husband and wife ⟸279(6)—Wife's derogatory remarks held not a breach of her agreement not to disturb husband's peace.

Where husband and wife before divorce entered into agreement for settlement of property rights, and the husband after paying the wife a considerable sum agreed to deposit $1,000 which should be paid over to her if she refrained for a stipulated time from disturbing his peace, or that of the employés of the company in which the husband was interested, the fact that the wife did make derogatory remarks to a third person concerning the husband cannot be deemed a breach of the agreement; such remarks not disturbing his peace.

2. Appeal and error ⟸171(1)—Party cannot rely on inconsistent theories.

Where a husband, who had deposited money to be paid to his wife in event she refrained from disturbing his peace for a given period, etc., sought to have the money paid over to him on the theory that she had violated the agreement, the husband cannot thereafter change his theory and proceed on the assumption that the agreement was void for want of consideration.

3. Husband and wife ⟸278(5)—Agreement to pay wife for refraining from disturbing husband held valid.

Agreement by husband, on separation from his wife, that if she did not disturb his peace for a given period of time, etc., a sum of money deposited in a bank should be paid over to her, is valid and binding and not subject to attack on the ground of want of consideration.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by C. H. Forsland against Nance B. Forsland who filed cross-complaint, and the Humboldt Savings Bank and others. From a judgment for defendants and cross-complainant, plaintiff appeals. Affirmed.

Harry I. Stafford and C. J. Stafford, both of San Francisco, for appellant.

H. K. McKevitt, of San Francisco (Royal E. Handlos, of San Francisco, of counsel), for respondents.

GOSBEY, Judge pro tem. This action arose out of the following facts: C. H. Forsland and Nance B. Forsland were, on the 25th day of September, 1917, husband and wife. Trouble and differences arose between them which subsequently resulted in their separation by a decree of divorce. Before the divorce was had and as a settlement of certain property rights, they entered into the following written agreement:

"This agreement, made and entered into between C. H. Forsland, hereinafter called the first party, and Nance B. Forsland, hereinafter called the second party, witnesseth that:

"Whereas unfortunate differences have arisen between the parties hereto; and

"Whereas, the parties hereto have not lived together as husband and wife for some fifteen months last past; and

"Whereas, the parties hereto entered into an agreement on the 12th day of April, 1917, wherein the first party promised and agreed to pay to the second party for her support and maintenance the sum of $100 per month, payable in advance on the 12th day of each month; and

"Whereas, litigation is now pending between the parties to set aside the agreement settling property rights heretofore referred to as well as to sever the bonds of matrimony now existing between the parties hereto; and

"Whereas the said parties desire to make a more satisfactory and final settlement of their property rights:

"Now, therefore, in lieu of any prior settlement and agreement heretofore entered into between the parties hereto and as a full and complete and final adjustment of their property rights the parties hereto agree as follows:

"In consideration of the cancellation of the prior agreement heretofore made between the parties hereto and the return to the first party of all papers, writings and documents of every kind pertaining to the business of the first party and of the Anti Teredo Paint Company, now in the possession or under the control of the second party, and also those two affidavits made by the stenographer of the Anti Teredo Paint Company reflecting upon the character of the first party hereto, and the giving up of all further claims against the first party hereto and the Anti Teredo Paint Company, and any claim that the second party might make against the estate of the first party, and the dismissal of the action now pending in the superior court of the state of California in and for the city and county of San Francisco, which suit was and is for the cancellation and setting aside of the agreement settling property rights hereinabove referred to, and also in consideration of the turning over to the first party of all of the papers, writings, documents and affidavits hereinabove referred to, the first party hereby agrees to pay to the second party the sum of four thousand dollars, and the further sum of $200 as and for her counsel fee, upon the receipt by the first party of the aforementioned papers, and also agrees to place an additional sum of one thousand dollars in a savings bank, to be turned over to the second party in a year and five days from the date hereof, provided that during the said year and five days the second party shall not in any way molest or disturb the peace of the first party, or of any employé of the Anti Teredo Paint Company, it being distinctly understood and agreed that if the second party does so disturb the peace of or molest the first party, or any employé of the Anti Teredo Paint Company, as aforesaid, during said period, she shall forfeit the said one

thousand dollars, otherwise at the end of the said period the said sum of one thousand dollars shall be paid over to the second party.

"And in consideration of the foregoing payment to her by the first party of the sum of four thousand dollars, and the further sum of two hundred dollars for her counsel fee, and the further sum of one thousand dollars upon the conditions hereinbefore set out, the second party hereby consents to accept the said sum of five thousand dollars so paid as aforesaid in full settlement of all demands and claims of every character and description which she now has or may have against the first party and the Anti Teredo Paint Company, and she hereby renounces all claims against the estate of the said first party, all letters, papers, documents and contracts of every character and description pertaining to the business of the first party, or of the Anti Teredo Paint Company and the affidavits aforesaid.

"In witness whereof the parties hereto have set their hands this 25th day of September, 1917. C. H. Forsland [Seal.]
"Mrs. N. B. Forsland. [Seal.]"

On the 1st day of October, 1918, the plaintiff filed his complaint herein, alleging that he had deposited $1,000 with the Humboldt Savings Bank "upon the understanding and agreement with said Nance B. Forsland that she would return to said plaintiff certain documents, letters, papers, contracts, and formulas for the making of paint, and also that the said defendant Nance B. Forsland should not disturb the peace of the said plaintiff or molest any employé of said plaintiff"; that said bank would pay the said sum of $1,000 to said Nance B. Forsland unless restrained by the court. Plaintiff further alleges:

"That ever since the execution of the said agreement as aforesaid the said Nance B. Forsland has willfully failed, refused, and neglected to return to said plaintiff any such contracts, papers, and formulas as provided for in said agreement, and that said Nance B. Forsland in addition thereto has on several times and occasions violently disturbed the peace of plaintiff and called the said plaintiff names and spoken scandalously about plaintiff, thereby violating the terms of the said agreement."

The plaintiff prays judgment declaring that said Nance B. Forsland has no right or claim to the said $1,000, but that the same be paid to himself. The defendants deny each and all of the allegations of the complaint. Nance B. Forsland, however, as a separate defense and by way of cross-complaint, admits that she made and executed said agreement, which she sets out in hæc verba in her answer. She alleges that all of the conditions of said agreement on her part to be kept and performed were kept and performed by her; that on the 30th day of September, 1918, she was entitled to receive said sum of $1,000; but that no part thereof has been paid to her.

During the progress of the trial of the action testimony was given by the plaintiff that said Nance B. Forsland had looted his safe and taken many letters, papers, checks, contracts, etc., from him. While inquiries were being made as to the taking away of these papers, etc., the trial court concluded that further proceedings along this line were not necessary, holding that the payment of the $4,000 mentioned in the agreement had to do only with the return of said papers, contracts, etc., while the payment of the $1,000 was only in reference to another and entirely different matter, namely, that said Nance B. Forsland would not molest or disturb the peace of the plaintiff or any employé of said paint company. Upon this latter issue the court gave judgment for the defendant, Nance B. Forsland. From said judgment the plaintiff has appealed.

Notwithstanding the announcement of the trial court relative to the only issue to be considered by it in the trial of the action, we find in the record on appeal the following finding made by the court:

"That ever since the execution of said agreement said Nance B. Forsland has not willfully refused or neglected to turn over to said plaintiff papers or formulas as provided in said agreement; that no demand has been made upon her so to do."

The court furthermore found that said Nance B. Forsland did not during said period of one year and five days mentioned in said agreement, on several occasions, or at all, disturb the peace of plaintiff, or violate the terms of said agreement. Upon this latter finding and the conclusions of law based thereon the court must have rendered its judgment.

The record presented to this court shows a confusion as to the issues raised by the pleadings, the findings of fact, and the judgment rendered thereon. Yet the ruling of, and the position taken by, the trial court at the time of the trial in eliminating all consideration with reference to the payment of the $4,000 and the surrender of said papers and documents, were assented to and approved by the attorneys representing the respective parties to the action. In view, therefore, of the construction placed upon the said agreement by the said court, we shall give no further consideration to this feature of the transaction.

[1] The appellant seeks to set aside said judgment upon two grounds, which we deem are the only ones of sufficient importance to be considered, viz.: First, that the evidence is insufficient to support the judgment; and, second, said agreement is void for lack of consideration therefor.

As to the first ground, the record does not show that said Nance B. Forsland ever in any manner or at any time, in the presence of either the plaintiff or any employé of said paint company, did or said anything to molest

or disturb the peace of the said plaintiff or of said employé. There is evidence, however, that Nance B. Forsland did at one time make some remarks to a third party about the plaintiff, but there is a conflict in the testimony as to the words she uttered. The trial court decided that whatever words said Nance B. Forsland may have spoken concerning the plaintiff to such third party did not molest or disturb the peace of the plaintiff. We shall not interfere with the conclusion reached by the trial court in this particular.

[2, 3] As to the second ground, we find the plaintiff has put himself in a rather embarrassing position and should not now be heard to complain. In his complaint the plaintiff demanded that said $1,000 be returned to him because Nance B. Forsland had violated said agreement by molesting him and disturbing his peace, and insisted upon the enforcement of said agreement as set out in his complaint. When the trial court made its ruling and gave its construction to said agreement and rendered its judgment thereon, then for the first time plaintiff claimed that the said agreement is void for the reason recited in his specification of error, viz., that said agreement was wholly void for lack of consideration.

The trial court made no finding whatever as to the consideration mentioned in or connected with said agreement; no issue was made or presented regarding a consideration. Plaintiff should not be permitted to attempt to enforce his own cause of action on one ground, and then attempt to defeat it on another ground. Such inconsistent positions cannot be upheld.

Contracts of the nature of that portion of said agreement wherein the $1,000 is involved are legal and binding. 13 Corp. Juris, 329; Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614.

We are satisfied from an examination of the record in this cause that there is sufficient evidence to sustain the finding in regard to the $1,000 portion of said agreement and to uphold the court in its judgment.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 325

HERALD v. GLENDALE LODGE NO. 1289, B. P. O. E. OF UNITED STATES.

(Civ. 3167.)

(District Court of Appeal, Second District, Division 2. California. Feb. 25, 1920.)

1. Associations ⟸20(2)—Unincorporated association cannot be sued in its own name in absence of statute.

Without express statutory authority an unincorporated association cannot be sued in its own name, but the action must be against the individual members, or some of them as representatives of all, or against the members of its governing board of trustees, or the committee if by its rules it has intrusted its management and control to such officers.

2. Associations ⟸20(2)—Statute relating to suits against associations in "business" construed.

Code Civ. Proc. § 388, providing that two or more persons associated in any "business" under a common name may be sued in such name, *held* not limited in its application to the associations formed for commercial business, but is applicable where a number of persons are associated under a common name in an undertaking in which the associates incur obligations for which they are legally liable, whether it is a money-making concern or otherwise, the term "business" having a common and general application to all sorts of enterprises which engage people's attention and energies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

3. Statutes ⟸208—Word to be construed in harmony with context where open to construction.

Where the sense in which the word is used is open to construction, it should be accepted with the meaning most in harmony with the context.

4. Appearance ⟸25—Without objection to being sued in associate name held waiver of such objection.

Where incorporated association being sued in its associate name appeared without, by motion, demurrer, or answer, raising the point of misnomer, or misjoinder, or legal capacity of parties, it waived any objection that could be taken to being sued in its associate name under Code Civ. Proc. § 434.

5. Injunction ⟸103—When equity will restrain commission of crimes.

Equity will not enjoin the mere violation of a law, but will restrain the commission of acts which are violative of public policy, create a nuisance, or assail rights of property, although such acts are crimes and punishable as such.

6. Evidence ⟸84—Presumed that infractions of the law will be prosecuted.

The legal presumption is that infractions of the law will be prosecuted.

7. Evidence ⟸83(1)—Presumed officers will prosecute and courts will convict violators of ordinance.

In suit by member to enjoin lodge from serving liquor to its members in violation of an ordinance, on the ground that the continuance thereof will subject the lodge to prosecutions, fines, and other expenses and losses incident to such prosecutions, it will be presumed that the officers of the municipality will prosecute, and that courts will convict and impose the penalties provided by such ordinance.

8. Injunction ⟸102—Member held entitled to enjoin lodge from serving liquor to members.

A member of a lodge is entitled to an injunction to restrain the lodge from serving liq-

uor to its members in violation of an ordinance, since the continuance of such practice will subject the lodge to prosecutions, fines, penalties, and other expenses incident to the prosecutions, and will affect its material prosperity and social standing.

9. Intoxicating liquors ⊜10(2) — City may prohibit liquor under its police power.

Under Const. art. 11, § 11, a municipality under its police power may enact stringent prohibition of the sale of and distribution of intoxicating liquors.

10. Intoxicating liquors ⊜146(7)—Ordinance held to prohibit lodge serving liquor to members at luncheons or banquets.

City ordinance, prohibiting a club or association from selling, furnishing, delivering, or giving away intoxicating liquors, *held* to prohibit a lodge from serving its members with liquor at luncheons and banquets.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by George R. Herald against the Glendale Lodge No. 1289, Benevolent and Protective Order of Elks of the United States of America. Judgment of dismissal, and plaintiff appeals. Reversed.

B. Dean Clanton, and W. E. Evans, of Los Angeles, amicus curiæ, for appellant.

Bert P. Woodard, of San Francisco, and Michael F. Shannon, of Los Angeles, for respondent.

SLOANE, J. This is an appeal from a judgment of dismissal after demurrer sustained to complaint without leave to amend. Plaintiff brought the action as a member of the defendant lodge to enjoin it from serving beer to the members at luncheons and banquets in violation of an ordinance of the city of Glendale prohibiting the serving or distribution of malt or spirituous liquors by any person, club, corporation, or association.

No briefs are on file, other than that of the city attorney of Glendale, appearing on behalf of the complainant as amicus curiæ. It is represented that the issue presented has become of slight practical concern to the club because of the potent stimulus to abstemious practices of the prohibition amendment to the federal Constitution. However, as there is nothing before us to indicate that the controversy has become a moot question, it seems necessary to decide the points raised upon the record.

The demurrer upon which the complaint was held insufficient alleged: insufficiency of facts to constitute a cause of action; that the acts complained of do not constitute a public offense or violation of the ordinance of the city of Glendale; and that the city of Glendale was without constitutional power to enact the ordinance prohibiting the serving of beer to its members by the lodge.

The first question which presents itself upon the face of the record—although not directly raised by the demurrer or referred to in the brief on file—is whether or not the defendant lodge can be sued in its associate name. It does not appear from the complaint that the defendant has any legal entity. The complaint alleges that—

"This defendant, Glendale Lodge No. 1289 of the Benevolent and Protective Order of Elks of the United States, is a fraternal and charitable organization, instituted upon the authority and by permission of the Grand Lodge of the Benevolent and Protective Order of Elks of the United States of America, and the only authority by which such lodge 1289 has heretofore and now continues to exist is by virtue of a charter granted to it by said Grand Lodge, which charter is subject to revocation by said Grand Lodge."

[1] There is nothing in this statement to give legal personality to the defendant. It must be considered as an unincorporated association, and as such cannot be sued in its associate name, unless it comes under the provisions of section 388 of the Code of Civil Procedure, which provides that—

"When two or more persons, associated in any business, * * * under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name."

It is clearly established by the decisions that without express statutory authority an unincorporated association cannot be sued in its own name, but that the action must be against the individual members, or some of them as representatives of all, or against the members of its governing board of trustees or committee, if by its rules it has intrusted its management and control to such officers. Pearson v. Anderburg, 28 Utah, 495, 80 Pac. 307; Pomeroy's Remedies, 395; Doyle v. Burke, 29 R. I. 123, 69 Atl. 362, 16 Ann. Cas. 1245; Greer, Mills & Co. v. Stoller (C. C.) 77 Fed. 1; Spaulding v. Evenson (C. C.) 149 Fed. 913; Kimball v. Lower Columbia, etc., Ass'n, 67 Or. 249, 135 Pac. 877.

Neither can section 388 of the Code of Civil Procedure be appealed to very confidently as permitting this action to be maintained against the defendant lodge in its associate name. By its terms this section is limited in its application to an association "in business" of two or more persons under a common name. If the word "business," in this connection, means an actual commercial business, carried on for profit, the defendant here, as described in the complaint, cannot qualify. As alleged in the complaint, its purposes are purely social and benevolent. It maintains a clubhouse, with lodgerooms, amusement rooms, kitchen, banquet hall, and other accessories for the amusement and entertainment of its members. The expenses of the lodge, including the expense of maintaining

the clubrooms, kitchen, and banquet hall, are met by the payment of regular monthly dues by the members. It owns property; but neither the lodge nor any feature connected therewith is run for profit or gain; and all funds remaining after the expenses of the lodge are paid are devoted to charity or the furtherance of the lodge's interests in pursuit of its regular and legitimate purposes. It clearly is not a business concern, in any mercantile or commercial sense. On the other hand, if the word is used with the more general and very common meaning of any occupation, employment, or interest in which persons may engage, it would include this defendant. The California decisions are by no means in harmony or determinative on this point.

In the case of Warman Co. v. Redondo Beach Chamber of Commerce, 34 Cal. App. 37, 166 Pac. 856, decided in June, 1917, the first division of the Court of Appeal for the Second District held that the defendant, an unincorporated association organized for the general promotion of the business interests and general prosperity of the community, was not a business organization such as contemplated under section 388, Code of Civil Procedure, and that action against it could not be maintained in its common name—citing Swift v. San Francisco Stock & Exchange Board, 67 Cal. 567, 8 Pac. 94, a case of doubtful relevance, and St. Paul Typothetæ v. St. Paul Book Binders' Union, 94 Minn. 351, 102 N. W. 727, 3 Ann. Cas. 695, which is clearly in point. In the latter case, construing a statutory provision practically identical with section 388, Code of Civil Procedure, in its application to an unincorporated trades union society, the Minnesota Supreme Court says:

"The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property and incurring pecuniary liability—and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the interests and welfare of the persons who are members thereof."

On the other hand, the First Appellate District Court of this state, in a later decision, of date November 13, 1917 (Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409) without referring to the case in the second district—and, it must be admitted, without the consideration given to the matter in the last-mentioned case—uses the following language:

"We do not think it was necessary to authorize the maintenance of the action against the members of the club by their common name, to show by the complaint the specific purpose or purposes for which the members of the club had so associated themselves together. Nor is it important whether it was a voluntary association, and not organized and conducted for pecuniary profit to its projectors or members. Armstrong v. Superior Court, 173 Cal. 341, 342 [159 Pac. 1176]. By this we mean to say that 388 has reference to an association of two or more persons who thus band together for the purpose of transacting as a single body any kind of business, whether for profit to themselves or for charitable or philanthropic purposes."

The case of Armstrong v. Superior Court, cited in the foregoing decision, does not throw much light on the subject, because in that case the matter arose on a record, as shown by the pleadings, and, the complaint having alleged the defendant to be "an association composed of two or more persons associated in business under a common name," it sufficiently appeared that it could be sued under section 388.

[2, 3] We are inclined to hold with the ruling in Camm v. Justice's Court, supra. We see no sufficient reason for restricting section 388 of the Code of Civil Procedure to associations formed for commercial business. As already pointed out, the term "business" has a common and general application to all sorts of enterprises which engage people's attention and energies. When a number of persons are associated under a common name in an undertaking in which the associates incur obligations for which they are legally liable, why should they not be sued in the common name which they have adopted, whether it is a money-making concern or otherwise? Indeed, the question of profit is the only distinction that exists between the two classes of associations suggested. If a number of persons were associated together, furnishing to their patrons for pay precisely the same accommodations, entertainment and service that the Elks' lodge furnishes its members, there would be no question but that they were engaged in a "business." Why should a different rule of liability exist because the associates happen to contract their liabilities in an enterprise in which they are catering to themselves? The word "business," in its broad sense, embraces everything about which one can be employed; and in its narrower sense it signifies a calling for the purposes of livelihood or profit. Easterbrook v. Orphan Society, 85 Conn. 289, 82 Atl. 561, 41 L. R. A. (N. S.) 615. Where the sense in which the word is used is open to construction, it should be accepted with the meaning most in harmony with the context. Parker Mills v. Commissioner, 23 N. Y. 242.

[4] However, irrespective of which of the conflicting constructions of the Code section under consideration should prevail, we are of the opinion that there has been a waiver of the point that in this instance suit was improperly instituted in the associate name of the lodge. The question presented does not

involve the sufficiency of the cause of action as pleaded, or jurisdiction of the court, particularly in view of the fact that it is not the circumstance that defendant is an unincorporated association, but the class of unincorporated associations to which it belongs, that is the test of the liability to suit under the association name. An appearance was entered here by the defendant in the name under which suit was brought, without, by motion, demurrer, or answer, raising the point of misnomer or misjoinder or legal capacity of parties. Under section 434 of the Code of Civil Procedure, all objections not so taken, and not going to the sufficiency of the cause of action or the jurisdiction of the court, are waived. Deems v. Albany & Canal Line, 14 Blatchf. 474, 7 Fed. Cas. 348; Liederkranz Singing Soc. v. Germania Turn Verein, 163 Pa. 265, 29 Atl. 918, 43 Am. St. Rep. 798; Agricultural Extension Club, etc., v. Hirsch, 179 Pac. 430. The case of Armstrong v. Superior Court, supra, is at least authority sustaining the power of the court to issue an injunction in an action against associations, under their common name, which shall be operative "against * * * all members of any such association having knowledge of the terms of any injunction issued therein, as well as all their officers, agents, representatives, and employés."

The next question—as to the ruling of the court on the demurrer to this complaint—goes to the power of a court of equity to enjoin the alleged unlawful serving of malt or spirituous liquors by defendant at the lodge banquets, and whether such action can be taken on the complaint of a member of the society complained of. These precise issues were presented to the Supreme Court in the cases of Cuzner v. California Club, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. (N. S.) 1095, and Varcoe v. Alameda Lodge, B. P. O. E., 174 Cal. 549, 163 Pac. 909. Both actions were by individual club members to enjoin sale or distribution of liquors to members in alleged violation of local ordinances. Both cases went off on the decision of the Supreme Court that the practices complained of did not come within the provisions of the ordinances pleaded. No other point is referred to in the opinion in the Varcoe Case; but in Cuzner v. California Club, the court, inferentially, at least, recognized the right of a club member to prosecute such action. Mr. Justice Angellotti, delivering the opinion of the court, said, "It is assumed by the parties that such an action will lie on behalf of a member of the club," and cited Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717. In the case cited—and thus incidentally approved—the right of a club member to prosecute injunction proceedings to restrain illegal sale of liquors was recognized. But that case also went off on the point that the acts of the club complained of were not in violation of law. The court, however, says:

"A bill having for its sole purpose an injunction against crime or misdemeanor it is well settled does not lie; but it is just as well settled that equity will interfere if the alleged criminal acts go further and operate to the destruction of or diminution of value of property."

[5] In the case of Manderson v. Commercial Bank, 28 Pa. 379, which, in principle, is somewhat analogous to the case here, the charter of the bank, granted by an act of the Legislature, provided that "the rate of discount at which loans shall be made shall not exceed one-half of one per centum for thirty days." It was held that an injunction should issue at the instance of a stockholder to prohibit the practice of the directors in discounting notes at a rate in excess of that allowed by its charter, on the ground that such a practice jeopardized the rights of the stockholders. The court says:

"A violation of the rule in relation to the rate of discount may expose the institution to the penalties for usury, and may also put the continuance of the charter in doubt. A stockholder has a right to the necessary means to prevent a course of practice which may produce such results."

It is beyond controversy that equity will not interfere by injunction to prevent the mere violation of law; but it is equally well settled that injunction may issue to restrain the commission of acts which are violative of public policy, which create a nuisance or assail the rights of property, although such acts are crimes and punishable as such. O'Hara v. Stack, 90 Pa. 477; Niblack, Benefit Societies, 115, 120; 14 R. C. L. 368; Roper v. Burke, 83 Ala. 193, 3 South. 439; Goodman v. Jedidjah Lodge, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; Christensen v. Kellogg, etc., Co., 110 Ill. App. 61; People v. Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198; Hackney v. Vawter, 39 Kan. 615, 18 Pac. 699; Cope v. District Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30. The case last cited was an action by a stockholder of the fair association to enjoin concessions to gambling devices. Relief in that case was denied on the ground that—

"The licensing of gambling tables * * * cannot in any sense be regarded as the act of the company * * * unless authorized by the stockholders, in which case it would doubtless be such an abuse of the company's franchise as would warrant the state in restraining them."

The court further says:

"If the bill in this case showed any pecuniary loss or injury, it would present an entirely different question."

[6-8] The petitioner in the present case bases his claim to relief on the fact that he is a

member of the lodge, and as such directly and financially interested in its affairs; that the lodge refuses to desist from, and threatens to continue, the practice of the unlawful serving of beer to its members and guests; and that as a result of such violation of the law the lodge will thereby subject itself to prosecutions, fines, and penalties, and other expenses and losses incident to such prosecutions. The legal presumption is that such infractions of the law will be prosecuted; that if the facts are as here pleaded—which, for the purposes of this appeal, must be presumed—the defendant lodge will be fined, and perhaps put to expense for attorney's fees and other incidental costs; and that such fines, costs, and expenses will fall upon the membership of the club, or at least be paid from money in which the members have an interest. It is not to be doubted—at least the law will not entertain a doubt—that the officers of the municipality will prosecute, and its courts will convict, those who are guilty of criminal offenses within its jurisdiction, and that the penalties provided will be imposed and enforced. Why, then, should not the individual members of the lodge be entitled to enjoin such harmful consequences as would thus result? This procedure is not against the infraction of law in itself, but against the infliction upon the club and its members of the pecuniary loss, as well, perhaps, as social odium affecting the material prosperity of the club, growing out of the unlawful method adopted by the managers in carrying on its business.

[9, 10] The remaining question is as to the constitutionality of the ordinance pleaded and its application to the alleged practices of the defendant lodge. That a municipality in this state, under section 11 of article 11 of the Constitution, is empowered, under its police authority, to enact the most stringent prohibition of the sale and distribution of intoxicating liquors has been settled by numerous decisions of the Supreme Court. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Ellsworth, 165 Cal. 677, 133 Pac. 272; Ex parte Anixter, 166 Cal. 762, 138 Pac. 356. And we think it clearly appears that the Glendale city ordinance covers the alleged offense of the defendant lodge in serving liquor to its members. The ordinance in question is about as sweeping and inclusive as language can make it. It declares that any person, firm, corporation, club, or association that keeps or maintains a place where vinous, malt, or mixed liquors or any alcoholic or intoxicating drinks are sold, furnished, delivered, or given away, or that sells, furnishes, or delivers any such drinks, is guilty of a misdemeanor, and that every person having in his possession any such liquors with intent to sell or distribute the same, and every person who visits or is present at any place where such liquors are sold, kept, delivered, or given away in violation of the ordinance, is guilty of a misdemeanor. This ordinance is easily distinguishable from that under consideration in Cuzner v. California Club, supra, where it was held that the prohibition was only directed to persons, associations, etc., "conducting, managing or carrying on the business of a retail liquor dealer." In Varcoe v. Alameda Lodge, supra, it was also held that the charter provision in question was applicable only to those engaged in the business of selling or dispensing intoxicating liquors. Although in that case the language of the charter is similar to the ordinance before us, in declaring it "unlawful for any person, firm or corporation to establish, open, keep or carry on any saloon, bar, store or any place where liquors are sold or given away, or for any person to sell, barter, or give away any intoxicating liquors without a license," this rather inclusive language is modified by further provisions indicating a limitation of its application to places where liquor is dispensed as a business—as, for instance, the direction that "no license shall be issued entitling the licensee to carry on the business licensed at more than one place." In both cases above cited the laws construed were license regulations, but in both decisions the Supreme Court expressly holds that it was within the power of the municipalities to absolutely prohibit all traffic in intoxicating drinks as a beverage, if they so enacted in explicit terms. We think that this has been done in the ordinance here pleaded, and that the complaint states facts which show that the defendant lodge was engaged in the habitual serving of malt liquors in violation of law, under circumstances calculated to inflict pecuniary loss on the lodge and its members, and that, under the facts as pleaded, the plaintiff was entitled to maintain his action.

The order and judgment appealed from are reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 338

JUMP v. BARR et al. (Civ. 2071.)

(District Court of Appeal, Third District, California. Feb. 26, 1920.)

1. Mortgages ⊂⊃401(2) — Provision for acceleration of maturity on default in payment of interest does not involve forfeiture.

Provision in note or mortgage to secure its payment, or in both, that, on default in payment of interest accumulated on note at time specified, owner of note and mortgage may treat whole of principal and interest as due before maturity of note, is merely agreement as to time when debt shall become due and enforceable, and does not involve forfeiture.

2. Mortgages ⊂⊃401(4) — Holder seeking to foreclose under acceleration clause need not give notice of election to declare principal due.

Holder of note secured by mortgage, with provision whole debt shall become due on failure to pay installment of interest, before commencing foreclosure action under acceleration clause need not give notice to defaulting maker and mortgagor of election to declare principal due for nonpayment of interest.

3. Trial ⊂⊃393(1)—Recitals of fact in decree may be treated as findings.

Where recitals of decree foreclosing mortgage involved full statement of ultimate facts, or all facts essential to support decree, facts stated may be treated as findings, and proposed findings signed nunc pro tunc by trial judge may be disregarded, and propriety of signing not determined.

4. Appeal and error ⊂⊃1170(10)—Inclusion of findings and conclusions in decree not reversible error.

Illegality in procedure in including in judgment or decree itself findings of fact and conclusions of law *held* not to have caused a miscarriage of judgment in suit to foreclose mortgage so as to justify reversal under Const. art. 6, § 4½.

5. Appeal and error ⊂⊃1050(3)—Evidence admitted held harmless in view of facts and stipulation.

In suit to foreclose mortgage executed by corporation, where both note and mortgage bore name and seal of corporation, and the genuineness of the officers' signatures was stipulated by counsel for the company and individual defendants, admission in evidence of letter, signed by company's officers, stating that at meeting of directors authority was vested in company to negotiate loan and give mortgage, *held* harmless to individual defendant.

6. Corporations ⊂⊃432(5)—Burden is on objector to show corporate mortgage was made without authority.

Where mortgage, purporting to have been given by corporation to secure debt or money borrowed, is signed by proper officers under corporate seal, presumption is that officers have been fully authorized, or did not transcend their authority, and the burden is on adverse party to show want of authority.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by James W. Jump against Florence A. Barr, Walter G. McCarty and others. From judgment for plaintiff, defendant Barr appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.

Leo V. Youngworth and Vernon Gibbs, both of Los Angeles, for respondent.

HART, J. From a decree of foreclosure of mortgage on real property in the county of Los Angeles, defendant Florence A. Barr prosecutes this appeal.

On the 1st day of April, 1914, Walter G. McCarty Company, a corporation, executed to plaintiff a promissory note in the sum of $4,000, payable three years after date, with interest at 8 per cent. per annum, payable quarterly. Said note contained the following provision:

"Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note."

The mortgage in question was given as security for the payment of said note. The only interest payment made on the note was that which fell due on the first day of July, 1914, which payment was made 10 days thereafter.

The complaint in the action was filed on the 10th day of February, 1917, 19 days before the maturity of the note. It stated specifically and separately the several amounts falling due from time to time as interest on the note, the last item of interest so stated being: "Interest due January 25th, 1917." Then follows this averment:

"That by reason of the nonpayment of said interest which became due as hereinbefore set forth and which is now due, owing and unpaid, plaintiff herein elects to declare and does hereby declare the whole sum of principal and interest immediately due and payable."

The charter of Walter G. McCarty Company became forfeited on the 4th day of March, 1916, by reason of its failure to pay the state license tax required by law. Walter G. McCarty, Margaret E. McCarty, and W. H. McCarty, sued as trustees of said corporation, and Florence A. Barr filed a demurrer to the complaint, which was overruled, and the defendants the McCartys made no further appearance. The defendant Barr answered the complaint, alleging that she was the owner in fee of the property mortgaged by the corporation; that the principal sum of the alleged note is not yet due; that plaintiff had no legal right to declare the whole sum of principal and interest immediately due and payable, and has not done

so; that the mortgagee has repeatedly waived the provision of said note giving him such option; "that every installment of interest that was ever paid on said note and mortgage was paid long after same fell due and was received and accepted by the payee long after the same had become due;" that it had become the custom of defendants to pay and the plaintiff to receive said interest long after the same was due, and plaintiff has never notified defendants of his intention to depart from such custom, and that by such conduct plaintiff has waived his right to declare a forfeiture by reason of the nonpayment of interest.

At the trial, proof was received of the execution of the note and mortgage in question, the payment of one installment of interest, the payment of taxes, etc., by plaintiff. A motion for nonsuit was made and denied, and defendant introduced no evidence.

It is contended by appellant—

"That the failure on the part of the mortgagee to declare a forfeiture on the numerous occasions when that right was open to him constituted a waiver of that right on his part which could only be reinstated by notice to the mortgagor that in the future prompt payment would be expected."

This argument is based upon the fact that the mortgagor never paid any but the installment of interest first falling due, he having failed and refused to pay the 10 successive installments falling due prior to the institution of this action.

[1] The action here is not, as appellant seems to suppose, one to declare a forfeiture by reason of the default of the defendant in paying interest on the note at the time stipulated therein. The action to foreclose the mortgage proceeds entirely upon a breach of the agreement that the defendant would pay the accruing interest on the note at certain designated times and that upon its failure to comply with that provision of the agreement the payee of the note would be at liberty at his option to treat the whole sum of principal and interest as being due and payable, and, if exercising his right to treat the whole sum as due, to proceed to collect or enforce the collection of the principal and the accrued interest. There is no forfeiture to be made or suffered or penalty imposed. The maker of the note loses nothing but the right it acquired under the contract to retain the payee's money until the expiration of the time during which the note was to run, and this right it has lost because of failure on its part to comply with the agreement as to the payment of interest. The situation is altogether different from where a party has paid his own money in part payment for something under an agreement for a sale, providing that he is, upon a certain or the first payment, to take possession of the thing he proposes to purchase, and that if he fails to make other stipulated payments at other specified times he is to return the thing to the vendor and the latter is to retain the money already paid. The case suggested involves a forfeiture. This is, as stated, simply a case of breaching an agreement whereby one party lends to another certain of his property upon the condition that with respect to the loan the borrower will do a certain thing, which he fails to do, and thus loses his right further to retain or keep in his possession the thing loaned. In other words, a provision in a note or in a mortgage to secure its payment, or in both, that, upon default in the payment of the interest accumulating upon the note at the time specified, the owner of the note and the mortgage may treat the whole of the principal and interest due before the date of the maturity of the note, is nothing more than an agreement as to the time when the debt shall become due and enforceable according to its terms. Dunn v. Barry, 35 Cal. App. 325, 169 Pac. 910; Jones on Mortgages (7th Ed.) § 1181; Whitcher v. Webb, 44 Cal. 127; Bank, etc., et al. v. Mundy, 162 Ill. App. 138; Curran v. Houston, 201 Ill. 442, 66 N. E. 228. In Dunn v. Barry, just named, the facts are mutatis mutandis, precisely the same as those of the case at bar, and therein Justice Burnett of this court, clearly shows that there is no forfeiture involved or inhering in the contract of the character of the one we are now dealing with. That case is, indeed, decisive of the point under consideration against the position of the appellant.

The cases named by the appellant do not support her contention. Two of these cases only involve actions to foreclose mortgages, to wit, Crossmore v. Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789, and Trinity County Bank v. Haas, 151 Cal. 556, 91 Pac. 385. In the first-named case it appeared that the defendant defaulted in the payment of interest on a promissory note which provided that, "if default be made in the payment of the interest, as above provided, then this note shall immediately become due at the option of the holder," but that the holder of the note did not bring suit to foreclose the mortgage given to secure the note until some months after the default. It was held that, while the holder of the note was entitled to a reasonable time after default in the payment of the interest within which to exercise his option, a delay of 7 months was unreasonable, and that, in attempting to exercise his right of option, the plaintiff was required to remain within the terms of his contract, which he did not do; hence, so it was held, it was necessary for him to wait until the next installment of interest was due. Here the action was brought 16 days after the last installment of interest became due.

In the other case (Trinity County Bank v. Haas), the defendant had failed to pay the interest due and payable on July 11, 1904, and a subsequent installment fell due on October 11, 1904. On the latter date one of the defendants, who had purchased the greater part of the mortgaged property and assumed the mortgage debt, tendered to the plaintiffs the interest then due comprising the two installments payable, respectively, on July 11, 1904, and October 11, 1904. The tender was refused on the ground that the plaintiffs had exercised their option "of considering both principal and interest due on that note and that their money was not sufficient." The defendant Elliott, who made the tender, thereupon and immediately deposited the aggregate amount of the interest due on the two installments "in a bank of deposit of good repute and gave notice thereof to plaintiffs." Civ. Code, § 1500. The only evidence of the exercise of the option by plaintiffs was that, two weeks before the commencement of the action to foreclose the mortgage, they had elected to exercise their option and declare the whole note due and payable and had directed their attorneys to proceed to foreclose the mortgage. The defendants were given no notice of such election until the day on which they tendered payment of the interest due on the two installments above mentioned. The Supreme Court held that the right to exercise the option and declare the whole amount of the note due was lost by reason of the fact that the defaulting debtor offered to pay the overdue interest prior to the time at which the attempt was made to exercise the option by the commencement of the suit to foreclose.

[2] Referring in this connection to the contention of appellant here that, before the mortgagee could exercise his right of option, it was requisite for him to have given the mortgagor notice of his default and of the former's election to declare the whole debt due, we may quote the following from the case last above considered as a sufficient reply thereto:

> "It is settled by several decisions of this court that the holder of an instrument of this kind need not, before commencing his action, give any notice to the defaulting maker of his election to declare the principal due for nonpayment of interest. Hewitt v. Dean, 91 Cal. 5 [27 Pac. 423]; Sichler v. Look, 93 Cal. 600 [29 Pac. 220]; Clemens v. Luce, 101 Cal. 432 [35 Pac. 1032]; Bank of Commerce v. Scofield, 126 Cal. 156 [58 Pac. 451]. As was said in Hewitt v. Dean, 91 Cal. 5 [27 Pac. 423]: 'The commencement of the action was notice of the exercise of the option, * * * and no previous notice or demand was necessary.'"

It is obvious that the above cases do not uphold the position of counsel on the point now in question.

The other cases cited by the defendant to the same point are Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Myers v. Williams, 173 Cal. 301, 159 Pac. 982; Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956; and Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751. A brief statement of the character of these cases will show that they are not applicable to the case here. The first case was for the specific performance of a contract for the sale of land, the contract containing a provision that the balance due after the first payment made on the execution of the contract should be paid in certain specified monthly installments, with the stipulated interest, and, if any installment was not paid within 60 days after it fell due, the whole of the unpaid balance should, at the option of the vendor, forthwith become due, in which case the vendor was authorized to sell the land to satisfy the unpaid portion and to retain as forfeited all previous payments.

Myers v. Williams is in its facts similar to the case of Boone v. Templeman; the action there, however, being for the purpose of having declared as forfeited the rights of a vendee under a contract for the sale of real property and to recover the possession of the said realty.

Pearson v. Brown was an action by the vendee to recover from the vendor a certain sum of money paid by the former under a contract for the sale of real property, which provided that, in the event that the vendee defaulted in the payment of any of the installments as provided therein, his rights in the property or under the contract and the moneys by him already paid should be forfeited, the latter as liquidated damages.

Stevinson v. Joy involved an action by the vendor in a contract for the sale of real property on the installment plan to quiet title to said property, the contract containing a provision as to default in payments of the purchase price and forfeiture substantially the same as those contained in the contracts considered in the cases last above referred to.

It is, of course, manifest that those cases dealt with contracts involving and authorizing forfeitures for breach of covenants as to time payments, and are therefore, as declared, entirely different from this case by reason of the provisions of the contracts authorizing action on the part of the vendors amounting in the very nature of the situation to a forfeiture.

[3, 4] It is next urged that the court was without jurisdiction to sign and cause to be filed findings of fact at the time at which that act was performed. The facts are: Findings of fact and conclusions of law were not waived. Proposed findings, unsigned by the judge and undated, were filed with the clerk on the 8th day of June, 1917. On the

11th day of June, 1917, the court signed and filed its decree. Thereafter, and on the 6th day of September, 1917, without notice to appellant or her counsel, and after a notice of appeal had been served and filed, the judge who tried the case signed the proposed findings, nunc pro tunc, as of the 11th day of June, 1917.

It has been held that, under certain circumstances, and upon the principle that justice requires it, the signing of findings, nunc pro tunc, is allowable. Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 Pac. 328, and cases therein cited. It has also been held that, while the nisi prius court may correct a mere clerical misprision in the record or correct its records so as to make them speak the truth, after an appeal has been taken (Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174), it cannot after such appeal amend its findings (Baggs v. Smith, 53 Cal. 88). But whether, where findings having been proposed which derive ample support from the evidence and which in turn amply support the judgment, such findings may be signed nunc pro tunc as of the date of the previous signing of the decree or judgment after an appeal therefrom has been taken, is a proposition as to which we have been furnished with no authorities directly in point. And we find no reason for considering or deciding the point herein, since the recitals of the decree in this case themselves involve a full statement of the ultimate facts or all the facts essential to support the decree, and the facts so stated may be treated as findings. In other words, the decree itself is sufficient as findings of fact, conclusions of law, and a judgment. The practice of specifically including in the judgment itself the findings of fact and conclusions of law may be irregular, but it is not such an irregularity as should or will require a reversal. Certainly, such irregularity, which is only an irregularity in procedure, cannot well be held to have caused a miscarriage of justice in this case. Const. art. 6, § 4½.

[5] A letter, signed by the president and secretary of the corporation Walter G. McCarty Company, stating that at a meeting of the board of directors thereof, previously held, authority was vested in the corporation to negotiate and make the loan and give the mortgage involved herein, and which letter was delivered to the plaintiff at the time the mortgage was executed, was admitted in evidence against the objection of the appellant for the purpose of showing authority in said corporation to borrow the money and to execute the mortgage as security for its repayment. The ruling is here assigned as prejudicial error. No prejudice could have been suffered by the defendants from the allowance of that evidence, even if it were deemed necessary to concede that it was incompetent for the purpose for which it was offered and received. Both the note and the mortgage bore the name and the seal of said corporation, and the genuineness of the signatures of the president and the secretary of the corporation was stipulated by counsel for defendants and appellant. Moreover, the fact that the defendant corporation obtained the loan secured by the mortgage to foreclose which this action was brought and used the money for its purposes is not questioned here.

[6] It is an elementary principle of the law that, where a mortgage purporting to have been given by a corporation to secure a debt or money borrowed by it is signed by the proper officers of such corporation under its corporate seal, the presumption is that the officers whose names are subscribed to the instrument and by whom for the corporation the mortgage purports to have been executed have been duly authorized to perform that act, or did not, in making the mortgage, transcend their authority as such officers, and the burden in such case is upon the adversary party to overcome that presumption by showing want of authority in such officers to execute the mortgage as that of the corporation. Schallard v. Eel River Nav. Co., 70 Cal. 144, 11 Pac. 590; Mills v. Boyle Mining Co., 132 Cal. 95, 64 Pac. 122; Potts Drug Co. v. Benedict, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609. No evidence was offered by the appellant to show that the mortgage and the note involved in this action were not executed by authority of the corporation, and therefore the presumptive evidence referred to stands as proof of the fact that the execution of said instruments was duly authorized by the corporation.

We have now considered all the points advanced in support of this appeal. There is to our minds no force to any of them.

The judgment appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 317

PEOPLE v. HANEY. (Cr. 883.)

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1920.)

1. Criminal law ⊜531(4) — Confession improperly admitted without permitting cross-examination as to voluntary character.

On a trial for homicide, it was error to permit witnesses to testify as to an alleged confession without first permitting defendant to cross-examine the witnesses as to the conditions under which the statement was made and its free and voluntary character.

2. Criminal law ⊜531(1)—Confession not admissible until voluntary character is shown.

Before defendant's confession can be offered in evidence it must be shown by the prosecution that it was voluntary and made without any previous inducement or by reason of any intimidation or threat.

3. Criminal law ⊜736(2) — Whether confession was voluntary is question for court.

Whether an alleged confession was voluntary and made without previous inducement or by reason of intimidation or threat is a preliminary question upon the admissibility of the testimony addressed to the court, and to be determined by it and not by the jury.

4. Criminal law ⊜1170½(5)—Exclusion of cross-examination before admission of confession rendered harmless by subsequent cross-examination.

The refusal to permit defendant to cross-examine witnesses as to the voluntary character of an alleged confession before admitting the confession does not justify a reversal, when the cross-examination of the witnesses, after the confession was introduced, fails to show that it was involuntary, or fails to impeach the previous testimony of the witnesses in that respect.

5. Criminal law ⊜516—False explanation of matter not a confession.

On a trial for murdering the driver of an automobile which defendant and another thereupon stole, defendant's statement when arrested that he purchased the automobile from certain parties is merely an untruthful statement and not a confession.

6. Criminal law ⊜531(3)—Evidence held to show voluntary character of confession to police officers.

On a trial for murder, evidence *held* to show that a confession to police officers while in custody was voluntary, though the officers admonished defendant that he had better tell the truth and that they expected him to tell the truth.

7. Criminal law ⊜519(9)—Confession to police officers who said they had evidence of guilt not necessarily involuntary.

That a confession was made to police officers who questioned defendant while he was under arrest, and that they told defendant that they had evidence of his guilt, did not necessarily render the confession involuntary.

8. Criminal law ⊜717 — Refusal to permit counsel to read judicial opinions proper.

On a trial for murder, in which the prosecution introduced an alleged confession made by defendant while in custody, the court properly refused to permit defendant's counsel, in his argument, to read from judicial opinions, discussing third degree methods of obtaining confessions.

9. Criminal law ⊜822(4) — Instruction as a whole not objectionable as telling jury evidence showed certain intent.

On a trial for homicide, an instruction that if the jury found from the evidence that defendant was at the place claimed with intent to commit robbery, and had an associate named C., and if they found at such time, "with the intention of committing this robbery, as the evidence goes to show that—if you find such to be the fact—that a blow was struck" by defendant or his associate, from which deceased died, it made no difference which party struck the blow, both being engaged in committing the robbery, if the jury so found, one was as guilty as the other, was not objectionable as telling the jury that the evidence showed an intention to commit robbery, as this impression was corrected by what followed.

10. Homicide ⊜305—Instruction as to liability if either defendant or his associate struck fatal blow not objectionable.

On a trial for homicide claimed to have been committed in committing robbery, an instruction that it made no difference whether defendant or his companion struck the blow, if the jury believed the claim of the prosecution that there was a common design on the part of the two, was not objectionable.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

William Haney was convicted of murder, and he appeals from the judgment and an order denying a new trial. Affirmed.

Joseph J. Bullock, of Redwood City, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. Defendant was charged with the murder of Albert Reidinger. He was tried, convicted of murder in the first degree, with the punishment fixed at life imprisonment. This appeal is from said judgment of conviction and the order denying defendant's motion for a new trial.

On the 29th of May, 1919, the defendant approached George Baldwin and offered to sell him a Ford automobile, which, he said, "was coming up from Los Angeles." Baldwin desired to purchase such a machine. The defendant and a young man by the name of Red Christiansen spent the rest of the day in the Mission district and downtown section of San Francisco looking for a Ford automobile. At the ferry building they found Reidinger driving the car they wanted.

They engaged him to take them to Daly City. When near Coppa's corner, in that vicinity, the defendant struck Reidinger over the head with a piston from a riveting machine—a short iron bar about three-fourths of an inch thick—fracturing his skull. They then drove to a lonely spot nearby, and laid the body in the bushes by the roadside, putting one of the cushions of the automobile under the head. Defendant and Christiansen then returned to San Francisco, leaving the automobile in front of Haney's home. The next morning he washed the blood out of the car, wiped off the dust, and delivered the automobile to Baldwin, who paid him for it. Reidinger died of his injuries some weeks later.

The actual commission of the crime by the defendant was established at the trial by the testimony of the police officers who arrested the defendant some days after the commission of the crime; they narrating, while on the witness stand, the details of a confession said to have been made to them by the defendant. A deputy sheriff of San Mateo county also told of a conversation he had with the defendant, in the county jail, shortly after he was taken there following his arrest and examination by the San Francisco police officers.

The defendant did not take the stand or produce any witnesses on his own behalf. No question is raised by the appellant as to the sufficiency of the evidence to support the verdict. The main points made on the appeal may be summed up under one heading, to wit: The validity of the trial court's ruling with respect to the admission in evidence of the confession made by the defendant to the police officers after his arrest. Two questions present themselves: (1) Did the trial court unduly limit the defendant in his cross-examination of the officers prior to the admission of the confession? (2) Was the confession free and voluntary?

The crime with which the defendant was charged was committed on the 30th day of May, 1919. He was arrested at his home at about 1 o'clock on the morning of June 13th, following, and then taken to the hall of justice in the city of San Francisco. Before he was placed in jail three police officers, Dullea, Lindecker, and Hughes, engaged him in conversation. It was then 2:30 o'clock in the morning; the defendant and the police officers were alone in the room. At that time the defendant merely told the officers that he purchased the automobile from parties by the name of Harris for the sum of $100 and sold it to Baldwin. On the morning of June 20th, the defendant was again questioned by Officers Dullea and Lindecker and by Sergeant McQuaid. During this conversation, which lasted from 9:30 o'clock until 11 o'clock, the defendant narrated all the details of the crime, making a complete confession of his part in its commission. As he proceeded, the sergeant wrote the confession in his notebook, and read it to the defendant when he had finished. Haney then signed his name to the following indorsement on the sergeant's notes:

"This statement is made free and voluntarily without any promise of reward, or any threats, and in the presence of Charles W. Dullea, Phil. Lindecker, Arthur McQuaid, at room 14 of the hall of justice, from 9:30 a. m. to 11 a. m., June 20, 1919."

[1-3] When the case came on for trial and the corpus delicti had been proved, the prosecution called Officers Dullea and Lindecker and Sergeant McQuaid as witnesses to the details of the two conversations. The first of these, Dullea, was asked concerning the interview with the defendant on the morning of his arrest. Before Dullea was allowed to answer, counsel demanded the right, and the court permitted him, to cross-examine him as to the voluntary character of the conversation. Counsel had not proceeded far, however, when the court directed the district attorney to proceed. This he did, over the objection of the defendant's counsel, and obtained the witness' version of the defendant's statement at that time. Officers Dullea and Lindecker and Sergeant McQuaid were each, in turn, examined as to the confession obtained from the defendant on the morning of June 20th. Upon their being asked to give the statement, the counsel for the defendant, in each instance, requested permission to cross-examine the witnesses as to the conditions under which the statement was made, and as to the free and voluntary nature of the conversation. The court very peremptorily denied the request and, as before, directed the district attorney to proceed.

It is urged by the appellant that the trial court was arbitrary in his rulings in this regard. We agree that this statement is correct. Before any confession of a defendant can be offered in evidence it must be shown by the prosecution that it was voluntary, and made without any previous inducement, or by reason of any intimidation or threat. This is a preliminary question upon the admissibility of the testimony addressed to the court, and to be determined by it, and not by the jury. Upon such preliminary inquiry the court should permit a cross-examination of the witness for the purpose of showing the particular circumstances under which the confession was made before permitting the confession itself to be given in evidence. People v. Miller, 135 Cal. 69, 71, 67 Pac. 12; People v. Loper, 159 Cal. 6, 17, 112 Pac. 720, Ann. Cas. 1912B, 1193. Unless that is done, the trial court is not in a position to rule understandingly on the question of the admission of the confession. Great injury may be done to a defendant by the admission in

evidence of a confession which further examination may disclose does not possess the necessary element of being free and voluntary. The only safe, and, we may add, the only fair, method to pursue in such cases is to allow a sufficient cross-examination to determine that question before the jury is permitted to hear the evidence tending to establish the confession.

[4] A refusal to permit such cross-examination will not, however, justify a reversal of the judgment, when it appears from the record that the defendant was not prejudiced thereby. If the cross-examination of the witness after the confession has been given in evidence fails to show that it was not given voluntarily, or fails to impeach his previous testimony in that respect, it is evident that the defendant was not prejudiced by being refused a prior cross-examination. People v. Miller, supra. The claim of appellant that the court unduly limited the cross-examination of the witnesses after the confession was given in evidence is not borne out by the record. His counsel examined the police officers minutely and at length as to the circumstances under which the confession was made. It only remains to carefully consider the contention that the result of such cross-examination was to show that the confession was not free and voluntary.

[5] We are satisfied that the first conversation had by the defendant with the police officers immediately following his arrest was only an untruthful statement, made in attempted explanation of his possession of the automobile sold to Baldwin. It did not amount to a confession at all, and need not be measured by the same rules governing our consideration of the circumstances surrounding the confession of June 20th.

[6, 7] The defendant had then been in jail for seven days. The cross-examination of the witnesses disclosed, in substance, the following facts: When he was brought into the consultation room, Sergeant McQuaid, who did most of the questioning, asked him if he desired to make a statement. One or the other of the officers told him that he did not have to talk unless he wanted to; that they had information about the case and knew he was guilty. He was told who "was with him on the job and how the job was done; that the truth would not hurt him and he better come out with it and tell it." He was further told by McQuaid that "if he told the truth, all right, and if he told anything else that I would write it down just what he told me;" furthermore, that they expected him to tell the truth. The defendant then stated, according to the testimony: "I might as well go ahead and tell you then. I did not want to bring Christiansen into it. I was going to save it until I got in court and tell it myself anyway." His complete confession followed.

It nowhere appears that the defendant was either frightened or unwilling to answer all questions put to him. No promises appear to have been held out to the defendant to induce him to make his statement. No coercion was used and the police officers emphatically denied the presence of any so-called "third degree" practices in securing the confession. All the officers testified that the defendant talked freely and voluntarily and that no threats or offers of reward were made. All the evidence indicates that the confession was freely and voluntarily made. A very searching cross-examination failed to confirm appellant's contention that such was not the case. The fact that the confession of the defendant was made to police officers, who questioned him while he was under arrest, does not necessarily render the confession involuntary. Neither does the fact that the police officers told him they had evidence of his guilt, which, they testified, they actually had, rob the confession of its voluntary character. People v. Siemsen, 153 Cal. 387, 395, 95 Pac. 863. See, also, People v. Walker, 140 Cal. 153, 156, 73 Pac. 831; People v. Warren, 12 Cal. App. 730, 731, 108 Pac. 725; 16 Corpus Juris, p. 728, § 1494.

The admonition of the officers to the defendant that "the truth would not hurt him, and he better come out and tell it; that they expected him to tell the truth," should not, in our opinion, under all the circumstances of this case so strongly establishing a free and voluntary statement, be construed as an inducement to a confession of guilt. People v. Heivner, 13 Cal. App. 768, 114 Pac. 411; People v. Luis, 158 Cal. 185, 190, 110 Pac. 580; State v. Grover, 96 Me. 363, 52 Atl. 757; 16 Corpus Juris, p. 721, § 1476. There is nothing in the instant case to indicate in the slightest degree that this admonition was in any way coupled with a threat, or was to be, or was, regarded as a promise. It held out no inducement of any kind.

We are fully satisfied, on the whole record, that the confession of the defendant obtained by the San Francisco police officers was freely and voluntarily given. The lower court therefore properly refused to strike it out, on the motion of defendant, following the cross-examination.

Subsequently to his arrest and examination by the San Francisco police, defendant was transferred to the San Mateo county jail. The morning after his arrival there he had a conversation with Deputy Sheriff McGovern, in which he admitted striking the blow which killed Reidinger. When McGovern was called to the stand the district attorney made no effort to show that the confession was free and voluntary before asking for the conversation. Defendant's counsel objected to the questions upon the ground that the requisite free and voluntary character of the statement had not been shown. The court merely

directed the witness to proceed. This was error, as we have already pointed out. However, on cross-examination of the witness, defendant's counsel developed the circumstances under which the conversation between the deputy sheriff and the defendant was had. While the proof was not along the usual lines of such questioning, it clearly established the free and voluntary character of the confession, and justified the action of the trial court in refusing to strike out the testimony on defendant's motion. The error just noted was therefore one without prejudice.

[8] During his address to the jury defendant's counsel sought to read from a volume of the California Reports, as a part of his argument, a public utterance made by Mr. Justice Sloss, when a member of the Supreme Court, relating to the "third degree" methods of obtaining confessions, and which statement Mr. Justice Melvin subsequently embodied in the decision in People v. Loper, 159 Cal. 18, 112 Pac. 720, Ann. Cas. 1912B, 1193. He was not permitted by the court to do so. Neither was he permitted, in the same connection, to read an excerpt from an opinion by Chief Justice White of the Supreme Court of the United States upon the same subject. The court's action in this regard was eminently proper. People v. Anderson, 44 Cal. 65; People v. Treadwell, 69 Cal. 226, 10 Pac. 502; People v. Forsythe, 65 Cal. 101, 3 Pac. 402.

[9, 10] One of the instructions given by the trial court reads as follows:

"If you find from this evidence, members of the jury, which has been presented here before you that this defendant was at the place claimed by the people and at the time claimed and was there with the intent to commit robbery, as I have defined it to you from the Penal Code, and you find that he had an associate by the name of Christiansen, and if you find at this time, with the intention of committing this robbery, *as the evidence goes to show*, if it does show that—if you find such to be the fact—that a blow was struck either by the defendant or by his associate Christiansen and from the result of that blow that the deceased died, then, members of the jury, I instruct you that it makes no difference as to which one of these parties struck that blow, either the defendant or the person they claim to be named as Christiansen, both being there engaged in this matter, in the committing of this alleged robbery, if you so find from the evidence, one is as guilty as the other. It makes no difference which one struck the blow, if you find there was one struck, if you believe the claim made by the people that there was a common design on the part of these two persons, this defendant and this man Christiansen."

Appellant claims that by the italicized phrase the court told the jury that "the evidence went to show" that the defendant and Christiansen had the intention of committing the crime of robbery. We think, however, that the court's prompt effort to correct the impression, which the objectionable phrase, standing alone, might reasonably carry with it, was fairly accomplished by the statement immediately following, "if it does show that—if you find such to be the fact"—and by the remainder of the instruction. We find nothing objectionable in the concluding sentence of the instruction.

The order and judgment are affirmed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

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BEAL v. SMITH et al. (Civ. 2727.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1920. Hearing Denied by Supreme Court, April 20, 1920.)

1. Corporations ⊂=210—In suit to cancel securities persons to whom issued and persons claiming interest are proper parties.

In a suit to cancel for fraudulent issue securities issued by a corporation to its promoters, the promoters and all other persons holding or claiming any interest in such securities are proper parties.

2. Corporations ⊂=30(2)—Unreasonable profits obtained by promoters recoverable, though they were the only stockholders.

Where the promoters of a corporation, organized with a view to bringing in other stockholders and placing its stocks and securities on the market for sale to the public, obtain unreasonable profits from the organization of the corporation, made possible only by concealment from those who have placed their trust in the promoters, such profits are deemed secret profits recoverable by the corporation or a stockholder on its behalf, though the promoters at the time were the only stockholders.

3. Corporations ⊂=30(2) — Promoters occupy fiduciary relation to corporation and stockholders.

A promoter of a corporation occupies a fiduciary relation to the corporation and its stockholders, and cannot profit to the detriment of the stockholders without a full and fair disclosure.

4. Limitation of actions ⊂=37(4), 100(7) — Suit to cancel fraudulent securities must be brought within three years from discovery.

An action to cancel securities fraudulently issued by a corporation to its promoters is an action of fraud, and must be brought within three years from the time it was committed or knowledge thereof obtained by the corporation.

5. Limitation of actions ⊂=100(7) — When knowledge of fraud imputed to corporation and stockholders.

Where all the directors and stockholders of a corporation either participated in or have direct knowledge of the withdrawal by promot-

ers of secret profits made at the time of the organization of the company, knowledge of the fraud is imputed to the company and to the stockholders as of the time of its commission.

6. Limitation of actions ⟸100(7)—Corporation dominated by those participating in fraud deemed under incapacity.

Where a corporation and its board of directors are wholly under the domination of those committing a fraud against it, it is deemed to be without legal capacity to know or act in relation to the fraud, and during such period of incapacity limitations do not run, at least against an innocent stockholder without knowledge of the fraud.

7. Limitation of actions ⟸100(7)—Stockholder may sue for secret profit within three years after discovering fraud.

Under Code Civ. Proc. § 338, subd. 4, limiting actions for fraud to three years from the discovery of the facts constituting the fraud, if any stockholder, becoming such before the statute has made a complete bar as to the corporation, is without knowledge of the facts respecting a fraud committed by the promoters, he may sue within three years from his discovery of the facts constituting the fraud, or facts putting a prudent man on inquiry.

8. Pleading ⟸8(21), 21—Allegations of discovery of fraud within three years insufficient, if entire complaint shows otherwise.

In a suit for fraud, it was not sufficient for plaintiff merely to allege that he did not discover the fraud before a certain time, and when from the whole complaint it appeared that discovery was actually made more than three years before the action was commenced, or that plaintiff was put on inquiry, equitable relief might be denied, notwithstanding his allegations that he first discovered the fraud within the statutory period.

9. Limitation of actions ⟸100(12)—Issuance of securities in exchange for stock held to put stockholders on inquiry.

The issuance by a corporation to its promoters of securities aggregating over $99,000,000 in exchange for stocks of unknown companies was sufficient to put a prudent man on inquiry, so as to start the running of limitations.

10. Compromise and settlement ⟸18(3) — Cannot be repudiated in part or without restoring benefits received.

Where an agreement between the U. company and others, whereby one of its promoters received back stocks in other companies delivered by him in exchange for the U. company's securities, received a release of his obligation to deliver other stocks, and returned part of the stocks and securities received from the U. company to a company whose stock it owned, constituted a compromise, the U. company could not both affirm and repudiate the agreement or repudiate the agreement without restoring the benefits received.

11. Pleading ⟸225(1) — Refusal to permit amendment not error.

There was no error in refusing leave to amend the complaint on the sustaining of demurrers nearly a year and a half after suit was commenced, as plaintiff had had ample opportunity to amend.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by C. N. Beal against F. M. Smith and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

Fabius M. Clarke and Tirey L. Ford, both of San Francisco, for appellant.

Morrison, Dunne & Brobeck, of San Francisco, McKee & Tasheira, of Oakland, R. P. Henshall, Luther Elkins, and Lilienthal, McKinstry & Raymond, all of San Francisco, for respondents.

NOURSE, J. On February 24, 1916, plaintiff, as a stockholder in the United Properties Company, commenced this action on behalf of the company and its stockholders to recover from certain defendants property alleged to belong to the corporation, to set aside alleged fraudulent conveyances of said properties, for the cancellation of securities alleged to have been fraudulently issued, for damages, and other incidental relief. The company was joined as a party defendant because it refused to institute the action after demand. The defendants demurred separately to the complaint upon both general and special grounds. The several demurrers were sustained without leave to amend, and thereupon judgment was entered in favor of the defendants.

It is alleged in the amended complaint that on the 25th day of October, 1910, the defendants Smith and Tevis, who owned or controlled more than three-fourths of the issued capital stock of the San Francisco, Oakland & San Jose Consolidated Railway, Oakland Traction Company, Bay Cities Water Company, and other corporations designated in the complaint as "going companies," entered into an agreement for the incorporation of the United Properties Company upon a capitalization of $200,000,000 to take over and control their interests in the said "going companies." In December, 1910, the United Properties Company was incorporated by the defendants Smith, Tevis, and Hanford; the latter, it is alleged, having been brought in as a partner of Tevis. The organization of the company was controlled by these three, who continued to designate and control the directors and officers during the time when the acts complained of were done. Immediately after the organization of the company Tevis and Hanford turned over to it all the stocks of the companies owned or controlled by them which were agreed to be delivered under the agreement of October 25, 1910, and received therefor securities issued by the United Properties Company on the basis of

exchange provided in said agreement. Smith also received his full allotment of securities of the United Properties Company on the same basis of exchange, but failed to deliver a considerable portion of the securities theretofore held by him and included in the promotion agreement and which it was said were covered by pledges as security for money borrowed by him.

In addition to the securities in these "going companies" which were turned over by the individual defendants, the agreement of October, 1910, called for the transfer of securities of the United Properties Company to Smith and Tevis in exchange for the stocks of four other corporations, which are designated in the complaint and referred to throughout the briefs as the "fraudulent companies"; the reason for this being that they had not been incorporated at the time of the agreement and that, though subsequently incorporated, they never owned any property or had any assets of any nature. However, for the purpose of carrying out the agreement of October, 1910, four companies were organized under the names of Consolidated California Land Company, Sacramento Short Line, San Jose Short Line, and Santa Clara Land & Water Company. The San Jose Short Line was incorporated for $8,000,000; the other three for $10,000,000 each. The entire capital stock of all four corporations was issued to defendants Smith, Tevis, and Hanford. Then another corporation, designated the Pacific Terminal Company, was incorporated for $5,000,000. Its entire capital stock was likewise issued to defendants Smith, Tevis, and Hanford. Then these defendants turned the entire capital stock of these five companies, amounting to $43,000,000 on paper, into the treasury of the United Properties Company and received in payment therefor stocks of that company amounting to over $61,000,000 and convertible debentures amounting to over $31,000,000, by reason of which it is alleged the three defendants named fraudulently received secret profits from the United Properties Company while acting in the capacity of promoters thereof, and that these secret profits and fraudulent acts, as well as the fact that none of the five fraudulent companies had any assets, were concealed from all subsequent stockholders thereof until the same was discovered by plaintiff some time in the year 1913.

It is then alleged that immediately following the organization of the United Properties Company the three defendants named had issued to themselves $6,000,000 of bond certificates of that company in consideration for an option which it was pretended the defendant Tevis held for the purchase of certain other stocks or property of the "going companies," while as a matter of fact no such option existed. It is therefore alleged that this issue of $6,000,000 of certificates was a fraud upon the company, being wholly without consideration to the company, and, like the exchange for the stocks in the "fraudulent companies," constituted secret profits abstracted by the promoters and concealed from the subsequent stockholders. The stocks and securities comprising this total of secret profits, amounting to over $99,000,000, plaintiff prays to be delivered up to the United Properties Company and canceled.

Upon the theory that the defendants Smith, Tevis, and Hanford had entered into a general conspiracy to defraud the United Properties Company and its stockholders, it is alleged that the three named defendants, while still having full control over the affairs of the company, permitted the defendant Smith to delay the delivery of a portion of the certificates of stocks in the "going companies" which he had agreed to transfer to the United Properties Company, and for which he had been paid by that company. In May, 1913, defendant Smith, it is alleged, transferred all his interest in said pledged stocks to the Mercantile Trust Company, as trustee for the benefit of himself, his family, and his creditors. And it is alleged that the Mercantile Trust Company received said stocks, not as an innocent bona fide purchaser, but as a voluntary grantee with notice. Then, it is alleged, these stocks, though pledged, were exchanged by Smith for shares of the San Francisco-Oakland Terminal Railways, a new corporation organized for the consolidation of three of the "going companies."

The Oakland Railways was incorporated by the defendants Smith, Tevis, and Hanford for the purpose of holding and owning corporation stocks and securities acquired by the United Properties Company, which, in turn, owned all the stock in the Oakland Railways. On May 5, 1913, defendants Smith, Tevis, and Hanford conveyed all their stock in the United Properties Company to five trustees, who were empowered to control the board of directors of said company and all its constituent corporations. The three defendants named, having full control of the United Properties Company, caused it to join in this conveyance and consent to its terms. Thereafter and on January 16, 1914, these trustees, acting for the United Properties Company and the respective boards of directors of the constituent companies named by said trustees, together with the Realty Syndicate, the Mercantile Trust Company, and the trustees of the five fraudulent companies heretofore mentioned—which had, however, been dissolved in the meantime—executed an agreement, the principal features of which are as follows:

Defendant Smith took back all of the stocks theretofore delivered by him to the United Properties Company and received a release of his obligation to deliver the remainder of the stocks of the "going companies" which were held in pledge at the time of the agree-

ment of October, 1910. He delivered to the Oakland Railways all the stocks and securities issued to him by the United Properties Company except the bonding certificates received by him for the fraudulent option. In addition to taking back all the stocks which he had delivered to the United Properties Company, he took other securities owned by this company of the par value of something over $4,000,000. As a part of the same agreement he conveyed to the Hanford Investment Company for the benefit of Tevis and Hanford, his portion of the $6,000,000 bond certificates which he had received for the fraudulent option. By this transaction the stocks and securities of the United Properties Company which Smith had received under the contract of October, 1910, were left outstanding in the hands of the Oakland Railways, and the United Properties Company received no consideration for the transfer of its assets. It is then alleged that through these transactions the defendants Smith, Tevis, and Hanford took from the United Properties Company all its assets except the securities of the Bay Cities Water Company, the United Light & Power Company, and the Sierra Water Supply Company, and that they left the interest of the United Properties Company in these three concerns incumbered to the extent of over $11,000,000, in addition to the $6,000,000 bond certificates which were issued to the three defendants on account of the said fraudulent option, making a total of over $17,000,000, which rendered the United Properties Company insolvent and destroyed all value of the shares of the stock and outstanding securities.

Through the agreement of January 16, 1914, it is alleged, a portion of the assets of the United Properties Company then held by the Oakland Railways, consisting of stocks in the "going companies" which Smith had delivered under the agreement of October, 1910, was conveyed to the Realty Syndicate, which in turn delivered to the Oakland Railways other securities of the United Properties Company which had originally been issued to defendant Smith. It is then alleged that in February, 1914, the Realty Syndicate conveyed all the property so acquired by it to the Realty Syndicate Company, which shortly thereafter received a deed from the Realty Syndicate for all property of the United Properties Company received by the Realty Syndicate through that agreement.

The Anglo-California Trust Company is joined as a party defendant upon the allegation that it makes some claim against some or all the properties which are involved in the suit.

The prayer of the complaint is that the defendants be required to deliver to the United Properties Company the stock which Smith agreed and failed to deliver; for the return to the United Properties Company of the property conveyed away from it on January 16, 1914; that the Mercantile Trust Company, in addition thereto, be required to surrender to the United Properties Company the stock held by it in trust; for the surrender and cancellation of the $99,500,928.50 of fraudulently issued stocks, bond certificates, and convertible debentures; and for damages against certain of the defendants in the sum of $5,000,000.

[1-3] The complaint contains a statement of facts relating to the secret profits taken by the defendants Smith, Tevis, and Hanford at the time of the organization of the company which, if properly pleaded, would constitute a good cause of action for the cancellation of the securities so alleged to have been fraudulently issued. In such an action these defendants and all other persons who hold or claim any interest in the securities so issued would be proper parties. It is argued on behalf of respondents that, inasmuch as Smith, Tevis, and Hanford were the only stockholders of the United Properties Company at the time the issue of these securities was made, they cannot be treated as secret profits. In other words, the argument is that, inasmuch as those who participated in the transactions complained of alone constituted the corporation at the time, the corporation itself must be deemed to have assented to the transactions, and that a subsequent purchaser of stock cannot sue on behalf of the corporation to recover from the incorporators the profits so made. In support of the argument Turner v. Markham, 155 Cal. 562, 102 Pac. 272, Sargent v. Palace Café Co., 175 Cal. 737, 167 Pac. 146, Old Dominion, etc., Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025, are cited as authority. It would serve no purpose to analyze the cases cited. It is sufficient to say that they are not applicable to a case such as this, where the parties participating in the fraud are promoters of a corporation organized for the purpose of bringing in other stockholders and of placing its stocks and securities upon the market for sale to the public. A promoter occupies a fiduciary relation to the corporation and to its stockholders, and persons acting in that capacity cannot profit to the detriment of their stockholders without a full and fair disclosure. Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 194, 135 Pac. 496. Thus, when persons associate themselves together for the purpose of promoting the organization of a corporation whose stock and securities are to be placed upon the market for sale to the public, any unreasonable profits which such persons derive from the organization of the corporation, made possible only by concealment from those who have placed their trust in the promoters, are deemed secret profits, which the corporation or a stockholder on its behalf may sue to recover. Bigelow v. Old Dominion, etc., Co.,

74 N. J. Eq. 457, 496, 71 Atl. 153; Old Dominion, etc., Co. v. Bigelow, 203 Mass. 159, 89 N. E. 204, 40 L. R. A. (N. S.) 314; Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017; Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762. There can be no doubt that the rule pronounced in the Old Dominion Case by the United States Supreme Court is not followed in this state, where the profits have been procured by promoters of a corporation organized for the purpose of bringing in future stockholders and offering its stock and securities for sale to the public, and the new stockholders have become such through faith in the promoters. The rule, as to profits procured under such circumstances is clearly stated in California-Calaveras Mining Co. v. Walls, 170 Cal. 285, 298, 149 Pac. 595, 600, where the Supreme Court say:

"When in the promotion of a corporation to take over property for the benefit of the corporation it is contemplated by those organizing it that shares of its stock shall be offered for sale in order that others may become future stockholders in the corporation, such promoters in dealing with the corporation occupy a fiduciary relation to it for the benefit of such future stockholders, and the interests of such future stockholders are entitled to protection from concealed benefits or profits acquired by the promoters in their transactions with the corporation and to a full disclosure of the true facts of the purchase price of the property turned over to the corporation, and any advantage or benefits accruing to the promoters by failure to do so or concealment constitutes a fraud on the corporation."

Plaintiff became a stockholder in the United Properties Company through the transfer to him of stock of that company from its treasury without notice of the fraud. He is therefore a proper party plaintiff in this kind of an action.

[4-7] But his action is plainly one of fraud, and relief from fraud of this nature must be sought within three years from the time it was committed or knowledge thereof had by the corporation, which is, in fact, the real party in interest. Where all the directors and stockholders of the corporation either participated in or had direct knowledge of the withdrawal of the secret profits made at the time of the organization of the company, knowledge of the fraud is imputed to the company and to the stockholders as of the time of its commission. But where, as alleged here, the corporation and its board of directors were wholly under the domination of those who committed the original fraud, the corporation is deemed to be in the same position as an incompetent person or a minor without legal capacity either to know or to act in relation to the fraud so committed, and during such period of incapacity the statute of limitations does not run, at least against an innocent stockholder who was without knowledge of the fraud. Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312. Such a stockholder suing on behalf of the corporation is in the position of a guardian ad litem. The time for beginning the action is governed by the provisions of section 338, subd. 4, Code of Civil Procedure, which limits it to three years from the discovery of the facts constituting the fraud. Where the corporation and all the stockholders have knowledge of the fraud, or of facts sufficient to put a prudent man on inquiry, the action is barred if not commenced within three years from the discovery of such facts. When any one stockholder, at least if he became a stockholder before the statute had made a complete bar as to the entire corporation, is without knowledge of such facts, he may commence such an action within three years from his discovery. The word "discovery" is here used as embracing, not only knowledge of the facts constituting the fraud, but knowledge of such facts as would put a prudent man on inquiry.

[8] Without detailing the various events upon which plaintiff bases his discovery of the frauds, it is sufficient to say that plaintiff became a stockholder in the United Properties Company in April, 1911, through the exchange of stocks of certain of the subsidiary companies which, it is alleged, were controlled by Hanford and turned into the merger in February, 1911, as a part of the general conspiracy to defraud. From that time until March 4, 1913, he dealt with these "conspirators" without protest, though in October, 1912, he had become suspicious and started a personal investigation of the books and business transactions of the company. On March 4, 1913, he filed an elaborate protest with the company, complaining of Smith's failure to meet the terms of the premerger agreement and demanding that the company commence proceedings to enforce that agreement. Therein he displayed a very intimate knowledge of the transactions which he now alleges were fraudulent. Nevertheless, he was content to participate in these frauds so long as they seemed beneficial to him. This action was commenced February 24, 1916. Thus, if the discovery had been made eight days before the protest of March 4, 1913, had been filed, the action would have been barred. It is not sufficient for a party merely to allege that he did not make the discovery before a certain time. The facts upon which the fraud is based must be alleged, and when from the whole complaint it appears that discovery was actually made more than three years before the action was commenced, or that plaintiff had knowledge of sufficient facts to put a prudent man on inquiry, the trial court may properly deny equitable relief, notwithstanding plaintiff's allegations that he did not discover the fraud until within the statutory period. Lady Washington Cons. Co. v. Wood, 113 Cal. 482, 486, 45 Pac. 809; Del Campo v.

Camarillo, 154 Cal. 647, 657, 98 Pac. 1049.

[9] Now, outside the general conspiracy to defraud, the main overt act of fraud is alleged to be the taking of over $99,000,000 in secret profits in the latter part of 1910. The fraud of this transaction consists mainly in the fact that these securities were issued in exchange for dummy and worthless stocks. But any prudent man willing to expose the fraud could have made the discovery with little difficulty, and the very fact that such a large issue of securities was made in exchange for stock of unknown companies was sufficient to put a prudent man on inquiry. For these reasons the complaint fails to show the diligence essential to entitle plaintiff to relief in a court of equity.

[10] Plaintiff also seeks relief from the alleged dissipation of the assets of the company resulting from the agreement of January 16, 1914. Generally, the allegations on this issue are that Smith took from the treasury of the United Properties Company all the stocks which he had theretofore delivered to it or their equivalent in the consolidated company, the San Francisco-Oakland Terminal Railways, and received a release of his obligation to deliver the remainder of the stocks agreed by him to be delivered under the promotion contract of October, 1910. In return it is alleged he conveyed to the Oakland Railways, a holding company merely, a portion of the stocks and securities which he had previously received from the United Properties Company, the greater part of which were fraudulently issued to him in payment for the stocks of the five fraudulent companies. As a part of the same transaction it is alleged Smith conveyed to the Hanford Investment Company, for the benefit of Tevis and Hanford, $3,600,000 of bond certificates of the United Properties Company. The theory of this portion of the complaint is that the United Properties Company was thus prevailed upon to dispose of a large portion of its valuable assets, for which it received no compensation other than the transfer of stocks and securities of the United Properties Company to the Oakland Railways, all the stock of which was held by the former company. But the exhibits clearly indicate that the agreement of January 16, 1914, was a compromise between the United Properties Company, an insolvent concern, with some of its creditors. The company joined in the agreement and apparently accepted the benefits. No protest was made by any other creditor, and plaintiff does not sue in that capacity. The company, of course, cannot both affirm and repudiate that agreement. If it affirms it, plaintiff has no cause of action. If it repudiates it, it must restore the benefits. But this has not been and, apparently, cannot be done.

[11] Other points do not require consideration. The complaint appearing in the transcript is designated the amended and substituted complaint. The demurrers were sustained in August, 1917, nearly a year and a half after the suit was commenced. Hence plaintiff had had ample opportunity to amend if so advised. There was no error in refusing leave to amend under the circumstances.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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BEAL v. UNITED PROPERTIES CO. OF CALIFORNIA et al. (Civ. 2728.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1920. Hearing Denied by Supreme Court April 20, 1920.)

1. Corporations ⟸482(1) — Equitable lien arising from failure to give mortgage bonds cannot be foreclosed in absence of default or insolvency.

Assuming that a corporation's oral agreement to issue first mortgage bonds, secured by a deed of trust on all of its property, in exchange for the bonds of another company, created an equitable lien on its property, the lien could not be foreclosed, where it was not shown that there had been any default in the payment of interest, or that the company was insolvent or unable to pay interest.

2. Specific performance ⟸10(1)—Cannot be granted in part as to agreement to execute mortgage and issue bonds.

Where a corporation agreed to issue to plaintiff first mortgage bonds, secured by a deed of trust covering all of its property, and as further security to deposit the personal property with a trustee, the court could not decree enforcement of that portion only of the contract favorable to plaintiff, and unless the contract as a whole, or at least its pertinent features, could be enforced, plaintiff was not entitled to specific performance.

3. Specific performance ⟸114(2)—Agreement to execute mortgage and issue bonds unenforceable for uncertainty.

Under Civ. Code, § 3390, subd. 6, prohibiting the specific performance of uncertain agreements, an agreement by a corporation to issue first mortgage bonds, secured by a deed of trust on all of its property, and deposit all securities of other corporations with the trustee, could not be enforced, where the complaint did not allege who the trustee was to be, or what duties he was to perform, or how the pledged property was to be sold in event of default, or what remedy the bondholders were to have in event of default of interest.

4. Specific performance ⟸114(2)—Complaint seeking enforcement of agreement respecting property must describe it.

A complaint seeking specific performance of a contract for the conveying, mortgaging, or leasing of property should specifically define the property agreed to be covered, or state suf-

ficient facts to establish a basis upon which such description may be made certain by extraneous evidence.

5. Specific performance ⇐114(1)—Complaint held too uncertain as to property to be subject to proposed deed of trust.

A complaint seeking specific performance of an agreement to issue corporate bonds, secured by a deed of trust covering all of the corporation's real and personal property, was insufficient, where it did not show that the corporation owned any real property, and, though showing ownership of certain corporate securities, showed that they had been converted into shares of stock without showing that the stock became the property of the company making the agreement, and where it further appeared that all of such securities would mature long prior to the maturity of the deed of trust.

6. Specific performance ⇐126(2)—Agreement to give bonds not enforceable by requiring issuance of securities payable forthwith.

In a suit for specific performance of a contract by a corporation to issue bonds payable in 50 years, secured by a deed of trust, the court cannot require the issuance of evidences of indebtedness payable forthwith and enforceable through foreclosure of a lien.

7. Torts ⇐12—Fraudulently inducing corporation to break contract supports action.

Acts of individuals interested in a corporation in inducing and enabling it by fraud to fail to perform an agreement to issue bonds to plaintiff, secured by a deed of trust, would, if properly pleaded, support a cause of action at law for fraud.

8. Action ⇐46—Action for fraud cannot be joined with action for specific performance or to foreclose lien.

An action at law for fraud in inducing and enabling a corporation to fail to perform an agreement could not be joined in a suit in equity for specific performance of the contract, or to foreclose an equitable lien.

9. Action ⇐50(9)—Representative action for corporation and action in plaintiff's own behalf cannot be joined.

Where a corporation agreed to issue bonds to plaintiff, secured by a deed of trust, an action by plaintiff in behalf of the corporation to compel the return to it of assets improperly distributed or dissipated, and which should be included in the deed of trust, cannot be joined with an action by plaintiff in his own behalf, wherein he is seeking personal relief.

10. Corporations ⇐477(1)—Agreement to issue secured bonds may be sued on as agreement to pay money and enforced by lien.

Where a corporation failed to perform its agreement to issue bonds to plaintiff, secured by a deed of trust on all of its property, plaintiff could have treated the agreement as a direct obligation to pay money, sued on it as such, and had a lien to aid in enforcing the judgment.

11. Limitation of actions ⇐167(1)—Lien under agreement to give secured bonds barred in two years.

Under Civ. Code, § 2911, providing that a lien is extinguished by the lapse of time barring an action on the principal obligation, plaintiff's right to an equitable lien growing out of an oral contract to issue corporate bonds, secured by a deed of trust, is barred in the two years during which an action on the oral contract must have been brought.

12. Limitation of actions ⇐179(2) — Complaint held insufficient to show reliance on representations and prevent running of statute.

In a suit commenced in February, 1916, on an oral agreement made in March, 1911, to issue corporate bonds, secured by a deed of trust, in exchange for bonds of another corporation, complaint *held* insufficient to show that plaintiff after June, 1913, relied on assurances that such bonds would be delivered, so as to prevent the running of limitations.

13. Limitation of actions ⇐172 — Party on whose property lien is asserted may plead statute.

In a suit to enforce an oral agreement by a corporation to issue bonds, secured by a deed of trust on all of its property, by establishing a lien on property, which should have been included in the deed of trust, the present owners of such property could plead the statute of limitations applicable to oral agreements, though the corporation failed to plead it.

14. Limitation of actions ⇐182(2) — Court held authorized to raise bar on its own motion.

In a suit to enforce a corporation's agreement to issue bonds, secured by a deed of trust on all of its property, by establishing a lien on property in the hands of other persons, the circumstances *held* to authorize a court of equity, on its own motion, to raise the bar resulting from plaintiff's acquiescence in the actions of the parties and long delay in instituting the proceedings until the time to sue had expired.

15. Pleading ⇐225(2)—Court held not to have abused discretion in denying leave to amend on sustaining demurrers.

Where the original complaint had been amended several times, the last amended complaint being filed more than a year after the filing of the original complaint, and the only cause of action stated was barred by limitations and laches, the court did not abuse its discretion in denying leave to amend on sustaining demurrers.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by C. N. Beal against the United Properties Company of California and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

Fabius M. Clarke and Tirey L. Ford, both of San Francisco, for appellant.

Morrison, Dunne & Brobeck, of San Francisco, McKee & Tasheira, of Oakland, R. P. Henshall, Luther Elkins, and Lilienthal, McKinstry & Raymond, all of San Francisco, for respondents.

NOURSE, J. This action, like that of Beal v. Smith et al., No. 2727, 189 Pac. 341, this day determined by this court, involves the transactions growing out of the organization of the United Properties Company in December, 1910. The demurrers of the several defendants to the amended complaint were all sustained without leave to amend, and judgment entered in their favor. The appeal is taken from this judgment, and the parties have stipulated that the briefs filed in both actions may be considered on each appeal.

The amended complaint alleges that on the 6th day of March, 1911, plaintiff was the owner of first mortgage bonds of the Sierra Water Supply Company and of a claim against such company of the total value of $150,000; that on said day the United Properties Company agreed to deliver to him therefor $150,000 in its first mortgage and collateral trust 5 per cent. 50-year sinking fund gold bonds, to be secured by a deed of trust to be thereafter executed covering all the real and personal property of the United Properties Company; that between the 6th and 20th days of March, 1911, in compliance with said agreement, plaintiff assigned and delivered to the United Properties Company his bonds and the claim against the Sierra Water Supply Company; that in April, 1911, the United Properties Company issued to him bond certificates, the material features of which are that the company on the surrender of the certificates promised to issue to the bearer first mortgage and collateral trust 5 per cent. 50-year sinking fund gold bonds, "to be issued under and secured by the deed of trust in preparation, dated January 1, 1911, made by said the United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified, issued, and ready for delivery." Such certificates called for the issue to plaintiff of 150 of said bonds of the par value of $150,000. It is alleged that neither the bonds nor the deed of trust were ever executed, and that from time to time covering a period at one time alleged to have ended on the 25th day of January, 1913, and at another time alleged to have ended in the month of March, 1914, the United Properties Company represented to plaintiff that said bonds and said deed of trust were in course of preparation and that they would soon be executed and the bonds delivered to him on the surrender of his bond certificates. In pursuance of a scheme and design to defraud the plaintiff and to cause him to rely upon said promises, so it is alleged, the United Properties Company paid to him on the 1st days of July, 1911, January, 1912, and July, 1912, the amounts of money that he would have been entitled to receive on said days as interest on the bonds if the same had been executed and delivered to him. Also that plaintiff fully believed and relied upon these promises until May, 1914, although in another portion of the complaint it is alleged that long prior to that time plaintiff, having made a personal investigation of the affairs of the company, had discovered a gigantic conspiracy on the part of the promoters of the concern to defraud the company and the holders of its stocks and securities, other than the said promoters. It is then alleged that plaintiff had not received any of said bonds and had not received or been paid any part of the said $150,000, and that the same is still due, owing, and unpaid. The remainder of the complaint is a long story of a conspiracy on the part of the promoters of the corporation, Smith, Tevis, and Hanford, alleging that the organization of the company was conceived in fraud and that all the transactions of the promoters and those acting under them were a fraud upon the corporation and the other holders of its stock and securities. These allegations are all made upon information and belief, with some feeble attempt to state the sources of the information and the grounds of the belief.

Treating the appeal in the same manner as would be done by a trial court in the consideration of the demurrers, as the grounds for the order sustaining them are not stated, it is first necessary to determine what are the equities of plaintiff's case.

It is strenuousy argued in the briefs of the respondents that the complaint attempts to state several cases of action which it is claimed are improperly joined. Thus it is argued that the allegations of the complaint tend to support three separate causes of action personal to plaintiff and one on behalf of the United Properties Company, as follows: (1) A cause of action to declare and foreclose an equitable lien upon property formerly owned by the United Properties Company; (2) a cause of action for the specific performance of an oral contract; (3) a cause of action for damages for fraud growing out of the failure to perform the same contract; and (4) a cause of action to recover on behalf of the corporation assets of the corporation which are alleged to have been illegally disposed of. It is stated in the complaint that the suit was instituted in behalf of all other lien claimants similarly situated with plaintiff who chose to join with plaintiff, but as the record does not disclose that any others joined, this matter may be dismissed from consideration. It becomes necessary first to determine whether the allegations of the complaint are sufficient to support any cause of action.

[1] 1. Taking the first-mentioned cause of action—that to declare and foreclose an equitable lien—in so far as the foreclosure is concerned, the complaint is lacking in one of the essential features of such an action, which is an allegation of default. This

complaint alleges an oral agreement to deliver to the plaintiff 150 first mortgage bonds of the par value of $1,000 each, dated January 1, 1911, to be "due and payable 50 years after the date thereof." The bond certificates issued to plaintiff in April, 1911, and which he argues are written evidences of its oral agreement, also provide for the issuance of 50-year bonds, secured by a deed of trust which was to be dated January 1, 1911. Though it is alleged that three semiannual payments of interest were received by the plaintiff, it is not alleged that this was all the interest that he received, or, in fact, that all interest payments were not made to him semiannually as called for by the original agreement. Furthermore, it is not alleged that the corporation had defaulted in any of the interest payments, or that the company was insolvent or unable to pay the interest. Thus, if plaintiff is entitled to an equitable lien in accordance with his agreement of March, 1911, he cannot foreclose on such lien unless there has been a default. There are no allegations in the complaint from which it could be inferred that such default has occurred.

[2, 3] In seeking to subject the personal property to a lien plaintiff is, in effect, asking for the specific performance of his contract of 1911. This contract, it is alleged, called for the delivery to plaintiff of 150 of its $1,000 first mortgages 50-year bonds, secured by a deed of trust "in due and legal form" covering all the real and personal property then owned or thereafter acquired by the United Properties Company, the personal property to be deposited with some trustee. Thus the complaint attempts to set up an indivisible contract—one calling for the issuance of bonds and the execution of a deed of trust with the delivery of the trust property into the hands of trustees. The court cannot decree that that portion only of such contract which is favorable to plaintiff may be enforced. Unless the contract as a whole, or at least its pertinent features, can be enforced, plaintiff is not entitled to specific performance. Section 3390, subd. 6, of the Civil Code, prohibits the specific enforcement of "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." All that is alleged as to the contents of the proposed deed of trust is " that said bonds should be secured by a deed of trust in due and legal form, which deed of trust should constitute a first mortgage and lien upon all real and personal property then owned or which might thereafter be acquired by said United Properties Company," and that all stocks, bonds, and securities of other corporations which said United Properties Company then owned or might thereafter acquire, in addition to being covered by said deed of trust, should be deposited with the trustee to be appointed in said deed of trust. But it is not alleged who this trustee should be or what duties it was to perform, how the pledged property should be sold in event of default, or what remedy the bondholders should have in event of default of interest. This brief statement of the contents of the proposed deed of trust would not justify any court in decreeing the execution of the deed. The objection here is, not that the complaint is uncertain in respect to these allegations, but that it fails to state sufficient facts because it fails to set forth the terms of the contract which is sought to be enforced. "A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity." Pomeroy's Equitable Remedies (4th Ed.) § 764; Los Angeles, etc., Co-Operative Ass'n v. Phillips, 56 Cal. 539, 546, 547; Klein v. Markarian, 175 Cal. 37, 165 Pac. 3; Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003. "The requirement of certainty as to contracts, in order that they may be specifically enforced, extends, not only to the subject-matter and purpose of the contract, but to the parties, consideration, and even the place and time of performance, where these are essential." 25 R. C. L. p. 219.

[4, 5] Under this rule it is essential that a complaint seeking specific performance of a contract for the conveyancing, mortgaging, or leasing of property shall specifically define the property agreed to be covered, or at least that it shall state sufficient facts to establish the basis upon which such description may be made certain by extraneous evidence. Here, although it is claimed that the bonds were to be secured by a deed of trust covering both real and personal property, there is no allegation that the United Properties Company ever owned any real property. The complaint does allege on information and belief that at the time of the agreement the United Properties Company owned 75 per cent. of the total issued shares of the capital stock of the Oakland Traction Company and the San Francisco, Oakland & San Jose Consolidated Railway, respectively, and the total issued capital stock of the East Shore & Suburban Railway Company, and that thereafter and before August 12, 1912, it became the owner of the following securities and promissory notes: (a) General consolidated mortgage 5 per cent. sinking fund 28-year gold bonds of the Oakland Traction Company; (b) general consolidated mortgage 5 per cent. sinking fund 30-year gold bonds of the San Francisco, Oakland & San Jose Consolidated Railway; (c) promissory note for $2,500,000, due June 12, 1913; and (d) promissory note for $128,814, the date of maturity not given. It is then alleged:

"That afterward, by the consolidation of said Oakland Traction Company and said San Francisco, Oakland & San Jose Consolidated Rail-

way and said East Shore & Suburban Railway Company into a corporation hereinafter described, named the San Francisco, Oakland Terminal Railways, the aforesaid capital stocks of said Oakland Traction Company and of said San Francisco, Oakland & San Jose Consolidated Railway and East Shore & Suburban Railway Company, were exchanged for and converted into shares of stock of said consolidated company."

It does not appear what became of the corporations which were thus consolidated or the stocks of said corporations upon which plaintiff claims he was entitled to a lien, nor does it appear that the stocks of the consolidated company, the San Francisco-Oakland Terminal Railways, became the property of the United Properties Company. As to the securities which it is alleged were acquired by the United Properties Company prior to August 12, 1912, those of the Oakland Traction Company matured in 1935, those of the San Francisco-Oakland & San Jose Consolidated Railway matured in 1938, and the promissory note for $2,500,000 matured June 12, 1913. Notwithstanding this, plaintiff claims that all these securities were to be pledged as security for bonds of the United Properties Company, payable January 1, 1961. It is manifest that if the oral agreement contemplated the execution of a deed of trust covering these securities, some provision would have to be made therein covering the loss sustained by the maturity of these securities.

[6] If plaintiff is to have judgment for specific performance of the oral contract, it is necessary that the entire contract of the parties be enforced. Thus the court must decree that the defendant United Properties Company should not only issue to plaintiff its 150 first mortgage bonds, secured by deed of trust covering the real and personal property, but that it should also execute the deed of trust to secure the bonds so issued. This, apparently, is the view taken by appellant, as he states that "plaintiff sues in a representative capacity, that is, for himself and all other bondholders, to establish an equitable lien upon certain property to secure the payment of all the lawful bonds." But, as has been pointed out, the allegations of the complaint covering the terms of the proposed deed of trust are so indefinite and uncertain that a court of equity could not possibly enforce its execution. As all the allegations of the complaint tend to support a contract calling for the issuance to plaintiff of 50-year bonds secured by a deed of trust, naturally the court cannot make a new and separate contract with the parties whereby the plaintiff may receive evidences of indebtedness which would be payable forthwith and enforceable through the foreclosure of a lien upon the personal property in direct opposition to the rights of the parties as they would have been fixed under the terms of the proposed deed of trust. For these reasons the complaint fails to state a cause of action for the declaration of a lien upon the personal property described in the complaint.

2. What has heretofore been said covers the allegations which tend to support the cause of action for the specific performance of the oral contract of March, 1911. It is unnecessary to consider the effect of the writing contained in the bond certificates issued to plaintiff in April, 1911, because plaintiff does not sue upon the certificates, but bases his right of action upon the oral agreement. It should be said, however, that the language of the writing supports the argument that the conversations alleged to have taken place in March, 1911, did not constitute a contract to subject any particular property to a lien or to execute any particular form of a deed of trust, and that such conversations were merely the basis of a contract to be thereafter made and not a contract in themselves. In this writing it was agreed that the bonds which were to be issued to plaintiff would be secured by "the deed of trust in preparation." It seems almost incredible that any man secured as plaintiff is alleged to have been, would part with his property merely upon the promise of some one connected with the corporation that its equivalent would be delivered to him in exchange, and then, when written evidence of the oral promise is made, would fail to insist that such written evidence should contain the most essential feature of the oral agreement —that is, that the written evidences should recite that the bonds to be delivered to him by the corporation would constitute an enforceable lien upon all the property of the corporation. But appellant says: "We are not seeking a specific performance of this agreement, but an equitable lien, and the enforcement thereof."

[7, 8] 3. Plaintiff alleges that by reason of the various acts of which he complains he has been damaged in the sum of $300,000, and prays judgment for that amount. The theory upon which such damages are sought is that certain defendants by fraud induced and enabled the United Properties Company to fail to perform its agreement to deliver to plaintiff his bonds. The allegations in this connection would, if properly pleaded, support a cause of action at law for fraud. No attempt was made to rescind or disaffirm the contract by which plaintiff parted with his property; but, on the other hand, the contract is fully affirmed, and plaintiff seeks damages for its nonperformance. Assuming that sufficient facts are alleged to sustain such a cause of action, it is evident that an action at law for fraud, growing out of the breach or nonperformance of a contract cannot be joined in a suit in equity for specific performance of the contract or to foreclose an equitable lien. This is especially true where

plaintiff has first availed himself of his equitable remedy. Abbott v. 76 Land & Water Co., 161 Cal. 42, 51, 118 Pac. 425; Thresher v. Clark, 188 Pac. 55. The same rule should apply here. If plaintiff is entitled to specific performance of his contract or to the declaration and foreclosure of an equitable lien, the decree in equity made for that purpose must necessarily adjudicate the rights of the respective parties and would foreclose the plaintiff from an action for damages upon the contract, which is purely an action at law. He has elected to seek the aid of a court of equity and cannot join in such suit an action for damages for fraud.

[9] 4. The other phase of the complaint is that plaintiff seeks indirectly the return to the corporation of assets which he alleges were improperly distributed or dissipated by those in control of the corporate affairs. Though he does not allege directly that he is suing on behalf of the corporation for this purpose, he does allege that he is suing on behalf of all the other bondholders similarly situated with him who might choose to join with him, and demands that the assets of the corporation be returned so that they may be subjected to the equitable lien. And of course, if it is true, as alleged in his complaint, that the terms of the oral contract called for a deed of trust covering all the real and personal property of the corporation then owned or thereafter acquired by it, then it would be proper that all these assets which it is alleged were improperly and illegally dissipated should be returned to the corporation so that they might be included within the deed of trust. It is manifest, however, that he cannot join such an action (wherein he is suing as a trustee of the corporation and in the nature of a guardian) with an action in his own behalf wherein he is seeking personal relief. James v. Steifer Mining Co., 35 Cal. App. 778, 787, 171 Pac. 117. The complaint is not framed upon this cause of action, and in answer to defendants' argument that it is improperly joined with an action for personal relief plaintiff denies the intention of making it the basis of a cause of action. A further consideration of the allegations relating to it is therefore unnecessary.

[10, 11] There is another phase of the case which has been purposely omitted from the foregoing discussion because it is not presented in any of the voluminous briefs which have been filed on this appeal, and that is that plaintiff, without seeking specific performance, could have treated the oral contract as a direct obligation to pay money, sued on it as such, and had his lien to aid in enforcing the judgment. Marshall v. Ferguson, 23 Cal. 65, 69; Cummings v. Dudley, 60 Cal. 383, 385, 44 Am. Rep. 58; Beckwith v. Sheldon, 168 Cal. 742, 746, 145 Pac. 97, Ann. Cas. 1916D, 963. And "where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same." Beckwith v. Sheldon, supra, 168 Cal. 747, 145 Pac. 99, Ann. Cas. 1916A, 963. But equity will grant such relief only as incidental to the enforcement of the original obligation. "A lien is extinguished by the lapse of the time within which * * * an action can be brought upon the principal obligation." Civ. Code, § 2911. Thus, where the principal obligation is unenforceable because barred by the statute of limitations, and the facts alleged do not support the conclusion that a resulting trust has arisen, equity cannot declare or enforce a lien. The principal obligation was the oral contract for the exchange of the securities, action upon which was barred in two years after it accrued, and this being so, whatever right plaintiff had to an equitable lien growing out of the oral contract was lost before this action was commenced. San Jose, etc., Bank v. Bank of Madera, 144 Cal. 574, 577, 78 Pac. 5; Newhall v. Sherman, Clay & Co., 124 Cal. 509, 512, 57 Pac. 387.

[12] The complaint alleges that the agreement was made in March, 1911. The suit was commenced February 24, 1916. Plaintiff excuses his delay by allegations that from time to time he was assured by the United Properties Company that the bonds would be delivered soon and that the deed of trust was in course of preparation. In one portion of his complaint he alleges that these assurances continued down to May, 1914, but the last definite assurance is alleged to have been on January 25, 1913. Then it is alleged that in October, 1912, he commenced a personal investigation of the books of the company which was completed March 1, 1913; that between March 1, 1913, and June 1, 1913, he discovered the scheme to defraud him. In appellant's reply brief it is said:

"Plaintiff's first discovery of frauds occurred thereafter when he looked into the resources of the 'fraudulent companies,' concerning which nothing definite was discovered until about the month of May or June, 1913."

And again:

"That plaintiff knew of no fraudulent scheme or intent, and suspected none, prior to his discoveries of May or June, 1913."

On March 4, 1913, he filed a written protest with the United Properties Company and the trustees under the deed of trust executed January 25, 1913, wherein the United Properties Company joined with Smith, Tevis, and Hanford in an assignment of all their interests in the securities of the United Properties Company to the trustees. In this pro-

test he demanded that the company commence suit against Smith to compel him to deliver to the company stocks and securities which he claimed belonged to the company. At that time he knew Smith, Tevis, and Hanford had conveyed all their interest in the United Properties Company to trustees with "full power and authority to deal with the properties and interests so assigned and transferred, as fully as if they were the sole and exclusive owners thereof in their own right." Again, on May 14, 1913, he filed a protest with the trustees against the assignment of Smith to the Mercantile Trust Company of all his securities including those which it was claimed should have been delivered to the United Properties Company under the promotion agreement. As these securities were a part of the properties which were alleged to have been owned by the corporation in March, 1911, and upon which the equitable lien is sought, it is evident that plaintiff had notice in May, 1913, at least, of the intention of the parties not to perform the alleged oral contract. The semiannual payments of interest were made to him, it is alleged, to induce him to rely on the promises that the company would issue the bonds. But the last of these payments made for that purpose was in July, 1912. In October of that year he became suspicious and started a personal investigation of the affairs of the company.

The foregoing presents the admitted facts evidencing the intention of the company not to perform the alleged oral agreement. But it is alleged that in August, 1911, the United Properties Company conveyed to the Oakland Railways all the stocks of the Oakland Traction Company, San Francisco, Oakland & San Jose Consolidated Railway, and the East Shore & Suburban Railway Company, which plaintiff claims were to be subjected to his lien as security for his bonds. He fails to allege that he did not then have knowledge of this transfer, which was a clear breach of the alleged oral agreement, and, construing the complaint as stating plaintiff's case in the manner most favorable to himself, it must be assumed that he had knowledge of the breach at the time of the transfer. And if he had knowledge of this transfer, it is of little importance that the Oakland Railways was controlled by the United Properties Company. They were separate corporate entities, and the transfer of the stock to the Oakland Railways transferred the title and made it impossible for the United Properties Company to either cover them by a deed of trust or deliver them into the possession of a trustee for the benefit of its bondholders.

[13] In view of all these facts, the allegations that "plaintiff believed said representations were true, and relied upon said promises and assurances," can have no weight. Assuming that the limitation of the statute began to run within a few months after March, 1911, unless tolled by representations made to plaintiff to induce him not to commence suit, the complaint fails to state any facts from which the court could reasonably believe that any such assurances were given credit after June, 1913, as conceded by appellant in his briefs. For these reasons the trial court was justified in sustaining the demurrers on the ground that the suit was barred by the statute of limitations. What has been said regarding the statute of limitations applies to all parties but the United Properties Company, which failed to plead it. The right of the other parties to plead the statute, especially against a complaint which seeks a lien upon property they have acquired, cannot be doubted.

[14] The fact that the time to sue had so expired justified all parties, including the United Properties Company, in assuming that no action would be taken by plaintiff. His acquiescence in the actions of the parties and his long delay in instituting these proceedings are a complete bar—one which under circumstances such as these a court of equity may raise of its own motion.

[15] It appears from the judgment of the trial court that the original complaint was filed on February 24, 1916; that amendments thereto were filed on the 28th day of July, 1916; that an amended complaint was thereafter filed on the 17th day of November, 1916; that demurrers to this amended complaint were sustained on the 5th day of March, 1916; and that the amended and substituted complaint which is involved in this appeal was filed on the 12th day of April, 1917. On this state of the record it cannot be said that the trial court abused its discretion in denying to plaintiff leave to amend the amended complaint, because, as has been pointed out, the only cause of action stated under any theory of the case is barred by the statute of limitations and the laches of plaintiff.

The judgment is therefore affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

182 Cal. 608

WAGNER v. MEINZER et al. (S. F. 9421.)

(Supreme Court of California. April 5, 1920.)

1. New trial ⟸79—Signing of decision without reading, or knowledge that it contained exact conclusions, irregular.

For a trial judge to sign a decision on controverted facts without knowledge that the same, as drawn up by prevailing party's attorney, expressed exactly his conclusions thereon, would be improper, and would constitute an irregularity in court proceedings, under section 657, subd. 1, relating to grounds for a new trial.

2. Exceptions, bill of ⟸55(1)—Irregularity in signing judgment without reading available only on motion for new trial.

An objection that a trial judge signed a decision on controverted facts without knowledge that the same expressed exactly his conclusions thereon could be urged only on motion for new trial on such ground, and only on affidavit setting forth alleged facts, under Code Civ. Proc. § 658, and, the error not being evidenced by a ruling or order subject to an exception, the insertion of a statement of such error is not within the proper scope of a bill of exceptions, allowable on motion to Supreme Court to establish exceptions.

In Bank.

Action by Anna M. Wagner against Gottlieb Meinzer and others. On application for leave to insert statement in bill of exceptions that trial judge signed findings without reading and without personal knowledge of contents. Application denied.

See, also, 177 Pac. 293.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for plaintiff.

PER CURIAM. [1] This is an unverified application, under section 652, Code of Civil Procedure; the object being to obtain the insertion, in a bill of exceptions to be used on an appeal from a judgment, of a statement going to show that the trial judge, in the matter of signing the findings of fact and conclusions of law constituting the written decision required by law, left the matter of the contents of such findings entirely to the attorney for the prevailing party, and signed the same without reading. We can hardly conceive that a trial judge would sign a decision on controverted facts without knowledge that the same expressed exactly his conclusions thereon. Certainly he could not properly do so, and we have no doubt that for him to do so would constitute an irregularity in the proceedings of the court under subdivision 1 of section 657, Code of Civil Procedure, relative to motions for new trial. Of course, the party is entitled to the decision of the judge.

[2] But we are satisfied that, upon the matters alleged, the claim of the applicant in this behalf could be urged only on motion for new trial on this ground, and only on affidavits setting forth the alleged facts. Section 658, Code Civ. Proc. As said in Woods v. Jensen, 130 Cal. 205, 62 Pac. 474:

"It is quite evident that this ground for a new trial is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which, therefore, must appear by affidavit."

It is just as true here as it was in Gay v. Torrance, 145 Cal. 144, 78 Pac. 540, that in the matter of the alleged departure from the due and orderly method of disposition of the action by which the substantial rights of a party have been materially affected, the "departure is not evidenced by a ruling or order that may be made the subject of an exception," and the attempted statement is not within the proper scope of a bill of exceptions.

The application is denied.

All concur.

(182 Cal. 561)

PEOPLE v. ROUTH. (Cr. 2260.)

(Supreme Court of California. March 30, 1920. Rehearing Denied April 29, 1920.)

1. Criminal law ⊜1037(2) — District attorney's misconduct not considered without assignment and request to have jury disregard.

That the misconduct of the district attorney in a criminal case may be considered by the Supreme Court on appeal, the misconduct must be assigned and request made that the trial court admonish the jury to disregard it.

2. Criminal law ⊜720(1)—Statement of district attorney as to identity of person whose check was forged held not misconduct.

In a prosecution for passing a fictitious check where it was claimed that the funds upon which it was drawn were created by the deposit of a forged check of an attorney in another city, a statement of the district attorney that the purported signer subpœnaed as a witness was an attorney and the only one of that name in such city *held* not misconduct; it being coupled with the statement of his intention to produce such attorney as a witness.

3. Criminal law ⊜900—Agreement to submit case held to waive district attorney's misconduct.

Where, in a prosecution for passing a fictitious check, counsel agreed that an absent witness might be introduced after the defense had put in its case, but defendant rested after the conclusion of the state's case, an agreement by counsel to submit the case *held* to amount to a waiver of any claim of misconduct by reason of the district attorney's assertion of what he intended to prove by the absent witness.

4. Criminal law ⊜722½—Argument of district attorney held not misconduct.

In a prosecution for passing a fictitious check where it was claimed that the funds on which the check was drawn were created by the deposit of a forged check, a statement of the district attorney in his closing argument referring to the forgery of the check *held* not misconduct.

5. False pretenses ⊜49(4)—Evidence held to show person passing fictitious check knew it was worthless.

In a prosecution for passing a fictitious check drawn upon a fund created by the deposit of an alleged forged check, evidence *held* to support a finding that defendant knew he had no funds in the bank.

6. False pretenses ⊜52—Instruction held not erroneous as authorizing conviction if defendant charged with passing fictitious check intended to defraud payee.

In prosecution for passing a fictitious check, an instruction that even if there were not sufficient funds in the bank to meet the check when presented defendant should be found not guilty if he had no intention to defraud, *held* not erroneous as authorizing a conviction if there was an intention to defraud the payee.

7. False pretenses ⊜41—Evidence as to understanding not to honor checks till information was obtained held not error.

In a prosecution for passing a fictitious check, admission of evidence as to the bank's understanding with defendant that checks would not be honored until certain information had been obtained *held* not error.

Angellotti, C. J., dissenting in part.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

W. B. Routh was convicted of drawing a fictitious check, and he appeals. Affirmed.

Eric J. Rosenstirn, of San Francisco, for appellant.

U. S. Webb, John H. Riordan, and R. L. Chamberlain, all of San Francisco, for the People.

WILBUR, J. Defendant was convicted of the violation of section 476a of the Penal Code, which makes it a felony, willfully with intent to defraud, to draw a check upon a bank, knowing at the time that there was not sufficient funds in, or that there is not credit with, such bank to meet such check upon presentation. On September 24, 1917, the defendant deposited with the Security Bank of Oakland a check for $1,500, signed "Ingall W. Bull," drawn on the Security Trust & Savings Bank of Los Angeles, and a passbook was given to the defendant showing a credit in his favor of $1,500. September 25, 1917, the defendant drew a check on the Security Bank of Oakland, payable to the order of Normandin-Campen Company in payment for an automobile, which check, upon presentation, was refused payment, and is made the basis of this charge.

Appellant's claim for reversal is based upon the proposition that there is not sufficient evidence to justify a conviction, that the jury was erroneously instructed, and that the district attorney was guilty of misconduct. The conduct of the district attorney, of which defendant complains, consisted largely in statements on the trial to the effect that the Bull check was a forgery. In

view of the failure to prove or offer evidence in support of that charge, defendant not only complains thereof as misconduct, but earnestly contends that in the absence thereof the evidence is insufficient to support the verdict of conviction. In view of this claim of misconduct, the submission of the case, under the circumstances hereinafter stated, makes defendant's contention of the insufficiency of the evidence peculiarly significant, and for that reason such contention, as now made, will be first stated and considered, more in detail than would otherwise be necessary.

The defendant, in support of his claim that the evidence is insufficient to justify a conviction, states:

"* * * There is not a word in the evidence that the Los Angeles check was not entirely good, nor does any reason appear why the Oakland bank closed the account of the defendant."

Appellant states that in presenting his argument the first four points "will be grouped under a heading discussing the entire absence of legal or any evidence to either support or justify the judgment or the allegations of the information. We will then argue that there is no legal or any evidence establishing the corpus delicti or connecting the defendant with the commission of any offense." Again appellant states:

"Nor is there a word of evidence that the defendant knew the check he deposited to be worthless or that it was a forgery or that the bank had refused to cash it. * * * There is not a word of evidence in the entire record that the Los Angeles check marked 'People's Exhibit No. 1' was not worth its face value of $1,500, or that the Los Angeles bank ever refused to cash it upon presentation, or that there was not sufficient funds to meet it upon its presentation to the Los Angeles bank, or that it was a forgery or that defendant knew it to be a forgery. The original credit was given by the Oakland bank upon the deposit of this check, they issued a check book and a passbook for the full amount of the check and credited the defendant with the amount on their books, and for some reason unknown that credit given to the defendant was by the Oakland bank itself and unknown to the appellant struck off his account in the bank. * * * We believe that the conclusion is irresistible that at the time the appellant drew and delivered the check marked 'People's Exhibit 2' he had no knowledge at the time of such drawing and delivery that he did not have sufficient funds in or credit with the Oakland bank to meet such check in full upon its presentation."

This point is again reiterated:

"But in this case there is absolutely no evidence that the defendant was without funds or credit in the Oakland bank, or that he knew at the time of making and delivering the check that he had no funds in the bank. * * * Therefore under the above authorities it is earnestly contended that none of the essential elements denounced by the statute were established by legal or any evidence, nor was the evidence sufficient to support either the allegations of the information or the judgment. We believe that the evidence shows the defendant to be innocent of violating section 476a of the Penal Code. * * * There was an entire failure of proof. * * * There is in the evidence a total failure of proof of the essential elements constituting the crime, namely, knowledge that he had no funds in the bank. * * * The transaction in this cause is clothed entirely in innocence and it is one that occurs frequently in the commercial world. * * * We submit that not only is there no evidence to support the judgment or order or to sustain the allegations of the information, but the evidence shows the appellant to be innocent of violating the provisions of section 476a of the Penal Code. * * * All that was established in the instant case is the drawing of the check and the refusal of the bank to cash it, and that does not establish the corpus delicti. Nor was there any evidence that the appellant knew the check was worthless when he deposited it with the Oakland bank, and likewise there was no evidence that it was a forgery, or that the defendant knew it to be a forgery or that he perpetrated a forgery or that it was for any reason invalid despite the misconduct of the district attorney in this regard. It is therefore urged that there is no evidence establishing the corpus delicti. * * * He performed an act in the regular course of business that any human being was permitted legally to perform. It was, as the evidence discloses, entirely innocent in character. * * *"

Before discussing the contention of appellant concerning the insufficiency of the evidence to justify a conviction, we will examine the assignment of misconduct on the part of the district attorney in the light of the contention of counsel.

In the opening statement to the jury the district attorney made the following statement with reference to the check deposited by the defendant in the Security Bank of Oakland:

"I think we will also show that this check was a forgery, and it was never honored. We will produce Mr. Bull to show that he never authorized the signature, and that the entire transaction from start to finish was a rank fraud perpetrated by the defendant for the purpose of securing the automobile."

On redirect examination the witness Charles A. Smith, cashier of the Security Bank, the following occurred:

"Q. Mr. Smith, the only thing that would be gained by telegraphing to Los Angeles, and the only information your telegram would elicit, would be this: You would find that a man by the name of Ingall W. Bull had an account which was worth $1,500 with the Security Trust & Savings Bank? That is all you would get from the wire, isn't it? A. That is all.

"Q. Whether or not the thing was a forgery could not be ascertained until the check was sent down there, which is obvious; and if this defendant, or the person who passed this check,

gave you the check of a prominent man, he might have $1,500 on deposit, but nothing of practical value would be gained by telegraphing?"

This was objected to, objection sustained, and question withdrawn. While the district attorney was introducing exemplars as a basis for expert testimony on handwriting, an objection was interposed to one exhibit offered. In response to the objection and in explanation of the purpose of the testimony, the district attorney said: "I intend to call a handwriting expert to show that he wrote the check that is a forgery." The objection was thereupon overruled. Thereupon the district attorney announced: "We will call Mr. Eisenschimel. Well, he is testifying in another case, they tell me, in another department." Thereafter the following occurred:

"The Court: Have you some other witnesses for the people?

"Mr. Wittschen: No. I didn't expect we would make the time we did, and I also expected to call Prof. Eisenschimel, who is in Judge Donahue's department, and they tell me he is on the witness stand, and also Mr. Bull. Unfortunately I had him subpœnaed for Thursday, and telegraphed him to come Friday, and then it was changed, and it went over on account of Mr. Mulcahy's dereliction in not being here Thursday. Will you agree that he may be put on out of order, that is, that you may proceed and put in your case?

"Mr. Cunha: Yes, that is all right.

"The Court: Who is this Mr. Bull?

"Mr. Wittschen: He is an attorney in Los Angeles who has an account with the bank that is mentioned here—the only Ingall W. Bull in Los Angeles.

"Mr. Cunha: I object to that statement of the district attorney and assign it as misconduct.

"Mr. Wittschen: Well, if there is any other Ingall W. Bull, you can produce him. Anyway, I intend to call him to show that he did not sign this check, and that this is not his handwriting, and some other things which probably would be a matter of rebuttal."

Thereupon the district attorney called Sadie Benson, and at the conclusion of her testimony stated:

"That is all. We rest.

"Mr. Cunha: So do we.

"Mr. Wittschen: No defense that you wish to offer?

"Mr. Cunha: We rest at this time.

"Mr. Wittschen: Well, I was going to call Mr. Bull. Mr. Bull would be in rebuttal. So there will be no misunderstanding, you rest completely, do you, if I withdraw Mr. Bull from the list? I don't want any resting and then coming back again. If the case is going to go to the jury, let it go to the jury right now.

"Mr. Cunha: I am willing that it should go to the jury right now.

"Mr. Wittschen: Very well, we rest.

"Mr. Cunha: All right.

"Mr. Wittschen: Shall I proceed with the opening argument?

"The Court: Proceed."

[1-3] In the first place, it will be observed that there was no assignment of misconduct of the district attorney in these repeated statements and no request that the trial court admonish the jury to disregard the statements of the district attorney. Such assignments and requests were necessary as a foundation for a complaint to this court of misconduct. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Babcock, 160 Cal. 545, 117 Pac. 549; People v. Yee Foo, 4 Cal. App. 743, 89 Pac. 450; People v. Amer, 8 Cal. App. 143, 96 Pac. 401; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Scott v. Times-Mirror Co., 184 Pac. 672. The only misconduct assigned was a statement of the district attorney that there was only one Mr. Bull in Los Angeles. This was coupled with his statement of an intention to produce Mr. Bull, and we think it is entirely without prejudice to the defendant. This case furnishes an excellent illustration of the necessity for proper assignments of error and request for an instruction to the jury. There is no suggestion that the district attorney did not enter upon the case with the bona fide intention of showing that the check in question was a forgery, and for that purpose intended to call handwriting experts, and Ingall W. Bull, the purported maker thereof. It was agreed between the counsel that Mr. Bull should be called at the conclusion of the defendant's evidence. When the people rested and called upon the defendant to present his case, he also rested. In accordance with the agreement of counsel, Mr. Bull should have been thereupon called as a witness. Counsel for the defendant was confronted with this dilemma: If he rested the case there was a chance that the district attorney, for the purpose of expediting the business of the court, might also rest, and thus give him an opportunity of arguing to the jury, as he has to this court, the innocence of the defendant and the absolute failure of proof of guilt, and, if he can so strenuously insist here that there was a complete failure of proof, the argument to the jury must have been much more persuasive. If the defendant, however, at that time had assigned the conduct of the district attorney throughout the trial in predicting the presence and nature of the testimony of Mr. Bull as misconduct, the district attorney no doubt would have arranged for the presence of Mr. Bull, who apparently at that very time was under subpœna and on the way to Oakland from Los Angeles. Under these circumstances, the agreement to submit the case amounted to a waiver of any claim of misconduct by reason of the assertion of the district attorney of what he intended to prove. We therefore conclude that the de-

fendant cannot here complain of the alleged misconduct of the district attorney, nor do we hold that such conduct was wrong. It would no doubt have been better for the district attorney to have delayed the case for the prospective witnesses, and thus, perhaps, have obviated the longer delay caused by this appeal and the necessary attention devoted to the case by the courts of appeal.

[4] Appellant also claims as misconduct a statement in the closing argument of the district attorney to the jury. But this statement was not objected to at the time, nor was it assigned as error, nor was a request made that the jury be instructed to disregard it, nor did it constitute misconduct. The statement was as follows:

"Now, we are not required, as I said before, to show that this check was a forgery. You can draw your own conclusions. I don't care what they are. All we are required to prove, and I want you to stick to the evidence—I want you to take the case for which the defendant is on trial—is that he passed a check on a bank with the intent to defraud Normandin-Campen Company, or the copartners doing business under that name, as it is alleged in the information, and when he drew that check he had no credit with the bank. Did he have any? Answer me, what credit did he have there? He had the credit that came from this transaction and nothing else."

There was no secret about the fact that the district attorney charged that this check was a forgery, and in view of that fact it was perfectly proper for him to argue to the jury that his failure to make that proof did not necessitate an acquittal. It was, under the circumstances, a necessary and important explanation which might have been made in the instructions to be given by the court, but was nevertheless a correct statement. Furthermore, no reference to the forgery was made in the opening argument of the district attorney, and he states in his closing argument that the only reason he referred to it at all was because of the argument of the defendant's counsel. In his closing argument the district attorney said:

"I don't care whether the Ingall W. Bull check is a forgery or not. * * * The fact remains that we have no evidence before the court, other than that produced by the prosecution, that this check is good or not good."

[5] In considering the claim that there was no substantial evidence to sustain the conviction it will be necessary to state other facts in evidence. When the defendant brought the $1,500 check purporting to be signed by Ingall W. Bull to the Security Bank of Oakland for deposit, he attempted to secure an advance of $100, which was refused. The cashier instructed the receiving teller to take the check subject to confirmation by the Los Angeles bank. He was also instructed, in the presence of the defendant, not to pay the defendant any money until the Los Angeles bank reported on the check. The cashier stated to the defendant that the bank would not permit him any credit to draw against the account until the bank had a report from Los Angeles "which would take a couple of days or something of that kind." On the same day the Oakland bank sent the check to Los Angeles with a request for immediate telegraphic report thereon, and on the following day it received a telegram, as a result of which the Security Bank of Oakland charged off the amount of $1,500 on defendant's account and refused to pay checks drawn by the defendant. On the same day that such notice was received and one day before the time fixed by the bank for a report from Los Angeles on the Bull check, the defendant went to San Jose and purchased the automobile, obtaining credit by showing his passbook with the bank with the entry of $1,500, and gave the check at such time and place that it was not likely to be presented immediately. This check reached the bank in Oakland two days later and was refused payment. From this evidence it is clear that the jury was justified in concluding that the defendant drew a check on the Oakland bank knowing that he had no funds in the bank and no credit with the bank. The defendant's check was drawn before the time fixed by the bank when it would either accept or reject checks. On the same day that the defendant gave his check for the automobile, he left Oakland with a woman whom he had introduced as his wife, and that night camped out in the suburbs of Sacramento. Four days later he was arrested at Drain, Or. The evidence was clearly sufficient to sustain the verdict.

Defendant complains of the following instruction:

"One of the essential elements in the commission of the crime charged in this information is that there should be an attempt to defraud the party to whom this check might be given. If you believe in the present case, even though there were not sufficient funds in the bank to meet the check concerned here when the same was presented to the bank, that the defendant had no intention to defraud Normandin-Campen Company, you are instructed to find the defendant not guilty."

[6] Appellant contends that this instruction authorized a conviction if there "was an intention to defraud the payee." We do not so understand the instruction. It required an acquittal in the absence of such proof, but left to the other instructions the statement of other facts essential to a conviction.

[7] Appellant complains of the overruling of his objection to the following question:

"Q. The only agreement or understanding you had with the defendant was, as you have stated, that no check would be honored against this deposit until you would hear from Los Angeles?"

This was objected to. The court remarked:

"What was or was not the understanding will be established by their actions and their conversations.

"Mr. Wittschen: Have I not the right to put this direct question, 'Did he have any credit at the bank so that you would honor checks?'

"Mr. Cunha: Oh, I have no objection to that.

"The Court: Yes, go ahead and answer that question.

"A. What was the question?"

The question then was repeated.

"Mr. Cunha: Did your honor rule upon that question?

"The Court: Yes, the objection is overruled.

"Mr. Wittschen: Q. And he had no other credit save that with the Security Bank, a banking corporation, that would honor any checks? A. No. He had no other agreement.

"Q. There was no other agreement or understanding with the bank? A. No other agreement."

It is not clear that the defendant intended to object to the question finally asked, and under the circumstances as detailed by the witnesses the answer amounted to nothing more than a statement that there was nothing said other than what had already been testified to.

The judgment is affirmed.

We concur: LENNON, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

ANGELLOTTI, C. J. I concur.

I have concluded that the proof was sufficient to sustain the verdict, though by no means as clear as doubtless it could have been made by direct evidence that the check on the Los Angeles bank was worthless. Unquestionably the state should have produced such testimony, if it was available, instead of leaving the matter to so great an extent a matter of inference. But consideration of the evidence in fact introduced, including, of course, the whole conduct of the defendant in the matter, leaves one practically without substantial doubt that the Los Angeles check was worthless, and that defendant drew his check on the Oakland bank knowing this and knowing it would be refused payment when presented in due course because of an adverse report from the Los Angeles bank.

I can see absolutely nothing in the conduct of the defendant's attorney at the time of the submission of the cause to the jury, as that matter is set forth in the opinion, to fairly warrant a conclusion that any claim of prior misconduct on the part of the district attorney was thereby waived. It was the district attorney's suggestion uninspired in any degree by any suggestion of the defendant's attorney, that the case go to the jury "right now," and he simply assented. I do not see very well what else he could have done. If the district attorney chose to thus close his case without waiting for further testimony, there was nothing else to do. I do not understand that it was incumbent on him to then formally warn the district attorney that he proposed to insist on all objections and assignments of error he had previously made. But if there had been misconduct on the part of the district attorney in suggesting that the check was a forgery, the claim here is sufficiently answered by what is said in the opinion as to the effect of failure of the defendant at the time to formally assign the same as misconduct and to request an admonitory instruction. Except as regards the matter of waiver of alleged misconduct by assenting to the submission to the jury, I concur in the opinion.

182 Cal. 538

HERDAN v. HANSON. (L. A. 4379.)

(Supreme Court of California. March 30, 1920. Rehearing Denied April 29, 1920.)

1. Election of remedies ⇐11—No estoppel where mistake in election.

While the fact that a party having two inconsistent, concurrent remedies by electing to proceed upon one will estop him from invoking the other, where a party makes a mistake in election of remedies, he is not estopped by his abortive election from subsequently resorting to a remedy to which he was really entitled.

2. Election of remedies ⇐7(1)—Plaintiff held not estopped to sue for damages by prior abortive suit for rescission.

Where plaintiff sued to rescind a contract for exchange of land for his stock of merchandise, but was nonsuited for failing to tender a deed to the land taken in exchange, such attempted election of remedies did not preclude him from subsequently maintaining an action for damages for fraudulent representations; the prior attempted election having been rendered abortive before plaintiff had proceeded to a point incompatible with the institution of the damage suit.

3. Fraud ⇐55, 57—Evidence as to value of merchandise exchanged for realty held admissible.

In an action for fraudulent representations inducing plaintiff to exchange merchandise for realty, evidence as to the value of the merchandise was admissible under the issue of fraud for the purpose of showing the circumstances as provided in Code Civ. Proc. §§ 1856, 1860, and also as to the issue raised by defendant's answer as to the true value of the stock.

4. Evidence ⊜113(2)—Evidence as to value of merchandise exchanged held admissible, though referring to value some months before.

In action for fraudulent representations inducing plaintiff to exchange merchandise for realty, evidence as to the value of the merchandise was not incompetent, though it referred to such value at the time some months prior to the execution of the exchange contract; its admissibility being within the discretion of the court.

5. Principal and agent ⊜180—Knowledge of interested agent as to value of property exchanged held not imputable to principal.

In an action for damages for false representations inducing plaintiff to exchange his stock of merchandise for defendant's realty where it appeared that plaintiff's agent was defendant's partner, plaintiff could not be charged with the agent's uncommunicated knowledge of actual conditions as to the value of defendant's realty, he being adversely interested, although ordinarily the knowledge of an agent is imputed to his principal in view of Civ. Code, § 2332.

6. Principal and agent ⊜171(4) — Principal having profited by representations of agent is bound thereby.

In action for damages for fraudulent representations inducing plaintiff to exchange his stock of merchandise for defendant's realty through the medium of his agent who was defendant's partner, defendant, having obtained the benefit of the agent's acts, was bound by the representations and concealments of such agent; he being in reality defendant's agent within Civ. Code, § 2330.

7. Fraud ⊜11(1)—Expressions of opinion becoming affirmation of fact defined.

A statement concerning the subject-matter of the transaction, which might otherwise be only an expression of opinion if affirmed as an existing fact material to the transaction and reasonably inducing the other party to consider and rely upon it as a fact, becomes an affirmation of fact within the general rule as to fraudulent representations.

8. Appeal and error ⊜1008(1)—Whether representations as to value were of fact held question for trial court.

In an action for fraudulent representations inducing plaintiff to exchange merchandise for realty, whether defendant's statements as to the value of the lands were affirmed so as to permit reliance upon them by plaintiff as statements of actual facts within defendant's knowledge *held* questions of fact for the trial court.

9. Fraud ⊜58(1)—Degree of proof stated.

While fraud must be clearly proved, direct evidence is not necessary, but the indirect evidence and the inferences to be drawn from the proved facts must be so convincing as to satisfy the trial court and jury that fraud was designed and accomplished.

10. Fraud ⊜58(1) — Representations as to value of property exchanged shown to be affirmation of fact.

In an action for fraudulent representations inducing plaintiff to exchange merchandise for realty, evidence *held* sufficient to sustain a finding that fraudulent representations were made by defendant as to the value of the land, which were tantamount to an affirmation of an existing fact rather than a mere expression of opinion, and were the inducing cause of the contract.

11. Appeal and error ⊜1047(3)—Refusal to strike statements as to value in suit for false representations, if error, held harmless.

In an action for fraudulent representations inducing plaintiff to exchange his stock of merchandise for defendant's realty, refusal to strike testimony that defendant, while the contract was being executed, made statements to plaintiff's daughter relative to the value of the land, if error because statements were made out of plaintiff's hearing, was harmless; the evidence whether plaintiff heard the statements being conflicting.

12. Fraud ⊜35—Action maintainable against party inducing exchange and unable to restore status quo by selling property received before attempting rescission.

The dismissal of an action for fraudulent representations inducing plaintiff to exchange merchandise for realty was not necessitated by defendant's attempted rescission of the contract prior to suit, it appearing that he had sold the merchandise and was unable to restore plaintiff to his original position.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by A. Herdan against E. O. Hanson for damages for fraudulent representations. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Barstow, of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

LENNON, J. Action for damages for fraudulent representations whereby defendant procured an exchange of property between himself and plaintiff. Defendant appeals from a judgment in favor of plaintiff.

On May 22, 1913, plaintiff and defendant entered into an agreement whereby plaintiff was to transfer to defendant a stock of merchandise in exchange for two parcels of real property belonging to defendant, one of which was in the city of Los Angeles and subject to a mortgage of $3,000, and the other situated in Flathead county, Mont., and subject to a mortgage of $1,400. The transfers thus agreed upon were consummated the following June. Plaintiff alleges that in August, 1913, he first discovered the true value of the Montana property, which he claims had been misrepresented to him by the defendant. On September 10, 1913, plaintiff commenced an action against said defendant, in the superior court of Los Angeles county, wherein plaintiff sought to

have the above-described contract rescinded. The trial court in that case granted defendant's motion for a judgment of nonsuit on the ground that plaintiff had failed to tender defendant a deed to said Montana property prior to bringing the action for rescission. The judgment, which was entered accordingly, has become final. Plaintiff then instituted the present action for damages resulting from the alleged fraudulent representations. In this action the trial court found, among other things, that the merchandise transferred by plaintiff was of the reasonable value of $10,000; that defendant, fraudulently and with intent to deceive plaintiff, represented to said plaintiff that the Montana property was of the fair and reasonable value of $6,000 and also represented to the plaintiff that the property in Los Angeles was of the reasonable value of $8,000, and that the equities in both parcels of real property were reasonably worth $9,500; that the true value of said property in Los Angeles was $8,000, "but said Montana property was not on said 22d day of May, 1913, or at any other time, of any greater value than the sum of $200"; that there was a mortgage on the Los Angeles property amounting to $3,000 and on the Montana property amounting to $1,400; and that the equities in both said parcels of real property were not at the time of making said contract, or at any other time, worth over $5,000. Judgment was rendered in favor of plaintiff for the sum of $4,600.

[1, 2] The main contention in support of the appeal is that the plaintiff, having elected to proceed in an action for rescission, is now precluded from resorting to an action for damages. It is insisted, upon behalf of appellant, that a party having two inconsistent, concurrent remedies may not pursue both, but must choose between them and, having clearly elected to proceed upon one, is thereby bound and will be estopped from invoking the other. Hines v. Ward, 121 Cal. 115, 53 Pac. 427. It is, however, equally true that, where a party makes a mistake in election of remedies, he is not estopped by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled. Agar v. Winslow, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84. It is insisted, however, upon behalf of appellant, that plaintiff's cause of action should be barred in the present case by his prior election of remedies for the reason that the action for rescission failed, not because plaintiff attempted to select a remedy to which he was not entitled, but because of his own neglect in omitting to comply with the conditions prerequisite to the granting of the relief prayed for by him. The answer to this contention is that the principle of election is founded upon the theory that a party should not be allowed to occupy inconsistent positions (Bigelow on Estoppel [6th Ed.] p. 732), whereas, the effect of the judgment of nonsuit in the prior action was merely to leave the plaintiff and defendant in the same relative position as before the action was commenced, namely, with a subsisting contract through which plaintiff claims to have been defrauded. McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460. The instant case is indistinguishable from the case cited. In that case the plaintiff, who had entered into an agreement for the purchase of certain real property, claimed a breach of the contract and instituted an action for recovery of the money paid on the purchase price in which a judgment of nonsuit was entered. Plaintiff thereafter prosecuted an action of specific performance of the contract, and it was held that she was not estopped, by reason of bringing the former action for money had and received, from insisting, in the subsequent action, upon specific performance. The ground upon which the nonsuit was granted in the first action does not appear, but the reasoning of the case is not thereby rendered inapplicable to the case at bar. The court there said (172 Cal. 75, 155 Pac. 463):

> "It [the action to recover the purchase money] could not have been successfully maintained except by proof that the contract had been rescinded, or that defendant had been guilty of a breach thereof. The judgment of nonsuit was, therefore, * * * based upon the fact that no rescission, termination, or breach of the contract had been proven and that it was still in force; that the plaintiff had no such remedy as she sought to enforce by that action. * * * The defendant is placed in no worse position by reason of the unsuccessful prosecution of that action. There is, consequently, no estoppel."

It follows that, inasmuch as the attempted prior election of the plaintiff was arrested and rendered abortive before he had proceeded to a point absolutely incompatible with the institution and maintenance of the present action, the principle of estoppel arising from an election of inconsistent remedies cannot be invoked and applied.

[3] Error is claimed in the admission, over defendant's objection, of testimony as to the value of plaintiff's stock of goods. The objection was made upon the theory that, while the value of the property transferred to plaintiff was material for the reason that his cause of action depended upon the existence of misrepresentations as to the true value of said property, still the value of the property transferred by plaintiff could not be considered for the reason that the contract related to the exchange of property only and did not purport to establish or refer to a pecuniary standard of value as the basis of the deal. Not only was evidence of the value of the properties exchanged admissible under the issue of fraud for the purpose of

showing the circumstances surrounding and attending the making of the contract (Beverly v. Blackwood, 102 Cal. 83, 92, 36 Pac. 378; Code Civ. Proc. §§ 1856 and 1860), but it was relevant and material to the issue raised by the defendant's answer as to the true value of plaintiff's stock of merchandise (Norris v. Crandall, 6 Cal. Unrep. 706, 65 Pac. 568).

[4] The testimony of the witness Sugarman as to the value of the merchandise was not necessarily incompetent, even though it referred to such value at a time some months prior to the date of the execution of the contract in suit. While such value on the date in question was the precise thing to be determined, nevertheless the admission of evidence of such value at times shortly prior or subsequent to the date in question was largely within the discretion of the trial court, and we are not prepared to say that, under the circumstances, the discretion was abused. Montgomery v. Sayre, 100 Cal. 182, 187, 34 Pac. 646, 38 Am. St. Rep. 271.

Several assignments of error and specifications of insufficiency of evidence to support the findings of fact are made and based upon the claim that plaintiff failed to prove any fraudulent representations by defendant by which plaintiff was induced to enter into the agreement. The testimony upon this phase of the case is, in substance, as follows: Plaintiff, being desirous of disposing of his stock of merchandise, placed it in the hands of Morris Reiss, his wife's nephew, for sale at the price of $10,000. Reiss was in the real estate business for himself, but having his office with the defendant, and an understanding with the defendant that all commissions earned by him were to be shared equally with defendant. Reiss and defendant discussed the possibility of trading defendant's Los Angeles and Montana land for plaintiff's stock and agreed, in effect, that, if the exchange could be brought about, Reiss was to receive from the defendant the sum of $200 as commission for his services. At that time defendant told Reiss that he had never seen the Montana land; that he had bought it about two years before from a man named Fisher for $2,200, paying $800 in cash and giving a mortgage for the balance of the purchase price; that Fisher told him the land was worth $150 an acre, and was good land for subdividing, in which case $250 an acre might be realized; that some Norwegian friends of the defendant, who were familiar with the land, said it was good apple land because of the elevation and soil. Defendant further stated, "I'll stake my life on it that Fisher tells me the truth," and referred Reiss to Fisher, who was at that time living in Southern California. Reiss reported to plaintiff, in substance and effect, what defendant had told him about the land, but did not inform plaintiff that defendant had never seen the Montana land. Plaintiff objected to taking land which he himself had never seen and, upon Reiss so reporting, the defendant then said to Reiss that, if plaintiff took the land, he would later trade it off for plaintiff for "local holdings." This was reported by Reiss to plaintiff. The night before the contract was signed, Reiss's wife received a letter from Montana, in response to inquiries made by her concerning the value of the Montana land. This letter stated that the 40 acres of land in question were valueless by themselves, for the reason that they consisted entirely of a very high hill, which was too steep for farming and not good for pasture because of a large ledge of rock running through it. The letter further stated that if the owner purchased the balance of the quarter section the land in question would be worth something. Reiss and his wife took this letter to the defendant, who informed himself of its contents. Defendant thereupon stated that the writer must have had the wrong description "or else someone was knocking," and again said to Reiss that the land was worth $150 an acre and that he would positively guarantee that everything was just as he had said. Reiss and his wife both testified that defendant requested them not to show the letter to plaintiff as it would spoil the deal. There is testimony that defendant stated to Reiss that he had refused an offer of $100 an acre for the land. The letter in question was not called to the attention of plaintiff, and the following morning the contract was signed. While Reiss was drawing up the contract, the defendant stated to plaintiff's daughter, in the presence of plaintiff:

"Your father is making a good trade. That Montana land is worth $150 an acre and will soon be worth $250 an acre. It is fine apple land. If you were to take the mortgage of $3,000 off the University property and put in on the Montana land and take the mortgage of $1,400 off the Montana land and put it on the University property, I would take the Montana land every time."

[5, 6] In contending that the evidence as thus outlined does not support the findings complained of, it is argued that Reiss was the agent of the plaintiff, and that therefore the knowledge of Reiss, obtained from the defendant, was that of the plaintiff. Ordinarily the knowledge of an agent is imputed to his principal. Civ. Code, § 2332. But, assuming that Reiss was the agent of the plaintiff, it is the rule that, where an agent is interested in the result of a transaction adversely to the interest of his principal, the rule of imputed knowledge on the part of the principal no longer obtains. 31 Cyc. 1595. In the present case, there was sufficient evidence to support the finding of the trial court that Reiss was acting as agent for defendant in securing the exchange in question. Since he was acting for defendant, upon a commission

basis, his interest was adverse to plaintiff, and plaintiff cannot be charged with his uncommunicated knowledge of the actual conditions. On the other hand, having accepted the advantages obtained thereby, defendant was bound by the representations and concealments of Reiss, his agent. Bonnarjee v. Pike, 185 Pac. 479; Civ. Code, § 2330.

[7-10] With reference to the contention that the evidence does not support the findings in question because the alleged and found fraudulent misrepresentations were but mere expressions of opinion, it will suffice to say that, when a statement concerning a subject-matter of a transaction, which might otherwise be only an expression of opinion, is affirmed as an existing fact material to the transaction and reasonably induces the other party to consider and rely upon it as a fact, the statement then becomes an affirmation of fact within the meaning of the general rule as to fraudulent representations. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, § 878. This rule is frequently, and properly, applied to statements concerning the value of land at a distance when the party to whom the statements are made possesses no other information and is not in a position to investigate. Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Nichols v. Moore, 183 Pac. 531; Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, § 878, note h. Whether the statements as to value in this case were affirmed in such a manner as to permit reliance upon them by plaintiff as statements of actual facts within the knowledge of defendant, and whether the suppression of the information contained in the letter received from Montana amounted to fraud, were questions of fact for the determination of the trial court. Fulton v. Fisher, 151 Iowa, 429, 131 N. W. 662. While fraud must be clearly proved, direct evidence is not necessary for this purpose, but the "indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished." Ryder v. Bamberger, 172 Cal. 791, 800, 158 Pac. 753, 757. We are not prepared to say that the evidence in this case was insufficient to have satisfied the trial court that the alleged and found fraudulent representations were made by defendant and that they were tantamount to an affirmation of an existing fact, rather than a mere expression of opinion, and were the inducing cause of the plaintiff's entering into the contract.

[11] It is claimed that defendant's statements made, while the contract was being drafted, to plaintiff's daughter, were inadmissible because it was not shown that plaintiff heard them and that, in any event, it cannot be fairly said that they formed any part of the inducements to the making of the contract since the terms of the contract had been previously agreed upon and were actually being reduced to writing at the time the statements were made. No objection was made to the questions which upon direct examination elicited the testimony concerning the statements complained of; but, upon cross-examination, the witness, plaintiff's daughter, declared that nobody else but she and a Mrs. Orlejan heard the statements. Thereupon counsel for appellant moved to strike out the daughter's testimony concerning the statements of the defendant made at the time the contract was being drafted, upon the ground that they were immaterial and irrelevant. The ruling of the trial court denying the motion is assigned as error. Of course, if the plaintiff did not hear the statements complained of, they were not material and relevant as a part of the misrepresentations which, it was claimed, induced the plaintiff to enter into the agreement in controversy. Strictly speaking, the motion to strike out should have been preceded by a previously stated and sufficient objection made at the time of the introduction in evidence of the statements complained of, but, assuming, as may perhaps be properly done, that the nature of the testimony of the witness upon direct examination was not such as to put counsel for appellant upon notice of its irrelevancy and immateriality, and that therefore he was not required to interpose an objection upon those grounds before he could avail himself of a motion to strike out, still the record shows that, in addition to his daughter's testimony, the plaintiff testified concerning the making of the statements, in effect and without objection, that they were made in his presence, and the fair import of his testimony in this particular, as shown by the record, is that he heard the statements. It is apparent, therefore, that there was a substantial conflict in the evidence as to whether or not the plaintiff heard the statements in question and this being so the error, if any, in the ruling of the trial court refusing to strike out the testimony of the daughter in the particulars stated was harmless. Even though the statements in question were made after the terms of the agreement had been arrived at, we think it cannot be fairly said that they formed no part of the cause which ultimately induced the plaintiff to finally execute the contract. This being so, the statements in question had a material and relevant bearing, to some extent at least, upon the issue of whether or not the plaintiff's participation in the agreement was procured as the result of fraudulent misrepresentations.

[12] There is no merit in the contention that the action should have been dismissed because of defendant's attempted rescission of the contract prior to the commencement of the present action. Defendant had sold the stock of merchandise before making the offer to rescind, and therefore the trial court did not err in concluding that, even if de-

fendant were able to obtain the merchandise from his vendee, he was not able to restore plaintiff to his original position.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; WILBUR, J.; KERRIGAN, Judge pro tem.; SHAW, J.; OLNEY, J.

182 Cal. 588

DYER BROS. GOLDEN WEST IRON WORKS et al. v. CENTRAL IRON WORKS et al. (S. F. 8797.)

(Supreme Court of California. April 3, 1920.)

1. Damages ⟸81—Inquiry into original transaction permissible to show that notes deposited to insure performance were penalty.

Where contract provided for payment by each of the parties of certain sum into a common fund, to be distributed, on breach of the contract by one or more of the parties, to the other parties damaged thereby, provision of contract that notes could be executed in lieu of the cash payment did not, in action on the notes following a breach, preclude an investigation into the original transaction to determine sufficiency of notes as a basis for recovery of liquidated damages, under Civ. Code, § 1531; the obligation on notes not extinguishing the obligation under the contract, but merely covering damage in case of breach.

2. Damages ⟸78(2)—Designation of sum not controlling on question of whether a "penalty" or liquidated damages.

Though designation of the sum is to be considered in ascertaining whether a penalty or a provision for liquidated damages, it is not controlling, even though the word "penalty" is used, the question depending upon whether from a consideration of the nature of the agreement there was an actual intent to prescribe a penalty, that is, an intent to determine and define the liability in the case of a breach of the contract without any reference to the actual damage likely to be sustained.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Penalty.]

3. Damages ⟸80(1)—Amount depending upon gross business upon breach held liquidated damages.

Where a number of iron manufacturing concerns entered into a contract to protect themselves against demands of their employés which provided for a common fund to which each of the parties contributed, to be distributed, upon breach of the contract by any of the parties, to the others as damages in proportion to the gross business done by them, the amount to be so paid was liquidated damages, and not a penalty.

4. Damages ⟸79(1)—Amount fixed recoverable only if actual damages could not be ascertained.

A party seeking to recover, under a contract, the amount specified as damages in anticipation of a breach, must plead and prove that it would be impracticable or extremely difficult to fix the actual damage, under Civ. Code, §§ 1670, 1671.

5. Damages ⟸150—Pleading of impossibility of ascertaining actual damages held sufficient.

In action to recover amount of damages fixed by contract prior to breach, allegation that actual damages could not be ascertained *held* sufficient.

6. Corporations ⟸447—Contract delegating to committee of an organization negotiations with employés held not beyond corporate powers.

Contract entered into by a number of manufacturing corporations to protect themselves against demands of their employés, whereby an executive committee was created to represent the parties in negotiations with the employés *held* not beyond the powers of the corporation as against objection that it attempted to delegate discretionary corporate functions.

7. Account ⟸1—Equity held to have jurisdiction of action on note involving accounting.

Where contract provided for payment by each party of certain amount to a common fund, to be distributed, on breach by any of the parties, to the other parties as their damages, an action on the notes given in lieu of the cash payments to common fund by defendant parties who had breached contract and for distribution of money to those entitled thereto under the contract, making their share dependent upon gross business, *held* within jurisdiction of equity, in that it involves accounting and will avoid a multiplicity of suits.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Dyer Bros. Golden West Iron Works and others against the Central Iron Works and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

William P. Hubbard, of San Francisco (Edgar C. Chapman, of San Francisco, of counsel), for appellants.

Nathan C. Coghlan, William F. Herron, Myrick & Deering, and Edwin V. McKenzie, all of San Francisco, for respondents.

LENNON, J. This is an appeal from a judgment in favor of defendants after an order sustaining demurrers to plaintiffs' amended complaint without leave to amend. The contract sued upon was entered into by plaintiffs and defendants for the alleged mutual protection and advancement of the business interests and conditions of plaintiffs and defendants, some of whom were incorporated and others of whom were copartnerships or doing business as individuals. All of the parties to the contract were structural steel and iron manufacturers of San Fran-

cisco, and among the objects and purposes sought to be attained by the contract were the promotion of settlements of industrial disputes between the parties to the contract, as employers, and their employés, by conciliation and arbitration, and the effecting of a more thorough organization of employers with the view to improving the conditions of the industry in which the several respective employers were engaged. To be more precise, the contract recites that the parties thereto were desirous of protecting themselves against various and sundry demands of their employés; that the parties were unable to resist, settle, or arbitrate said demands singly and severally without great loss to themselves and injury to their business; that, in the event of any parties withdrawing from the agreement and ceasing to act in concert with the remaining parties, great damage and loss would result which might not be recoverable under the law of damages, and which damage would be impracticable of ascertainment or proof under the rules of evidence. After providing for certain uniform regulations and restrictions to govern the conduct of the parties to the contract and for an executive committee to represent them in specified dealings and negotiations, the contract requires that each party pay into a common fund a sum of money in cash, or promissory notes given in lieu thereof, the amount thereof to be determined by the gross annual business of the party making such payment. This fund was to be kept intact until the termination of the agreement, by lapse of time or otherwise, and then be distributed among the parties who had kept the covenants and conditions of the contract in the proportion which the amount of their respective payments into the fund bore to the whole of said fund. All of the parties elected to make the required payments by means of promissory notes. The complaint alleges failure on the part of defendants to observe and abide by the terms of the agreement, thereby causing great loss to plaintiffs and necessitating the termination of the agreement, and prays that all the parties to said contract be directed to pay into the common fund contemplated by the contract the respective sums represented by their several promissory notes, and that such common fund be distributed among plaintiffs, or those determined by the court to be entitled to participate in the distribution under the terms of the contract.

The following grounds are urged in support of the demurrers:

(1) That the sums represented by the promissory notes constituted penalties, and not liquidated damages, and that therefore the complaint should have alleged the actual damage sustained by the breach.

(2) That the contract was void in that, by the creation of the executive committee to act as the agent of the parties, it attempted to delegate discretionary corporate functions in so far as the contract related to the corporations who were parties thereto.

(3) That the action is for the specific performance of a contract for the payment of money, and therefore not maintainable.

[1] The mere recital in the contract that the notes are to be taken in discharge of the obligation of the contract will not, in and of itself, suffice to prevent, as appellant contends, an investigation into the preliminary matters touching the original transaction out of which the notes emanated. To eliminate an inquiry into the original transaction by a novation, there must be a clear intent to extinguish the old obligation and supplant it with a new one. Civ. Code, § 1531. The terms of the contract in controversy in accordance with which the notes in question were executed did not provide for the extinguishment of an existing obligation, but were expressly designed to cover the damage which might be occasioned by a breach of the contract in the future. Consequently the covenant of the contract calling for the notes necessitates, proprio vigore, a consideration of the sufficiency of the notes as a basis for the recovery of liquidated damages.

Counsel for respondents contend that the provisions of the contract relating to the distribution of the common fund among those parties who had complied with the terms of the contract were intended to fix a penalty or forfeiture, and that therefore plaintiffs cannot recover on the notes, but are limited to the recovery of the actual damages proved to have been sustained. Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417; Wilmington Trans. Co. v. O'Neil, 98 Cal. 1, 5, 32 Pac. 705; Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707.

The contract, after reciting the impracticability of ascertaining the amount of the damage and loss under the rules of evidence in the event of a breach, proceeds as follows:

"Whereas, the parties hereto nevertheless desire to insure each other against such loss or damage and to induce each other to execute this agreement, assure and make each other safe in the keeping thereof, * * * and to provide a *penalty* [italics are ours] for the violation of this agreement. * * *"

[2] While the terms by which the parties designate the sum decided upon are to be considered in ascertaining the purpose and intent in stipulating the amount to be paid in case of a breach, such terms are by no means controlling, and, even though the term "penalty" is used, it must be ascertained from a consideration of the nature of the agreement whether there was an actual intent to prescribe a penalty; that is, an intent to determine and define the liability in the case of a breach of the contract without any reference to the actual damage likely to be sustained. The agreement in question provides

a complicated arrangement for the purpose of meeting various conditions incapable of being satisfactorily dealt with by individual action, and sets forth at length the peculiar facts surrounding the subject-matter of the contract. The securing and maintaining of united action in certain contingencies by the parties thereto was the gist of the contract, and from the terms of the contract it is apparent that the parties thereto considered that any independent action in regard to the matters within the scope of the contract was likely to produce serious losses and defeat the aims and purposes contemplated by the parties. The sums to be paid for a noncompliance in this regard were not uniform amounts arbitrarily determined, but were to be based upon the gross business transacted by the respective parties, evidently upon the theory that the loss to those continuing to observe the terms of the contract depended in a considerable measure upon the volume of business of the party ceasing to act in unison with the remaining parties. The contract is thus clearly distinguishable from that class of contracts in which an arbitrary sum is to be paid for each day during which the violation of the contract continues. Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Hansen v. Vallejo Electric, etc., Co., 188 Pac. 999. Nor can it be said of the provisions under consideration, as was said in the case of Nakagawa v. Okamoto, supra, that "the sole design of these provisions was apparently to furnish a club to be used to prevent" a violation of the contract. It is true that in the case of McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 N. Y. Supp. 385, the sums to be paid in the case of a breach of a contract similar to the one here presented were held to be penalties, and not liquidated damages, but the reason for so holding was that the money was not to be apportioned among the parties to the contract, as here, but was the property of the association created by the contract, which, as such, could suffer no pecuniary loss from the violation of the agreement. Furthermore, provisions in contracts indistinguishable in purport and purpose from that here presented have been held to provide for liquidated damages, and not penalties. Associated Hat Manufacturers v. Baird-Unteidt Co., 88 Conn. 332, 91 Atl. 373; Schrader v. Lillis, 10 Ont. Rep. 358.

[3] Looking to the entire agreement, its scope, purpose, and subject-matter, and considering the result of a breach and the reasonableness of the sums agreed to be paid therefor, it is clear that there was an intent to estimate a just compensation for the loss sustainable in the event of a failure to comply with the agreement.

[4] In this state a contract which attempts to fix the amount of damages in anticipation of a breach of an obligation is void to that extent (Civ. Code, § 1670), except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage" (Civ. Code, § 1671). Whether or not the damage would be impracticable or extremely difficult of precise appraisal is largely a question of fact. A provision in a contract which fixes the amount of the damage in advance of a breach is void unless the party seeking to recover the sum agreed upon shows, by pleading and proof, that the provision is within the single exception to the general rule. Long Beach, etc., v. Dodge, 135 Cal. 401, 67 Pac. 499; Los Angeles, etc., Ass'n v. Pacific Surety Co., 24 Cal. App. 95, 140 Pac. 295. The complaint in the case at bar, after enumerating the circumstances wherein plaintiffs sustained loss occasioned by defendants' breach, alleges:

"That at all times, it was, and is impracticable and extremely difficult to fix the amount of damage or loss to plaintiffs or to prove the same."

[5] This allegation, which, of course, is admitted by the demurrer, renders the complaint sufficient for the purpose of bringing the case within the exception provided by section 1671 of the Civil Code. Los Angeles, etc., Ass'n v. Pacific Surety Co., supra. Whether plaintiffs will be able to sustain this allegation by proof is immaterial upon a consideration of the merits of the demurrers.

[6] The appointment of the executive committee to exclusively represent the parties in certain negotiations was not a delegation of the discretionary functions of the directors of each of the corporations so represented, and the execution of the contract was not, therefore, beyond the powers of the respective corporations who were parties thereto. The clause in the contract which creates the executive committee makes this committee, consisting of certain named persons, the agents of the parties to the contract for a period of three years, and gives said committee the full and exclusive power to represent the parties in negotiations involving the subject-matter of the contract. The committee is to act, and the complaint alleges that it did act, "by and with the advice of the parties to the contract," and such advice was to be controlling and conclusive upon the committee when concurred in by three-fourths of the parties to the contract. The modern method of transacting corporate business requires that agents frequently, in cases where action by the board of directors would be impracticable or unfeasible, represent the corporation in dealings requiring the exercise of a great degree of discretion. Fletcher on Corporations, vol. 3, § 1952. In the present case it is not contended that the act which the agent was authorized to perform was beyond the powers of the corporations attempting to delegate the authority. The power dele-

gated was merely the full authority to handle a branch of the corporations' affairs; i. e., the regulation of the conditions of employment. If it was deemed necessary, in order to successfully carry on the business of the corporations, to segregate this subject-matter and place it under the control of a duly authorized agent, there is no material difference between appointing an agent for such a purpose and for other purposes requiring the exercise of discretion. The fact that the committee appointed as agent was composed of representatives of a number of firms, corporations, and individuals does not render the contract unenforceable by reason of attempting a delegation of discretionary powers to a committee of persons not responsible to the stockholders or members. A similar arrangement was held not beyond the power of the corporations participating therein in McCord v. Thompson-Starrett Co. (Sup.) 112 N. Y. Supp. 902. In discussing the question the court there said:

"The plea that it was beyond the corporate power of the Thompson-Starrett Company to vest in any outside body the right to bind it by the regulations adopted by the board of governors merits scant recognition. The agreement with the plaintiff association had reference to the business which, by its charter, the defendant was authorized to conduct. It was designed to facilitate it in its business operations, and to prevent a repetition of the ruinous and hazardous situations with which it had been confronted just prior to the time that it became a member of the association. The act of becoming a member being in itself a lawful one and directly related to its corporate purposes, it seems clear that it did not transcend its powers when it subscribed to the constitution of the association."

Upon appeal the Appellate Division of the Supreme Court of New York recognized as beyond question the power of the corporation to enter into such an agreement and thereby place the control of a part of its business in the hands of a common agent, but reversed the decision upon the ground that the order of the board of governors which had been violated was, in that particular instance, an order against public policy. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 N. Y. Supp. 385, affirmed 198 N. Y. 587, 92 N. E. 1090.

[7] The complaint alleges the execution and delivery of the notes, demand for payment, failure and refusal to pay the same, and contains a prayer for judgment thereon. It therefore states a cause of action upon the notes. The complaint also sets forth the contract between the parties and asks the court, in the exercise of its equity jurisdiction, to distribute the money, after payment, among those to whom the court finds it should go under the contract. While the satisfaction of a legal demand is the basis of the action, and there is, doubtless, a remedy at law by an action upon the notes, the steps necessary to a final and complete adjustment of the rights of the parties include the collection, by the officer designated by the contract, of various sums of money from a number of persons and the disbursement thereof after the respective rights of the several parties in and to the common fund have been determined. The relief, if it is to be effective and complete, may thus involve and include an adjudication of the obligations and duties imposed upon this officer by the contract, as well as an accounting among the parties to the contract. The grounds for the jurisdiction of equity in this case are further strengthened by the fact that a multiplicity of suits would be required if a purely legal remedy were sought, whereas the rights of the parties can be more readily determined in a single action. The reasons for upholding the jurisdiction of equity in this case are similar to those prevailing in the case of Warfield-Howell Co. v. Williamson, 233 Ill. 487, 498, 84 N. E. 706, 710, where the court said:

"There is a legal obligation at the foundation of the suit, but difficulties may arise out of the manner in which the obligation rests upon the persons or property of plaintiffs in error or in the efficiency of the process belonging to the law court which makes the legal remedy inadequate."

An action seeking a judgment for the payment of sums of money into a common fund, together with a decree distributing the fund among the parties entitled thereto, is not an action for the specific performance of the payment of money, and an action of this nature has been upheld in this state. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 117 Pac. 767.

The judgment is reversed, with directions to the court below to overrule the demurrers with permission to the defendants to answer, if they be so advised, within a designated time.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; KERRIGAN, Judge pro tem.; OLNEY, J.; SHAW, J.; WILBUR, J.

182 Cal. 652

CITY OF LOS ANGELES v. SAN PEDRO, L. A. & S. L. R. CO. (L. A. 5254, 5255.)

(Supreme Court of California. April 8, 1920. Rehearing Denied May 6, 1920.)

1. Boundaries ⟸13—Where lines are intended as meander, the stream or shore is the boundary.

Where the boundary lines as described in the patent were intended as the meander lines of a stream or shore, the actual stream or shore line is the boundary, not the meander line if it departs therefrom.

2. Boundaries ⟸14—Where two corners are on stream, boundary is presumed to be the stream.

Where two corners of the tract described are located on a stream and a line is called for extending from one such corner to the other, the stream is the boundary unless there is something which shows the contrary intention of the parties.

3. Navigable waters ⟸37(4)—Patent should be construed to exclude lands below high tide.

A patent to shore lands should ordinarily be construed as excluding therefrom the land below the high-tide line which belongs to the state by virtue of its sovereignty in the absence of an express showing to the contrary.

4. Public lands ⟸114(1)—Patent construed in favor of government.

A patent to public lands, like every other grant by the sovereign, is construed strongly in favor of the grantor under the rule embodied in Civ. Code, § 1069.

5. Navigable waters ⟸37(4)—Patent held to intend conveyance to high-water line, not meandered line.

A patent which described the tract so as to include a bay, but excepted therefrom the portion covered by the navigable waters of the bay "and which are included within the following described lines," was intended to except from the grant all of the bay up to the mean high-tide line, though the lines described did not include within the exception a portion of the bay.

6. Public lands ⟸222—Patent, not decree confirming Mexican grant, controls.

A patent excluding from the land described the portion thereof covered by the waters of a bay determines the rights of the parties, though it was issued in pursuance of a decree confirming a Mexican grant which did not mention the exception.

7. Navigable waters ⟸37(4)—Patent intending conveyance to water lines controls notwithstanding surveyor's intention to include tidelands.

Where the language of the patent clearly expresses an intention to except from the grant a bay included in the description up to the high-tide line, that intention controls, though the surveyor who ran the lines to describe the exception may have intended not to follow the high-tide line.

8. Navigable waters ⟸36(7)—Evidence held to sustain court's findings as to boundaries across tidal estuaries.

In a suit to quiet title to tidelands against the owner of the uplands, evidence *held* to sustain the trial court's findings as to the location of the headlands at the mouth of tidal estuaries so that its judgment defining the boundary line as that drawn from headland to headland was correct.

Olney, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action to quiet title by the City of Los Angeles against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Halstead J. E. Kelby and Oscar Lawler, both of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., Clyde M. Leach, Deputy City Atty., and Anderson & Anderson, all of Los Angeles, for respondent.

WILBUR, J. These actions were brought by the city of Los Angeles to quiet title to certain tidelands at San Pedro. The state of California, by an act of the state Legislature in 1911, ceded to the city of Los Angeles certain lands held by the state by virtue of its sovereignty in and around the bay of San Pedro. Defendant predicates its right to the lands involved herein upon a United States patent of the San Pedro Rancho. This patent was issued in 1858 and was in confirmation of a Mexican grant prior to the year 1809. The patent contains a description by metes and bounds and has attached thereto a plat. We are concerned in this case only with the proper interpretation of such description and plat. The description in the patent first delimits the exterior boundaries of the Rancho San Pedro; such boundaries cross the inner bay of San Pedro and the entrance thereto, thus including within such exterior boundaries a large portion of the inner bay of San Pedro, the balance being contained in the Rancho Palo Verde to the west. The "inner bay of San Pedro" is, however, excepted by a description, the interpretation of which forms the basis of this controversy. All the parcels of the tidelands to which the city seeks to quiet its title lie outside of the lines of the inner bay exception and within the Rancho San Pedro as described in the patent, if the courses and distances of the inner bay exception are treated as boundary lines of such exception and rancho. If, however, the shore line of the bay at mean high tide is the boundary, then the lands are excluded by the inner bay exception, and were therefore reserved to the

state, and now belong to the city as trustee for the public.

[1] The sole question, then, for determination by this court is whether or not the lines of the patent defining the inner bay exception are meander lines of the inner bay within the meaning of the rule which makes the shore line of that bay the actual boundary line where the intent is to meander such shore. The law is thus stated in the syllabus to the opinion of the Supreme Court of the United States in Jeffries v. East Omaha Land Co., 134 U. S. 178–198, 10 Sup. Ct. 518, 523 (33 L. Ed. 872):

"Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the water course, and not the meander line, as actually run on the land, is the boundary."

See, also, Railroad Co. v. Schurmier, 7 Wall. 272, 19 L. Ed. 74.

[2] In St. Clair County v. Lovingston, 23 Wall. 46–69 (23 L. Ed. 59), it is said:

"It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise."

See, also, City of St. Louis v. Rutz, 138 U. S. 226–251, 11 Sup. Ct. 337, 34 L. Ed. 941; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Producers Oil Co. v. Hanzen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330.

In addition to this rule of interpretation, there are two others which bear upon the situation now under consideration.

[3] The first is that a patent should ordinarily be construed as excluding therefrom land below the high-tide line. The rule is thus stated in Wright v. Seymour, 69 Cal. 122, 10 Pac. 323:

"The lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty, and in the absence of an express showing to the contrary, it will not be presumed that the government of the United States intended to convey it. * * * We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government. Had the government found the claimant entitled to the bed and banks of a tidewater stream, we must suppose it would have used in the patent apt words for its conveyance. Not having done so, the presumption is, that it was not intended to convey the bed of the stream."

In Carver v. S. P., L. A. & S. L. Ry. Co. (C. C.) 151 Fed. 334, it is held that a grant from the sovereign of land bounded by the sea or by any navigable tidewater does not pass any title below high-water mark unless the language of the grant or long usage under it clearly indicates that such was the intention.

[4] The other rule of interpretation is a corollary thereto, namely, that every grant by the sovereign is construed strongly in favor of the grantor. The rule is thus stated in our Code, section 1069, Civil Code:

"A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."

This rule of construction was applied by the Supreme Court of the United States in Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, where it was said:

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tidewater, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.'"

The controversy here must be determined by the application of these well-established rules of construction to the patent in question. The patent and the accompanying plat are to be construed together. The plat showed the exterior boundaries of the rancho, and within the boundaries of the rancho a body of water marked "Inner Bay of San Pedro (Exception)." Every one of the fifteen stations of the line delimiting this bay appears from the map thereof to be upon the shore line of the bay as such line is drawn upon the plat. The stations of the inner bay exceptions are marked "I. B." Between stations I.B.12 and I.B.16 of the inner bay exception survey the plat shows some land lying within the bay between the shore line and the surveyed lines. The plat not only shows that all the water of the bay is within the excepted area but some of the high

land also; whereas, this controversy is based upon the fact, now ascertained and admitted, that the shore line at the places here in controversy lies entirely outside these meander or survey lines. In other words, while the meander lines purport to include the whole of the bay and, in addition, some of the upland, the fact is that the shore line lies outside of the meander lines and the exception lines do not include all the water. The plat under the head of "Traverse of the inner bay of San Pedro to be excluded from survey of the claim" gives a table of the same courses and distances which are used in the description thereof in the patent. Upon the plat is the following statement:

"Area within the exterior lines of the confirmed grant 44,219.72 acres; area within the lines '1' to '16' being the lands covered by the navigable waters of the 'inner bay of San Pedro' connected with the ocean and therefore to be excluded 1,100.59 acres; included in the boundaries specified by the confirmatory decree exclusive of the bay 43,119.13 acres."

Thus the plat, by delineation of the boundaries, and by express exception of the "navigable waters of the inner bay," which because connected with the ocean are "therefore to be excluded," indicates the intention of the government, to exclude from the lands granted the "navigable waters of the inner bay." It would thus appear that it was the intention to except from the patented lands the entire surface of the inner bay. The uncertainty in the case arises from the fact that the plat accompanying the survey does not correctly delineate the shore line of the bay at mean high tide. The description contained in the patent, so far as it relates to the controversy, is as follows:

"Excepting, reserving and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines, to wit:

"Beginning at the stake on the high-water line of the inner bay of San Pedro on the line between stations 23 and 24 of the survey of the rancho, and which stake is 212 chains south 7° 32′ east from said station number 23."

(1) "Thence according to the true meridian (the variation of magnetic needle being 13° 30′ east) along the high-water line of the inner bay of San Pedro, south 80° 45′ east 10 chains and 84 links to station."

(2) "Thence south 89° 45′ east 9 chains to station."

(3) "Thence north 76° 45′ east and 25 chains to station."

(4) "Thence south 77° (and) 45′ 8 chains and 90 links to station."

(5) "Thence south 15′ west 6 chains and 50 links to station."

(6) "Thence south 72° 15′ east 15 chains to station."

(7) "Thence south 68° 15′ east 16 chains to station."

(8) "Thence north 24° 45′ east 14 chains and 13 links to station."

(9) "Thence north 46° 45′ east 11 chains and 50 links to station."

(10) "Thence north 69° 45′ east 11 chains 50 links to station."

(11) "Thence north 58° 15′ east 16 chains to station."

(12) "Thence south 34° east at 9 chains crosses a slough 4 chains wide, course northeast; 59 chains crosses a slough 3 chains wide, course east and to station at sand hills."

(13) "Thence south 67° west 76 chains and 50 links to station."

(14) "Thence south 34° 45′ west 98 chains to station No. 25 of survey of exterior boundaries."

(15) "Thence north 31° 30′ west, crossing the channel or entrance to the bay, 19 chains and 44 links to 'La Goleta' exterior boundary, station No. 24."

(16) "Thence north 7° 32′ west, crossing the said 'inner bay' 125 chains and 20 links, to the stake 16 on the high-water line of the bay, and commencement of this survey thereof; containing, exclusive of the lands above described as covered by the navigable waters of the 'inner bay of San Pedro' 43,119.13 acres; and being designated upon the plats of the public surveys as lots Nos. 37, 38 and 39 in township 3 south of range 12 west, lot No. 37 in township 3 south of range 13 west, lot No. 37 in township 3 south of range 14 west, lot No. 37 township 4 south of range 13 west, lot No. 37 in township 4 south of range 14 west, lot No. 37 in township 4 south of range 15 west, and lot No. 37 in township 5 south of range 13 west, of San Bernardino Meridian Line."

The various stations in this Inner Bay Exception Survey are known and indicated on the maps in evidence here as "I.B.1," etc., the eleventh call ending with Inner Bay Station 12 or "I.B.12."

[5] Had the description ended with the word "San Pedro" in the following phrase, "Excepting, reserving and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro," the title to the tidelands of the bay would unquestionably be in the plaintiff, for the reason that it is thoroughly established that the term "navigable waters" includes all waters below the high-tide line, and the phrase thus used is equivalent to the statement "that portion thereof covered by the waters of the inner bay of San Pedro at mean high tide." It should be noted that immediately after the foregoing clause and preceding the description by metes and bounds is the following phrase, "and which are included within the following described lines, to wit." The word "and" is significant for the reason that it implies that the former phrase "excepting the navigable waters" is synonymous with the description which followed. Without the word "and" it might be contended that the patent should be construed as though it read, "only that portion of the navigable waters which are included within the following described lines, to wit," etc. The inner bay exception survey begins

at a stake *on the high-water line of the inner bay of San Pedro*, and proceeds, "Thence according to the true meridian *along the high-water* line of the inner bay of San Pedro" from station to station until the description, "Thence north 31 degrees, 30 minutes, crossing the channel or entrance to the bay," and then again the last course which for 125 chains and 20 links crosses the inner bay "to the *stake on the high-water line of the bay* and the commencement of the survey thereof." The phrase, "containing, exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro," again indicates an intention to exclude from the patent the navigable waters of the inner bay of San Pedro.

The Rancho Palo Verde lies immediately to the west of the Rancho San Pedro, and a portion of the inner bay is included within exterior boundaries of the latter rancho. This fact accounts for the final course which departs from the high-tide line "Thence north 7 degrees, 32 minutes west, *crossing said inner bay* 125 chains and 20 links to the stake on the high-water line of the bay and the commencement of this survey thereof. * * *" (Italics all ours.)

In Spring v. Hewston, 52 Cal. 442, it was said:

"If the initial point of a boundary is the mouth of a creek, and it is described in a conveyance as 'thence ascending the creek,' and several courses and distances are given up the creek, and these courses and distances do not follow, but often diverge from the creek, the true boundary is the creek."

This reasoning applied to the situation involved in this case would make the phrase "thence along the high-tide line" modify and affect every one of the courses and distances from the original point of the inner bay exception and make the high-tide line its true boundary. See, also, Stoll v. Beecher, 94 Cal. 1, 29 Pac. 327. The decision of this court in Freeman v. Bellegarde, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76, leads to the same conclusion. There the description was "thence along the margin of the bay (giving four courses and distances) * * * 11 chains to mouth of creek, thence ascending creek (giving thirteen courses, with their distances) * * * N. 45 degrees W., 9 chains 50 links, crossing the creek to the end of the old wall on N. side of marsh." The court said:

"The further call in the mortgage and subsequent conveyances, 'thence ascending said creek,' must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary it is impracticable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike."

See, also, Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496; Railroad Co. v. Schurmier, 7 Wall. 272, 19 L. Ed. 74.

The patent of the San Pedro Rancho has already been before this court and before the Supreme Court of the United States. De Guyer v. Banning, 91 Cal. 400, 27 Pac. 761; Id., 167 U. S. 723, 17 Sup. Ct. 937, 42 L. Ed. 340. The question involved was as to the ownership of Mormon Island within the inner bay exception. It was there contended that the decree of confirmation and the patent granted this land to the patentees. This controversy was first decided by this court in favor of the claim of the patentees, but subsequently on rehearing it was held that the patentees were bound by the terms of the patent, and the island therefore did not pass to the patentees. This decree was affirmed by the Supreme Court of the United States. It is therefore now conceded by the parties to this action that the patent controls the rights of the parties. The question litigated in the case of De Guyer v. Banning, supra, did not involve the exact question now before us. The statements in the opinions of the Supreme Court of this state and of the United States relating to the "inner bay exception," although obiter dicta, are very persuasive as to the meaning of the patent. It is stated (167 U. S. 735, 17 Sup. Ct. 941, 42 L. Ed. 340):

"The map which accompanied and was made part of the patent of 1858 shows the exterior lines of the survey made under the decree of confirmation. *Those lines include the whole of the inner bay of San Pedro.* The map also shows the exterior lines of the bay itself. But across that part of the map which designates the bay are the words 'Inner Bay of San Pedro (Exception).' And, as already stated, the map has on its face not only a table showing the exterior lines of the entire boundary run by the surveyor general, but a table of courses and distances, under the heading 'Traverse of inner bay of San Pedro to be excluded from survey of the claim.' It is not disputed that Mormon Island is within the exterior lines of this inner bay, and is almost covered with water at high tide. *That the part excluded or excepted from the survey embraced the navigable waters of the inner bay cannot be doubted.* Was it not also intended to exclude Mormon Island, which, according to the opinion of the court below on the original hearing, consisted, at high water, 'of a pile of rocks, covering not much more than an acre'? This question was answered in the negative by the Supreme Court of California, which, on the rehearing of the case, said: 'The remaining question is, whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception properly construed embraces all the

lands within the exterior boundaries of the inner bay of San Pedro, as shown on the map accompanying the patent and is not confined simply to such land as is covered by the navigable waters of that bay. That this is the true meaning of the exception is made to appear not only from the fact that the inner bay of San Pedro is marked "excepted" upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, "exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro," as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro, as marked on said map.' We entirely concur in that view." 167 U. S. 739, 17 Sup. Ct. 943, 42 L. Ed. 340. "If the claimants under the decree of confirmation did not themselves present the survey to the General Land Office, and ask a patent in accordance therewith, they accepted a patent based upon that survey, and plainly showing that it conformed to a survey that did not embrace, for the purposes of a patent, *anything within the exterior lines of the inner bay of San Pedro.*" (Italics ours.)

The patent as thus interpreted excluded not only all lands within the inner bay covered by navigable water, but all lands within the exterior boundaries of said bay. If we follow this interpretation in the present case, it necessitates the affirmance of the judgment, for it is not disputed that all the lands claimed by the plaintiff lie below the navigable waters of the inner bay.

A course of the inner bay exception survey was involved in the case of Wheatley v. San Pedro, etc., Ry., 169 Cal. 505, 147 Pac. 135. It was there held that the shore line was the boundary (see map, 169 Cal. 508, 147 Pac. 136), but as to all calls to station I.B.12, including the foregoing, the defendant concedes that the shore line is the real boundary, but contends that the last three lines are not meander lines; that all the land outside of these lines is owned by the defendant as successor to the patentee, regardless of the fact that some of it lies below the line of the mean high tide; for the reason that by a patent issued in pursuance of a Mexican grant the tidelands therein pass to the grantee. This contention involves a consideration of the actual shore line as shown by later surveys, and is largely based upon the fact that such survey shows so wide a departure from the courses and distances of the inner bay exception as to demonstrate that such lines were intended as arbitrary boundaries rather than meander lines of the shore. A further statement of facts will be necessary to present and discuss the defendant's position. Parcels "C" and "B" lie east of the line connecting I.B.12 and I.B.13 (the line marked 12 on the plat) and contain, respectively, 3.42 acres and 30.29 acres. Parcel "A" lies to the south of line 13 (I.B.13 to I.B.14), and contains 229.73 acres. The plane of mean high tide is 5.1 feet above the plane of mean low tide. Maps of the inner bay were made in 1857, 1858, 1883, 1899, 1908. During each of these surveys parcels "A," "B," and "C" were in their natural condition. A comparison of the different topographical surveys shows that there had been little change in the bay during all this period.

From I.B.13 to I.B.14 the course is from six inches to one foot below the level of ordinary high tide.

Nearly the entire East Basin lying east of Mormon Island, including parcel "A," lies under water from 6 inches to a foot at ordinary high tide. Parcel "C," a shallow bight, is covered by water, in the main from 1 foot to 1½ deep. At high tide the water is deeper over parcel "B" than over parcel "C."

Southerly from station I.B.12 the survey followed for several hundred feet practically along the 5.1 foot contour line, until the first slough called for between those points is approached. After crossing, the line again practically follows the line of ordinary high tide for some distance, when it leaves the line of high tide, and crosses the southeast portion of the bay, to I.B.13. This station is 1.1 feet below high-tide line. From I.B.13 to I.B.14 the line leaves the high-tide line and crosses ground covered at mean high tide by water from six inches to a foot or more in depth at ordinary high tide. Station I.B.14 is about 4.5 feet below ordinary high tide. From I.B.14 to I.B.15 the line for about 3,000 feet runs through still deeper water, between 1 to 3½ feet below mean high tide. Parcel "A" is nearly 2 miles in length along the line I.B.13 to I.B.15, and nearly 2,000 feet in width. It is a shallow portion of the bay itself. Around "C" and "B" there is a comparatively abrupt rise of 1.1 feet.

Parcels "O" and "P" are clearly parts of the bay and of San Pedro channel. The survey, upon leaving station I.B.12 at 9 chains, crosses a slough 4 chains wide, course northeast, and at 59 chains crosses a slough 3 chains wide, course east. It is clear that the surveyor did not intend to follow the high-tide line of these sloughs, which extended for long distances beyond the lines of the inner bay survey. From these facts the defendant deduces the conclusion that at I.B.12 it was the intent to make an arbitrary boundary line rather than to follow the meanderings of the shore line at high tide. In considering the survey however, it should be borne in mind that the surrounding land to the east and south was so nearly level that a rise of a foot in the tide would, in some places, advance the shore line a mile, and in other places the land was even more nearly level. In legal contemplation, the bay may always be said to extend to the mean high-tide level;

as a matter of fact, the actual water line is constantly changing, and perhaps the mean high-tide level, as now so definitely and accurately determined, may have been unknown in 1858 when the survey for the patent was made.

The following statement by the Supreme Court of the United States in Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, is particularly applicable to the lines under consideration:

"The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which, by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream."

In this survey, for the purpose of defining the patent boundary of the Mexican grant, the surveyor is not concerned with the question as to the amount of land contained within the patent boundaries as the basis of fixing the contract price. The amount of land granted, however, was 8½ leagues, and this was an important element in fixing the boundaries thereof. The appellant contends that the area of the inner bay exception, conforming as it does to the traverse lines shown upon the plat and in the patent, tends strongly to confirm its position that the traverse lines of the inner bay exception were intended to be the boundary lines and not meander lines. This coincidence, however, was to be expected as the government rules of survey provide for such method of computation, and therefore the statement of the area of 1,100.19 acres for the inner bay exception adds nothing to the delineation of the boundaries, shown by the patent.

[6] It is suggested that, as the decree confirming the Rancho San Pedro made no exception of the inner bay, the unauthorized exception thereof ought not to be further extended by construction. This suggestion is not in accord with the decision of De Guyer v. Banning, supra, which holds that the patent boundaries are conclusive upon both the patentee and the United States. It is perhaps worthy of note that the decree confirming title in the patentee, and subsequently made the basis for the issuance of the patent, stated that the land thus confirmed to the petitioners contained 8½ leagues more or less. As a league contains 4,340.278 acres (U. S. v. Perot, 98 U. S. 428, 431, 432, 25 L. Ed. 251), the decree called for 36,892.363 acres. The patent recites that the claimant petitioned for confirmation of a ranch containing "ten leagues more or less" (43,420.78 acres), and had confirmed to them "eight leagues and a half more or less." The actual area conveyed to them, exclusive of the inner bay exception, is stated in the patent to be 43,119.13 acres, or only 283.65 acres less than the 10 leagues claimed and 6,610.42 acres more than confirmed to the patentees (8½ leagues). We do not, however, attach any importance to this point.

The case of Producers' Oil Co. v. Hanzen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330, is very much relied upon by the appellant because it is there held that the line run by the government surveyor, although purporting to be a meander line of a bayou, actually excluded from the survey portion of the high land between the meander lines and the bayou. There the cases stating the rule applicable are thus summed up:

"They unquestionably support the familiar rule relied on by counsel for the oil company that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights."

The facts upon which the court distinguishes Producers' Oil Co. v. Hanzen, supra, from those cases holding that the shore line and not the meander lines in a patent constitute the boundary lines of the land patented are thus stated in the opinion:

"In the instant case we find a survey [by Bristol] of improved lands made at the express request of the occupant to whom they were subsequently patented; a grant from the United States specifying the exact number af acres conveyed; a positive declaration in field notes that land to the north [i. e., between the traverse line and the bayou] lies outside the traverse lines; admission that excluded area contains not less than 40 acres of high ground, and evidence of large timber growing there; official plat delineating the surveyor's courses and specifying the acreage of the several subdivisions, which cannot be said to indicate a water boundary beyond possible question. Outside the southern traverses of this plat, in space designated 'Open Lake,' lie 300 acres of fast land surveyed by Barbour in 1896. Although Noel, the oil company's immediate vendor, as owner, was in possession of property known as Wilson's Point place for some 30 years, and until after alleged unlawful entry by defendants in error, his corporeal possession (as expressly stipulated) was limited east and north by the Bristol traverse lines and he never occupied or exercised any act of corporeal possession over the above-indicated 40 acres or more without the same."

In that case, a successor of the United States government claiming under a mineral location was contesting the validity and extent of the patent, and the above rules of

construction required that the description in the patent should be most strongly construed against the patentee and in favor of the government and its successors. In the case at bar that same rule works against the contention of the appellant, for here the city succeeding to the rights of the government is seeking to establish its claim to land lying between the meander lines and the shore line. There the patentee was trying to maintain title to the land between the meander line and the shore line.

[7] In considering the relation of the actual shore line to the meander line of the inner bay exception, much stress is laid, in appellant's brief, upon the intention of the surveyor. We are, however, not concerned with the intention of the surveyor who made the survey on the ground. The plat of his survey, with the field notes, were submitted to the United States Land Office at Washington by the United States Surveyor General at San Francisco, with the following certificate of approval:

"The field notes of the 'Rancho San Pedro' and from which this map has been made out have been examined and approved and are on file in this office. United States Surveyor General's Office, San Francisco, California. February 19, 1858. J. W. Mandeville, United States Surveyor General for California."

—and such plat thereafter filed in the General Land Office at Washington, D. C., and made a part of the patent. When we have determined that the patent and plat attached thereto on their face purport to meander the line of high tides of the inner bay exception, it follows that the grant should be so construed, in favor of the government, notwithstanding the fact that the surveyor, in making a survey on the ground, may have included within the exterior boundaries of the Rancho San Pedro tidelands which should have been more carefully delimited by the meander lines of the inner bay exception, and thus excepted from the grant. In other words, if the patent and plat on their face show an intention to meander the shore line of the inner bay, the latter is the proper boundary, where the effect of following the meander lines as boundary lines would be to convey tidelands from the government to the patentee. All the foregoing considerations compel the conclusion that the mean high-tide line of San Pedro bay is the boundary between the land conveyed and the land retained by the government, and that therefore the claim of the plaintiff to the tidelands as successors of the government is valid.

[8] In anticipation of this possible construction of the patent, appellant contends that in any event parcels "C" and "B" should be excluded from the inner bay exception, because included in the mouths of estuaries tributary to the bay and that the surveyor crossed the same as required by law and by good surveying practice. The following statements in Knight v. United States Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974, are relied upon, to wit:

"Where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland. The existence of tidelands in the intersecting water in no respect affects the result."

"In determining a boundary line stated as the line of 'ordinary high-water mark,' on the bay of San Francisco, there can be no other course than to follow the stated line of ordinary high tide on the shore of the bay, crossing the mouths of all inferior tidal streams or estuaries, many of which enter into San Francisco bay at different points, and not to follow the meanders of any such inferior tidal streams or estuaries."

See, also, Bolsa Land Co. v. Burdick et al., 151 Cal. 254, 260, 90 Pac. 532, 12 L. R. A. (N. S.) 275.

It is true that the course I.B.12 crosses two sloughs, one extending east and the other northeast. But in determining the proper point of crossing, if we follow the shore line to such slough or estuary, the point of crossing is the intersection of such shore line and such estuary to a corresponding point on the opposite bank. For this purpose we assume the bay to be filled with water to the mean high-tide line. The application of this principle to the lines of the bay at high tide is not free from difficulty. The banks of the northernmost channel are clearly defined and the line of intersection with shore of the bay clearly indicated. By crossing the channel diagonally from point to point parcel "C" is included in the bay.

Parcel "B" contains a total area of 47.41 acres but within the exterior boundaries thereof are four parcels of land indicated on the diagram as parcels "I," "J," "K," and "L," containing 41.31, .97, .86, and .98 acres, respectively. Parcel "I" is separated from the balance of the Rancho San Pedro and from the other parcels by channels and mud flats which form a "shoreshoe." The channel to the north of parcel "I" at low tide dwindles to a few feet and at high tide is five or six hundred feet wide along the line I.B.; thence narrows to two or three hundred feet wide and expands to five or six hundred feet. The channel to the south of parcel "I" is somewhat deeper and more uniform in width. Perplexing as it appears to locate the high-tide line of the bay as distinguished from the high-tide line of the estuaries flowing into the bay, we think the presumption in favor of the government and against the patentee sufficiently supports the finding of the trial court with reference to the high-tide line of the bay, and therefore as to the ownership of parcel "B."

In view of the interpretation of the patent

adopted by the trial court and hereby affirmed, the various assignments of error in the admission of testimony become immaterial and need not be specially noted, such as the testimony of witness D. E. Hughes to the effect that in his opinion the lines I.B.13, I.B.14, and I.B.15 were ascertained by triangulation and not actually surveyed upon the ground.

Judgments affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; KERRIGAN, Judge pro tem.; LAWLOR, J.

OLNEY, J. I concur in the major portion of the main opinion, but dissent from that portion which upholds the judgment of the lower court in its finding that title to all of parcel "B" is in the city. In my opinion, is very clearly appears from the evidence, from the original patent map, and from maps introduced by the city itself, that the high-tide line of the waters of the bay is intersected by inferior tidal streams or sloughs, and that the boundary line of parcel "B," as found by the court, runs up these sloughs instead of crossing them as it should have done under the rule of Knight v. United Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974, and Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275.

(46 Cal. App. 377)

PEOPLE v. SOMSKY. (Cr. 880.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1920.)

1. Criminal law ⇐881(1)—Verdict sufficient though not stating defendant was guilty as charged.

Verdict, "We, the jury, find the defendant (naming him) guilty of felony, to wit, forgery," *held* sufficient, though omitting words "as charged in the information."

2. Forgery ⇐7(2) — False certification of check constitutes "forgery"; "bill of exchange"; "acceptance."

Defendant who forged certification of a check in the name of a bank, signed by its cashier, a check being a "bill of exchange" under Civ. Code, § 3254, was guilty of "forgery"; certification by authorized officers constituting "acceptance" by a bank, and Pen. Code, § 470, expressly making the forgery of an acceptance of a bill of exchange a crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acceptance; Bill of Exchange; Forgery.]

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Theodore Somsky was convicted of forgery, and appeals. Affirmed.

George Appell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment based on a verdict of conviction of the defendant upon the charge of forgery.

The appellant's first contention is that the verdict of the jury was insufficient in form to support the judgment appealed from. The information charged the defendant with the commission of "the crime of felony, to wit, forgery committed as follows." It then proceeded to set forth in detail that the defendant did willfully, unlawfully, feloniously, falsely, fraudulently, and with intent to prejudice, damage, and defraud the Bank of Italy, make, alter, forge, and counterfeit a certain indorsement and certification, to wit, "Certified 12/5 1917, Hellman Commercial Trust & Savings Bank, W. O. Tarry, Cashier, $3,800.-00," upon a certain check (setting the same forth in detail), and did then and there with the same fraudulent and felonious intent utter, publish, and pass the same as true and genuine to the said Bank of Italy, contrary, etc. The verdict of the jury read as follows: "We, the jury, find the defendant, Theodore Somsky, guilty of felony, to wit, forgery." The defendant's contention is that this verdict, in order to be sufficient to support the judgment, should either have contained the words "as charged in the information," or should have sufficiently set forth the language of the information to identify the particular act of forgery of which the defendant was found guilty.

[1] This contention in either aspect has no merit. The addition of the words "as charged in the information," while frequently and appropriately found in verdicts, would not add anything to such a verdict as that in the instant case, which in itself identifies a particular statutory crime. It has in fact been held that a verdict which omits the specification of the particular crime, but merely finds the defendant guilty "as charged in the information," would be an insufficient verdict. People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788. It would seem to follow that the omission of these words from a verdict which did in itself identify the particular statutory crime of which the defendant was found guilty would not vitiate such a verdict.

The cases cited by the appellant in support of his contention are clearly to be distinguished from the case at bar. In each of them the defendant was charged with the doing of acts constituting a crime, but which crime outside of said acts had no specific definition in the statute; such as "obtaining money under false pretenses," or "receiving stolen property," and the like. In such cases

the statute does not define the crime except as the specially forbidden acts define it, and hence a verdict would be insufficient which neither referred to the information nor contained a recital of the inhibited acts of which the defendant was found guilty. But in the case of forgery the statute in a word specifies and defines the crime, and hence it is sufficient in the verdict to so specify and define it.

[2] The only other contention of the appellant is that the information is insufficient in charging the defendant with the certification of a check, his claim being that section 470 of the Penal Code does not expressly designate the certification of a check as being the subject of forgery. The information sets forth the precise language of the certification which the defendant is alleged to have forged, including the name of the cashier of the bank executing the same, and alleged that the said certification was indorsed upon the check drawn upon said bank, which check is also set forth in full. A check is a "bill of exchange" under section 3254 of the Civil Code. A certification of a check by the authorized officers of the particular bank upon which it is drawn constitutes an "acceptance" thereof on the part of the bank which binds it to pay the amount called for by the check upon presentation for payment. The forging of an acceptance of a bill of exchange is expressly made a crime under section 470, Penal Code. It follows that an information which specifically charges the forging of such a certification as is set forth in this information sufficiently accuses the defendant of the statutory crime of forgery.

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

(46 Cal. App. 469)

HOUGHTON v. KUEHNRICH. (Civ. 2075.)

(District Court of Appeal, Third District, California. March 10, 1920. Hearing Denied by Supreme Court, May 6, 1920.)

1. Brokers ⊂=54—Entitled to commissions on producing purchaser ready, able, and willing to buy.

Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission, and it is payable, when he produces within the time allowed a purchaser who is ready, able, and willing to buy on the terms prescribed, or with whom the owner enters into a contract on other terms satisfactory to him.

2. Brokers ⊂=63(2)—Where owner exercised option to refuse to exchange property, broker, who brought parties together, not entitled to commission.

Where a contract for the exchange of lands, providing for payment of commissions to the broker negotiating the same, gave defendant the option of canceling the agreement within a fixed time, and defendant exercised such option, the broker, whose rights to commissions depend wholly on the contract, cannot recover, notwithstanding another clause of the agreement provided that, if for any cause principals should fail to comply with contract, party at fault should pay the broker for commissions; such clause obviously having reference to a failure of title or the like.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by W. H. Houghton against P. Max Kuehnrich. There was a verdict for plaintiff, and, defendant having been granted a new trial, plaintiff appeals. Order granting new trial affirmed.

McKinley & McKinley and A. W. Ashburn, all of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. Plaintiff sued defendant for $4,000 real estate commission for procuring one Ralph Granger to assent to the terms of an agreement for exchange of real estate, which was drawn by defendant's attorney. The cause was tried before a jury,which rendered a verdict for $4,000 in favor of the plaintiff. The trial court granted defendant's motion for a new trial, and from this order the plaintiff has appealed.

The pleadings admit that the defendant executed and delivered a certain instrument, which is set forth in paragraph I of the complaint, and which appears to be an agreement for the exchange of real property between the defendant, P. Max Kuehnrich, as party of the first part, and Ralph Granger, as party of the second part. It was stated in said agreement that the party of the first part therein (the defendant herein) was the owner of certain property in Los Angeles (describing it), which he desired to exchange for certain real property in Brooklyn, N. Y. (describing it), owned by Ralph Granger, the party of the second part therein. The terms upon which the defendant was willing to exchange his property for the property of Granger are therein set forth in detail. The agreement bears date of October 28, 1915, and contains the following paragraphs:

"It is understood, however, that the first party [Kuehnrich] shall have 17 days from and after the 28th day of October, 1915, within which to inspect said property of second party, and that first party, if not satisfied therewith, may at any time during said period cancel and terminate this agreement. W. H. Houghton [plaintiff herein] are hereby authorized to act as my agents in negotiating an exchange, and I agree that, if they shall secure an acceptance of the proposition to exchange the above-

described properties on the above terms, I will within 2 days furnish a certificate of title or abstract from a competent searcher of titles, together with a deed of bargain and sale, conveying a good and sufficient title to the property above mentioned, except as aforesaid. * * * It is further understood and agreed that if, for any reason whatever, either or all principals to this agreement shall fail to comply with same, and in consequence this exchange shall fail of consummation, then the parties or party at fault for such failure hereby agrees to pay W. H. Houghton the full commission for both sides, together with attorney and escrow charges.

"It is further agreed with W. H. Houghton that, when they have received an acceptance to exchange the above properties on above mentioned terms, I will pay them the sum of $2,500 as commission for such service, irrespective of any commission paid by the other party."

This agreement was signed by Kuehnrich, the defendant herein, and witnessed by H. B. Mathews. Immediately following their signatures is written the following:

"This agreement witnesseth that I, Ralph Granger, of San Diego, owner of the second herein described piece of property, hereby accept the proposition of exchange made therein upon the terms stated, and agree to furnish a certificate of title or abstract from a competent searcher of title within 22 days, showing property vested as described, and to furnish a good and sufficient deed of conveyance as directed. I agree to pay to W. H. Houghton the sum of $1,500 commissions for services rendered. Dated Oct. 28th, 1915.

"[Signed] Ralph Granger,
"By W. H. Houghton, Agent.
"W. B. Mathews, Witness."

W. H. Houghton was not authorized by any instrument in writing to sign Mr. Granger's name to the above paper. He talked with him over the telephone, and was told by him to execute the contract, and it was upon this telephonic authorization that he signed Mr. Granger's name.

Within 17 days after October 15, 1915, Kuehnrich, the party of the first part in said agreement, sent to Mr. Granger, at San Diego, a telegram worded as follows:

"You are notified that I am not satisfied with your property known as Clinton Apartments in borough of Brooklyn, New York City, described in our agreement of exchange dated October twenty-eighth and hereby cancel and terminate said agreement.

"P. Max Kuehnrich."

It is to be stated that plaintiff is not a party to any of the above documents. His name appears on the exchange agreement, not as a party thereto, but simply as agent for Mr. Granger for the purpose of signing his name thereto. He had no independent contract for the payment to him of a commission for making the exchange. His right to any compensation was dependent upon and inseparably bound up with the agreement of exchange, which contained a cancellation clause for the benefit of the defendant. After the cancellation of the contract by the defendant, Houghton sued Kuehnrich for $4,000 as broker's compensation, being $2,500 claimed as due on Kuehnrich's promise and $1,500 due on Granger's promise. As stated, the jury found a verdict in favor of the plaintiff for the full amount sued for, and on motion of the defendant the court set aside the verdict of the jury and granted a new trial.

Respondent attempts to justify the action of the court in granting the motion for a new trial upon several grounds. We do not deem it necessary, in disposing of the case, to enter into a discussion of all of them. We think that upon the merits of the case, as drawn from a construction of the written contract of exchange, coupled with the proved facts, the plaintiff was not entitled to recover.

[1] The circumstances under which a broker is entitled to his compensation for finding a purchaser of real estate is thus stated by the appellate court in Stewart v. Bowie, 185 Pac. 868:

"Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission, and it is payable when he produces, within the time allowed, a purchaser who is ready, able, and willing to take the property on the terms prescribed, or with whom the owner enters into a contract upon those or other terms satisfactory to him."

[2] We are of opinion that this case must be governed by the principles announced in cases like Jennings v. Jordan, 31 Cal. App. 338, 160 Pac. 576, and Brion v. Cahill, 34 Cal. App. 262, 165 Pac. 704. In the latter case it appeared that the defendant and one Krummes entered into a written contract of exchange of their respective properties, and in the same contract and as a part of it, over the signature of the defendant, was written:

"And I further agree to pay to P. A. Brion, as agent, the sum of $1,000 for services rendered, for such services."

The exchange was not consummated, owing to the fact that Krummes had no title to the property he agreed to convey. Upon suit brought by the broker, judgment was rendered in his favor. We find the following language used in the course of the opinion of the appellate court, in reversing the judgment:

"In support of the judgment the respondent relies upon a line of authorities holding that a real estate broker, employed to sell real property, has earned his compensation when he has produced a purchaser able and willing to take the property on the terms proposed, or who has been accepted by his principal as such

purchaser by entering into a contract with him. In the latter event those authorities hold that the ability of the purchaser to carry out his contract is immaterial to the right of the broker to receive compensation from his principal."

And in the same case, quoting from Jennings v. Jordan, supra, the opinion continues:

"The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therein for the payment of a commission to Eppinger must be construed in its relation to the whole contract. * * * Unless and until the exchange was consummated, the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything, except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it), the whole contract fell, the provision relating to Eppinger's compensation with the rest."

These cases are referred to in Stewart v. Bowie, 185 Pac. 868, as follows:

"In such cases [referring to Jennings v. Jordan and Brion v. Cahill, supra] the broker, not having the protection of the ordinary broker's contract for compensation for services to be performed, must stand or fall by the contract actually entered into; and, if he has seen fit to allow the payment of his compensation to be dependent upon the performance of a contract made between other parties than himself, he cannot complain if through the nonperformance of that contract his own contingent right be lost."

The case at bar is very much stronger in favor of respondent's position than either the Jennings or Brion Cases. In neither of those cases did the contract give to either party the privilege, as does the contract here, of terminating it within a specified time. In both of those cases the exchange was not consummated because one party to the contract had not a good title to convey, and the contracts were either abandoned or rescinded for that reason. In the case at bar the exchange was not consummated because the defendant, availing himself of an express provision of the contract, gave notice before the time fixed by the contract for so doing that the contract was terminated and annulled. The exact language was: "I hereby cancel and terminate said agreement." The provision of said agreement for the payment of a compensation to plaintiff was an integral part of it, and when the contract was canceled and terminated all its provisions were canceled and terminated, including the provision for plaintiff's benefit. The only contract that ever existed providing a compensation for plaintiff having ceased to exist, he is in court without any contract to support his claim, and cannot recover.

Counsel for appellant rely upon the case of Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254, to sustain their position upon the point now under discussion. The agreement in that case between the owner of the property for an exchange was quite similar to the one in this case; but there is the material distinction between the two, in that the contract there considered contained no provision, like the one in this contract, that the party had the option to cancel the same within a specified time—to cancel the entire contract. When such option was exercised, it occurs to us the plaintiff's right to compensation no longer existed.

The case of Ketcham v. Axelson, 160 Iowa, 456, 142 N. W. 62, also relied upon by appellant, is clearly distinguishable from this case, in that in the Axelson Case plaintiff had an independent broker's contract, good under the laws of Iowa, in and by which it was agreed that he would be paid $170 if he would secure a party who would exchange property with the defendant at such figure as would be satisfactory to the defendant. The plaintiff procured a party who entered into a binding written contract with the defendant for an exchange of lands on terms satisfactory to the defendant. It is true the contract of exchange contained a clause that defendant might cancel it before a certain date. The parties, after entering into a mutually binding agreement, had some misunderstandings, a lawsuit and finally released each other from the contract of exchange. The contract was not canceled by the party exercising the privilege of cancellation therein contained. It was correctly held that the agent was entitled to his compensation. He had fully performed his contract. He had procured a party ready and willing to exchange properties on terms satisfactory to the defendant, and they had entered into a binding written contract of exchange. The plaintiff's contract for compensation antedated the exchange agreement. His compensation was not provided for therein, nor referred to. He brought the parties together, and they made their own contract. His compensation was not contingent upon anything either party to the contract might thereafter do, or fail to do. His contract for compensation, not being a part of the exchange contract, was in no way affected by its terms or by subsequent mutual cancellation. The court said:

"The right of the agent to his commission is in no way affected by the conduct of his principal to which he has not consented subsequent to the execution of the contract of sale."

Appellants call attention to a clause in the exchange agreement wherein it is agreed

that if, for any cause, either of the landowners should fail to comply with its terms, and in consequence the exchange should fail, the party or parties at fault should pay the plaintiff his full commissions, and claim that this clause secures him a right of recovery. Obviously this has no reference to the contract becoming unenforceable between the parties by reason of its cancellation by the defendant, acting within the rights given him by the terms of the contract. Each party had agreed to do certain things, such as to give certificates or abstracts of title, to execute certain mortgages, to execute deeds conveying title, etc. Either one, or both, might neglect to do some or all of these things, and as a result no exchange of properties be made, and the clause refers to such contingencies. Neither party could be said to be in "fault" when simply doing or omitting to do the very things which the contract specifies he might do or not do.

As we are of the opinion a fair construction of the terms of the contract, viewed in connection with what transpired, leads to the conclusion the plaintiff has not a right of recovery, it follows that upon this ground alone the court was justified in granting the defendant's motion for a new trial.

The order granting a new trial is hereby affirmed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 504

HAYWARD et al. v. BLACK. (Civ. 3243.)

(District Court of Appeal, First District, Division 1, California. March 10, 1920. Hearing Denied by Supreme Court May 6, 1920.)

Quieting title ⊂⊃15—Agent cannot counterclaim for commissions in principal's action to quiet title.

Under Code Civ. Proc. §§ 437, 438, in action to quiet title, defendant, who expressly denied he claimed any interest in plaintiff's land, could not present a counterclaim for commissions earned as agent for plaintiff in making sale of the property.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by William R. Hayward and another against George A. Black. From a judgment for plaintiffs, defendant appeals. Affirmed.

John C. Benton, of Santa Barbara, for appellant.

B. F. Thomas, of Santa Barbara, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs in an action to quiet title. The complaint is in two counts, in the first of which the plaintiffs, after alleging themselves to be the owners in fee simple and possessed of the tract of land involved in the action, allege that the defendant, George A. Black, claims some interest in said parcel of land adverse to the ownership of plaintiffs, which claim is without right, and the defendant has no right, title, or interest in or to any part of said premises. The second count adopts the above averments of the first count, and then proceeds to set forth two instruments in writing, which, being recorded, are alleged to be a cloud upon the plaintiffs' title. The first of these is termed an "agency agreement," wherein the plaintiffs purport to authorize and employ said defendant to act as their agent in negotiating a sale of said property. This agreement purports to be signed with the names of the plaintiffs, by one Archie Hood, as agent, and by said defendant. The other agreement is one purporting to be made by the plaintiffs, through said defendant, acting as their agent under the prior agreement, with one J. G. Gardner for an exchange of certain property of the latter for the said property of the plaintiffs upon certain terms. The plaintiffs allege that neither of them ever authorized said Archie Hood, or the said defendant, or any other person, to sign their names, or the name of either of them, to either of said agreements, and that both of said agreements are void. Wherefore the plaintiffs pray that their title be quieted as against said defendant.

The defendant demurred to the sufficiency of this complaint, which demurrer was overruled, and he thereupon filed an answer and counterclaim, to which the plaintiffs demurred, and which demurrer the trial court sustained. Thereupon the defendant presented an amended answer and counterclaim, wherein he expressly denied that he claimed any interest whatever in the lands of the plaintiffs, but in respect to the second cause of action alleged certain facts tending to show that he had been created the agent of the plaintiffs by virtue of the first agreement set up in said second cause of action, and that by virtue of such agency he had entered into the agreement with said Gardner set forth in the plaintiffs' complaint, and had thereby become entitled to a real estate agent's commission, amounting to $700, for having produced said Gardner as a purchaser of the plaintiffs' said premises under said agreements, for which amount he prayed judgment against said plaintiffs. Plaintiffs also demurred to this amended answer and so-called counterclaim, and upon hearing said demurrer the trial court sustained the same without leave to amend, and thereupon proceeded to take testimony and make its findings of fact and conclusions of law thereon in favor of the plaintiffs, quieting their title as against said de-

fendant. From the decree entered in accordance therewith the defendant prosecutes this appeal.

The only contention of the appellant discussed in his briefs upon this appeal is his contention that under and by virtue of sections 437 and 438 of the Code of Civil Procedure he was entitled to present in this action to quiet title a counterclaim for his commission claimed to have been earned under and by virtue of the two agreements set forth in the second count of the plaintiffs' complaint. Section 437 of the Code of Civil Procedure provides that the answer of the defendant shall contain (2) a statement of any new matter constituting a defense or counterclaim. Section 438 thereof provides that—

"The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action."

It will at once be seen that the defendant's contention that he is entitled to present a counterclaim in this action cannot be predicated upon the second subdivision of said section 438 above set forth, since this is not an action arising upon contract, but is a suit in equity, founded upon the plaintiffs' claim of title to the lands in question. The defendant's contention must therefore be confined to the first subdivision of said section, and he must be able to show in it authority for the filing of such a counterclaim as he has set forth in his answer herein in an action to quiet title. It is clear, both upon reason and authority, that this he cannot do. The foundation of the plaintiffs' claim is their asserted ownership of and title to the premises described in their complaint. Whatever cause of action the defendant might have for commissions cannot be said to arise out of the plaintiffs' title to and ownership of said premises, and cannot be said to be in any way connected with the subject of the action, which is the plaintiffs' right to have their title quieted against any asserted adverse claim on the part of the defendant. The defendant by his answer asserts no adverse claim, but, on the contrary, denies that he makes any adverse claim to the plaintiffs' premises. It therefore follows that he was not entitled to assert his so-called counterclaim in this action.

The authorities fully support this view. In the case of Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879, which was an action to foreclose the lien of a street assessment, the Supreme Court held that the defendant could not assert by way of either cross-complaint or counterclaim a claim for damages for a trespass alleged to have been committed by the contractor foreclosing said lien through his having wrongfully piled dirt upon the abutting property of the defendant. In the case of Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40, which was an action to quiet title, the defendant undertook to set up a cause of action for damages for the breach of a contract with the plaintiff to sink a well upon the land to which his action to quiet title related. The Supreme Court held that such a claim could not be made the subject of a counterclaim under subdivision 1 of section 438, Code of Civil Procedure, in an action to quiet title. In so holding, the Supreme Court cited with approval the case of National Fire Ins. Co. v. McKay, 21 N. Y. 191, in which case the court said:

"A counterclaim, when established, must in some way qualify or must defeat the judgment to which a plaintiff is otherwise entitled."

In the early case of Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314, it was held that in an action of ejectment the defendant could not set up by way of counterclaim an alleged indebtedness of the plaintiff to him for rent alleged to have accrued by virtue of a lease between himself and the plaintiff. Under these authorities we are constrained to hold that the defendant's asserted counterclaim could not be properly pleaded or heard in connection with the plaintiffs' suit to quiet title, and hence that the trial court was not in error in sustaining the plaintiffs' demurrer to the so-called counterclaim without leave to amend.

No other points are discussed in the briefs upon this appeal.

The judgment is affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

(46 Cal. App. 148)

HAM et al. v. LOS ANGELES COUNTY et al.
(Civ. 3044.)

(District Court of Appeal, Second District, Division 2, California. Feb. 14, 1920. On Petition for Rehearing, March 13, 1920. Opinion of Supreme Court, In Bank, Denying Hearing, April 10, 1920.)

1. Appeal and error ⊂=78(3)—Order sustaining demurrer not final judgment.

An appeal cannot be taken from an order sustaining a demurrer to a complaint, such an order not being a final judgment.

2. Appeal and error ⊂=933(4)—Order granting new trial without stating ground sustained if any ground is well taken.

Where the particular grounds on which an order granting a new trial was made do not appear in the record, a ruling of the trial court must be sustained if any of the grounds presented on the motion is well taken.

3. Appeal and error ⊂=977(3)—New trial ⊂=6—Discretion of trial court very broad and not reviewed unless abused.

The discretion of the trial court in granting a new trial is very broad, and an order will be upheld unless it appears that such discretion has been abused.

4. Trial ⊂=315 — Prior agreement to abide thereby renders a quotient verdict invalid.

There is no impropriety in jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement without further deliberation or discussion is fatal to the verdict.

5. Appeal and error ⊂=1015(5)—Determination of fact on counter affidavits on motion for new trial binding on appeal.

It is not the province of the appellate court on appeal from an order granting a new trial to determine what facts related in contradictory affidavits are true, and a finding of the trial court on such affidavits can no more be disturbed than a finding in the trial of the facts in the case.

6. Highways ⊂=166—Local regulations not in conflict with state regulation, though more stringent, valid.

Local regulations may be adopted controlling street and highway traffic which are not in conflict with the Motor Vehicle Act 1913, and regulations are not in conflict which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law.

7. Bridges ⊂=30—County ordinance regulating motor vehicles on bridges not in conflict with state law.

The ordinance of the county of Los Angeles which declares it unlawful to drive any vehicle over or across any county bridge at a rate of speed greater than five miles an hour is not in conflict with Motor Vehicle Act 1913, § 22, subd. b, relating to speed of automobiles on bridges, etc.

8. Bridges ⊂=32—Statute as to speed of vehicles on bridges relates only to places where view is obstructed.

Motor Vehicle Act 1913, § 22, subd. b, relating to speed of motor vehicles on bridges, etc., only relates to conditions where the view of the road traffic is obstructed.

9. Bridges ⊂=30—Local ordinance may prescribe less rate of speed than state law.

A local ordinance prohibiting motor vehicles to travel at more than five miles an hour over a bridge would not conflict with a state law prohibiting motor vehicles from traveling at a rate of more than ten miles per hour over a bridge.

10. Bridges ⊂=44(3)—Violating speed ordinance on bridge contributory negligence.

Violating a local ordinance prohibiting motor vehicles from traveling at a rate of speed in excess of five miles an hour when crossing a bridge is contributory negligence, if it proximately contributes to an accident.

11. Bridges ⊂=44(3)—Darkness may constitute "obstruction" within law relating to speed of automobiles.

Darkness may constitute an "obstruction" within the meaning of Motor Vehicle Act 1913, § 22, subd. b, declaring that a motor vehicle shall not be driven at a greater rate of speed than one mile in six minutes when the operator's or chauffeur's view of the road traffic is obstructed, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruction.]

12. Highways ⊂=197(1)—Trial ⊂=253(9)—Not negligence per se to operate automobile so that it cannot be stopped within distance lighted by lamps; instruction erroneous as ignoring conditions relative to negligence.

While negligence may be predicated as a matter of law on the fact that an automobile is being driven in the nighttime at such a rate of speed that it cannot be stopped within a radius illuminated by its lights, it was erroneous for the court to lay down the general rule of law that it is negligence per se to drive an automobile at night at a rate of speed which will not permit stopping within such distance; such instruction not taking into account the degree of darkness of the night or known conditions of the road.

13. Highways ⊂=209—Person injured by reason of defect has burden of proving due care.

Under St. 1911, p. 1115, one suing for injuries from a defect in a highway must affirmatively show that he was, at the time of the accident, using due care.

14. Death ⊂=104(2) — Trial ⊂=296(7) — Instruction as to presumption of care by deceased held erroneous.

In an action for death of one killed while riding in an automobile on a highway by reason of a defect in a bridge, the court erred

in instructing that it is presumed that all persons use due care for the preservation of their own lives, although the court instructed that plaintiff must affirmatively show due care, in view of St. 1911, p. 1115.

15. Officers ⟸116—Liable for negligence in performing "ministerial acts."

Public officers are liable for their negligence in performing duties ministerial in character, and not judicial or discretionary; a duty being "ministerial" which unqualifiedly requires the doing of a certain thing (citing Words and Phrases, Second Series, Ministerial Act).

16. Highways ⟸198—Officers, when liable for negligence.

A street superintendent or road supervisor upon whom is imposed by statute or ordinance, or under the express direction of the legislative or administrative authority of a city or county, the duty of keeping in repair and making safe for public use the streets and highways, and to whom the means of carrying out these duties are available, is liable for a negligent performance of his duty, subject to certain statutes relating to notice to officers of condition of street or highway demanding attention.

17. Highways ⟸198—When road officers liable for negligent maintenance.

Under Los Angeles County Charter, art. 12, § 27, when the supervisors have by appropriate general rules, regulations, and directions provided for the maintenance and repair of the highways by the road commissioner, in the absence of specific knowledge of his failure to perform his duty in some particular case, they are relieved from responsibility for the results of his negligence.

18. Bridges ⟸37—Road commissioner not liable for delay in repairing bridge beyond his authority to repair.

Where repairs to be made on a bridge were so extensive that a road commissioner could not make them without special action first taken by the county board of supervisors, he was not liable for damages for injuries to a traveler by reason of his failure to repair the bridge without action by the board.

19. Bridges ⟸21(2), 37—Method and time of making repairs on defective bridges discretionary with county supervisors.

Under Pol. Code, § 4041, requiring that, when the cost of construction of a bridge exceeds $500, such work shall be done by contract, or, in case of emergency by unanimous consent of the board, by day labor, it is a matter of discretion with the county supervisors, not only as to the method of repairs of a bridge, but when the repairs shall be made, or whether made at all, and they are not liable for injuries resulting to travelers on the bridge by reason of delay in repair.

On Petition for Rehearing.

20. Highways ⟸198—Statute does not absolve officer from liability in failing to place barriers at dangerous breaks in road.

St. 1911, p. 1115, does not absolve those in charge of the care and maintenance of highways from liability for negligence in failing to place warnings or barriers at dangerous breaks in a road until such time as it might be convenient to repair them.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Margaret A. B. Ham and others against the County of Los Angeles and others. From an order sustaining a demurrer to the complaint as to certain defendants, and from an order granting a new trial after judgment in their favor, the plaintiffs appeal. Appeal from order sustaining demurrer dismissed, other order affirmed in Appellate Court, and hearing denied in Supreme Court.

Mattison B. Jones and Jones & Evans, all of Los Angeles, for appellants.

A. J. Hill, Co. Counsel, and Edward T. Bishop, Deputy Co. Counsel, both of Los Angeles, for respondents.

SLOANE, J. The plaintiffs brought this action to recover damages for the death of one George Ira Ham, whose death was caused by his being driven off a bridge partly washed out by flood waters, while riding in an automobile with a companion, who was driving. The bridge was on one of the county roads and was part of the highway system of the county of Los Angeles.

The defendants were the county of Los Angeles, members of the board of supervisors of the county and their bondsmen, and F. H. Joyner, chief engineer of the county roads, Sydney A. Butler, John J. Hamilton, and Arthur King, and were charged with negligence in safeguarding and repairing the broken bridge.

Demurrers to the complaint, as not stating a cause of action against the defendants county of Los Angeles, Sydney A. Butler, John J. Hamilton, and Arthur King were sustained without leave to amend. On the trial before a jury a verdict and judgment were rendered in favor of defendants Woodley, one of the supervisors, and Joyner, the road engineer. Verdict and judgment were for plaintiffs and against the remaining defendants, members of the board of supervisors and their bondsmen. The amount of recovery against these defendants was the sum of $18,330 and costs. On motion for a new trial the judgment for plaintiffs was set aside and a new trial granted. Plaintiffs have taken two separate appeals, one from the judgment or order sustaining the demurrers as to the defendants county of Los Angeles, Butler, Hamilton, and King; the other from the order of the trial court granting the motion for a new trial.

[1] The first appeal may be briefly disposed of. It does not appear that any judg-

ment of nonsuit or dismissal was taken as to the defendants in whose behalf the demurrer was sustained. In any event, the appeal is not from any final judgment, but from the order sustaining the demurrer. As this is not an appealable order, the appeal must be dismissed. Rickert v. Zoeger, 169 Cal. 399, 146 Pac. 894. It may be stated, however, that appellants have abandoned their contention of error in sustaining the demurrers as to defendants Butler, Hamilton, and King; and only base their appeal as to the demurrer affecting the cause of action against the county of Los Angeles, on the validity of that provision of the act of the Legislature approved April 26, 1911 (Stats. 1911, p. 1115), attempting to make municipal corporations liable for negligence of their officers in the care or repair of highways, which provision, because not covered by the title of the act, was held unconstitutional in Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 Pac. 950.

[2, 3] The order granting a new trial which is the basis of the second appeal, was made, generally, without specifying the particular grounds, upon a motion containing among others, the following specifications: Newly discovered evidence; misconduct of counsel on the trial; errors in ruling on evidence; errors in instructions to jury; misconduct of the jury; insufficiency of the evidence; and errors in law occurring at the trial. Appellants, in attacking the order appealed from, are confronted with two limitations upon the action of this court in reviewing such an order: First, that where the particular grounds upon which the order was made do not appear in the record the ruling of the trial court must be sustained if any of the grounds presented on the motion is well taken (Minturn v. Bliss, 77 Cal. 90, 19 Pac. 185; Morgan v. Robinson Co., 157 Cal. 348, 107 Pac. 695; Hitchcock v. Rooney, 171 Cal. 286, 152 Pac. 913; Miller v. Logan, 32 Cal. App. 28, 161 Pac. 1022); and, second, that the discretion of the trial court in granting a new trial is very broad, and the order will be upheld unless it appears that the discretion has been abused (Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019). In the case last cited, the Supreme Court lays down this broad rule:

"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic. * * * So long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below."

As we are satisfied that, under these general principles and the facts shown in the record here, the order appealed from must be affirmed, it would only be necessary to consider a single well-grounded specification on the motion for a new trial. Since the case must go back for a new trial, however, and in compliance with request of counsel, we will give our best consideration to all the points raised on this appeal which are likely to arise on a retrial.

[4, 5] *Misconduct of the Jury.*—We are of the opinion that there was sufficient evidence before the trial court of misconduct of the jury in the manner of arriving at its verdict to justify granting a new trial. There were submitted by defendants on this point affidavits of most, if not all, of the jurors that, in determining the amount of damages, after nine of the jurors had agreed upon a verdict for plaintiffs, they agreed and proceeded as follows:

"That each of said nine jurors would place upon a slip of paper the amount to which he believed the plaintiffs entitled; that said amounts should be added together, the resulting sum divided by nine, and the resulting quotient taken as the amount of the damages to be assessed against the defendants without further discussion, balloting or assent; that in pursuance of this agreement each of said nine jurymen placed upon a slip of paper the amount to which he believed the plaintiffs entitled, which nine amounts were thereupon added together, divided by nine, and the quotient resulting was $18,330.00; that thereupon, pursuant to said previous agreement, said sum of $18,330 was, without further discussion, balloting or assent on the part of or by any of said nine jurors who joined in said verdict, entered by the foreman in the form of verdict prepared by the court, and no ballot was taken or assent given to said verdict other than that hereinabove set forth."

Some of the affiants state that, although they deemed the quotient thus arrived at too large, they accepted it because of the agreement to abide by the result of the average.

If this state of facts existed, it is quite unnecessary to further analyze or discuss the matter. It was obviously a chance verdict, and not only justified, but made imperative, a new trial. Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; McDonnell v. Pescadero Stage Co., 120 Cal. 476, 52 Pac. 725. It is true, as held in the last-cited case, that there is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict. It is

true, in the case before us, that plaintiffs presented to the court, on the motion, counter affidavits of these same jurors, in which they modify their former statements, and allege that certain averments therein contained were inadvertently made; but these counter affidavits contain no denial that there was a previous agreement to abide by the average sum arrived at, or that they were influenced in adopting such amount as their verdict by such an agreement. They do state, however, that there was deliberation and discussion after taking this average, before they finally voted to adopt it. But it is not the province of this court to determine whether the facts as related in the counter affidavits are true; nor it is necessary to determine whether, if true, the amended affidavits avoid the attack on the verdict. If the trial judge had denied the motion for a new trial, we would be bound to presume that he accepted the amended counter statements as sufficient; but, as he granted a new trial, we must assume the facts most strongly against appellants. The court may have believed that the jurors told the truth the first time. Indeed, it is rather difficult to accept the explanation that each of them inadvertently and unknowingly made oath to a statement, plainly set out in the affidavits, that he agreed to abide by the result of such an average of the amounts before the slips were filled out and thereafter adopted such average as his verdict because of such agreement and without further discussion. At any rate, it was a question of fact for the trial court to determine where the truth lay, on this conflicting evidence, and we can no more disturb the finding against appellants than if the question arose on a finding in the trial of the facts of the case.

[6-9] *Exclusion of County Ordinance.*—Another ground of the motion for a new trial was the refusal of the court to admit in evidence an ordinance of the county of Los Angeles which declares it unlawful to drive any vehicle over or across any county bridge at a rate of speed greater than five miles an hour. The board of supervisors of Los Angeles county, under the county charter (section 10, art. 3), are vested with all the powers which are granted to supervisors under the Constitution and general laws of the state. Under section 4041 of the Political Code, subdivisions 4, 31, 37, and 41, boards of supervisors are empowered to make and enforce rules and regulations for the protection, management, control, and use of public highways, and to enact ordinances for that purpose, and generally to make and enforce, within the limits of their county, all such local, police, sanitary, and other regulations as are not in conflict with general laws. In fact, the only objection raised as to the effect and validity of the ordinance in question was that it is in conflict with the general laws of the state as embodied in the Motor Vehicle Act. The objection to the admission of the ordinance in evidence was based, and by the trial court sustained, on the authority of Application of Smith, 26 Cal. App. 116, 146 Pac. 82. In so far as the decision cited suggests the operation of the State Motor Vehicle Act as superseding all municipal regulation of automobile traffic, whether conflicting with the state law or not, it is in conflict with a considerable array of subsequent decisions in the appellate courts, and particularly with the expression of the Supreme Court in the late case of Mann v. Scott, 182 Pac. 281. Indeed, it seems now to be the accepted law that local regulations may be adopted controlling street and highway traffic which are not in conflict with the State Motor Vehicle Act, and that such regulations are not in conflict which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law. In Mann v. Scott, supra, the Supreme Court says:

"Upon a careful reconsideration of the appellants' contention that the State Motor Vehicle Act of 1913 is the controlling law upon the subject, and that it was error to give an instruction embodying the regulatory provisions of the city ordinance, we are constrained to confirm the opinion of the District Court of Appeal that the municipal ordinance in the respect noted was not inconsistent with the state law, but was valid and operative in the city of Los Angeles at the time of the plaintiff's injury. And this, we think, is so regardless of the question of whether or not the regulation of the traffic upon the streets of the city is a 'municipal affair.' * * * Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable."

As further illustrating the point, the court, in this decision, quotes with approval the language of Mr. Justice Henshaw, in the case of In re Hoffman, 155 Cal. 114, 118, 99 Pac. 517, 519 (132 Am. St. Rep. 75), as follows:

"If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not by ordinance, in the clear exercise of police power, for the benefit of its citizens, still further restrict the height of chimneys?" Mann v. Scott, 28 Cal. App. Dec. 171; Pemberton v. Arny, 183 Pac. 356; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724; In re Hoffman, supra.

Under these authorities, the county ordinance here in question is clearly not in con-

flict with any provision of the State Motor Vehicle Act of 1913, then in force. The only provision of the state law relating specifically to regulation of speed in crossing bridges is contained in subdivision (b) of section 22 (St. 1913, p. 649), and declares that a motor vehicle shall not be operated or driven at a greater rate of speed "than one mile in six minutes where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway." Under the natural and grammatical construction of this provision, it only relates to conditions where the view of the road traffic is obstructed, and we think the trial court was right in so construing it. But, at most, the provision is but a specification of a ten mile an hour speed limit over bridges, and, under the decisions above cited, does not inhibit a local law prescribing a less rate of speed. Moreover, the state law is obviously only intended as a speed limitation for the safety of traffic, while the county ordinance limiting the rate of speed to five miles an hour upon bridges, like the familiar enactments affixing a penalty for riding or driving over a bridge faster than a walk, may well be intended for the protection and preservation of the bridge itself against the well-known effect of excessive vibration. The issues on the trial involved the question of due care on the part of the deceased in the use of the highway. Evidence had been introduced showing that the automobile had slid or skidded forward a distance of from 30 to 50 feet, under locked brakes, before going over the broken end of the bridge, thus indicating an approach over the bridge at a considerable speed. Such a condition, in fact, might well indicate that if the ordinance had been observed the accident would have been averted.

[10] We are of the opinion that the county ordinance was valid, and that the violation of its terms was, under the established rules of law, an act of contributory negligence if it proximately contributed to the accident. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663. The exclusion of the ordinance from the evidence was error.

Instructions as to Speed Limits.—Respondents, on their motion for a new trial, further complained of the action of the trial court in refusing instructions in their behalf bearing on the provisions of the state law limiting the speed on approaching or traversing a bridge, where the view of the traffic is obstructed, at a greater rate than one mile in six minutes. One of the instructions objected to contained language as follows:

"In that connection I charge you that darkness may constitute an obstruction within the law quite as much as intervening objects. If the driver of a motor vehicle enters upon a bridge at night, when it is impossible for him by means of the lights carried by his automobile to see across the bridge, then his view of traffic along the bridge is obstructed within the meaning of the law, and he is forbidden to proceed at a greater rate of speed that ten miles per hour."

In a further instruction the court said:

"I instruct you that it is negligence, as a matter of law, to drive an automobile at night at such a rate of speed that the automobile cannot be stopped or an obstruction or excavation avoided within the distance lighted by the lamps of the machine."

[11] In view of our conclusion as to the validity and admissibility in evidence of the five mile per hour limitation of the county ordinance, the doctrine invoked in these instructions does not need to be determined for the purposes of this case; but we are disposed to venture an opinion that the contention of respondents as expressed in the first quotation therefrom is well taken. Obviously, what the regulative provisions of the statute are intended for is to prevent an automobile driver from exceeding certain moderate speed limits where he cannot see what is ahead of him. The legislators were not indulging in any nice physical or metaphysical distinctions as to the nature of the obstructions to sight, whether they arose from positive or negative conditions; whether they were objective or subjective. It is just as dangerous to speed into a crossing or over a bridge without the use of one's sight to warn and guide him, whether the limitation is caused by defective vision, physical obstructions, the glare of an approaching headlight, a bank of mist or fog, or the absence of light—the condition we call darkness. Artificial light has been called into service to dispel the obstruction of the vision by the darkness of night, but it is only effective so far as its rays penetrate and illuminate. And it seems clear that the automobile driver who attempts to cross a bridge in a state of darkness, even with the aid of artificial lights, is operating in violation of this provision of the state law if he travels at a rate of speed exceeding that named in the statute.

[12] The second instruction quoted from is clearly erroneous, in laying down a general rule of law that it is in all cases negligence per se to drive an automobile at night at a rate of speed which will not permit of stopping within the distance lighted by the lamps of the machine. Such instruction does not take into account the degree of darkness of the night or known conditions of the road. But we are not prepared to say that negligence may not be predicated as a matter of

law, irrespective of any positive law as to speed limits, where an automobile is being driven in the night on any part of the highway, and where the driver is dependent upon the lights of his machine for knowledge of the condition of the road and the traffic upon it, and runs into an obstruction, if he drives at a rate of speed which will not permit him to stop or slow up within the radius illuminated by his lights, and the accident is proximately caused thereby. This proposition is not without the support of eminent authority. In Lauson v. Fond Du Lac, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30, the driver of an automobile, traveling over a straight stretch of country road, ran into an unlighted and unprotected ditch or opening in the highway, and was injured. The evidence disclosed that he was traveling at a moderate rate of speed, but too fast to stop in time to prevent the accident after the broken condition of the highway was disclosed by his headlights. It was held by the Supreme Court of Wisconsin that it appeared as a matter of law that the driver was not using ordinary care in the use of the highway. The court says:

"It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which the plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his light be such that he can see objects for only a distance of ten feet, then he should so regulate his speed as to be able to stop his machine within that distance."

There are further arguments and conclusions in this case that are instructive on the principle invoked. Under similar conditions of darkness, where the automobile was run into an unlighted concrete mixer on the street, the Supreme Court of Tennessee, in West Const. Co. v. White, 130 Tenn. 520, 172 S. W. 301, held as a matter of law that—

"It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions."

It was held to the same effect in Knoxville Ry. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117, L. R. A. 1916A, 1111, with the further declaration that the blinding glare of an approaching headlight only imposed a further duty on the driver to reduce the rate of speed. See, also, on this point, Pietsch v. McCarthy, 159 Wis. 251, 150 N. W. 482.

[13, 14] *Proof of Due Care.*—Again, respondents claim, in support of the order for a new trial, that the jury was incorrectly instructed as to the nature and degree of evidence necessary to free the deceased from the imputation of contributory negligence. The statute under which it is sought to hold the highway officials of Los Angeles county liable for this accident is known as the "Pridham Act" (Act 2554, Stats. 1911, p. 1116). It is expressly provided by this act that no liability for injury resulting from negligence in keeping a highway in repair shall rest upon such officials unless it shall appear that the "damage or injury was sustained while such * * * highway * * * was being carefully used and that due care was exercised to avoid such danger." This, as to this class of actions, clearly changes the rule generally applicable in the state of California, that the burden of showing contributory negligence is on the defendant. In the absence of the clause just quoted, the defendants, if they wished to show contributory negligence as a defense, would have to plead and prove it. But, as the statute reads, an affirmative showing that the road was, at the time of the accident, being used with due care, that is, without negligence proximately contributing to the injury, must be made by the plaintiffs in order to maintain their cause of action. On the trial the court, after instructing the jury correctly as to the requirement that it must appear that the highway was being used with due care and without negligence, proceeded to cancel the effect of this requirement by the further instruction that—

"The law provides, however, that it is presumed that all persons use due care for the preservation of their own life and to avoid injury to themselves; in the absence of any evidence in the case with relation to the question of the care used by the deceased at the time of the injury in question, your findings on this issue on this presumption must be in favor of the plaintiffs. * * *"

This instruction, as thus far quoted, seems to relieve the plaintiffs from any showing whatever as to due care in the use of the highway, and, we think, introduces an element of error into the instruction. Bell v. Incorporated Town of Clarion, 113 Iowa, 126, 84 N. W. 962; Tyndale v. Old Colony R. Co., 156 Mass. 503, 31 N. E. 655; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128; Cordell v. N. Y. C. & H., etc., Co., 75 N. Y. 330; Wiwirowski v. Lake Shore, etc., Ry. Co., 124 N. Y. 420, 26 N. E. 1023. The instruction then proceeds with a submission to the jury of rules of law to govern them in weighing evidence in the case, bearing upon this question, which, taken apart from the portion above quoted, probably correctly states the law, and permits the jury to take into account the recognized disposition of every rational person to avoid injury, but does not save it, as appellants justly contend, from the vice

pointed out. From the recognized disposition of every rational person to avoid injury, the jury doubtless may infer, where the circumstances shown in evidence warrant it as a legitimate inference of fact, that the injured person did use due care; but to instruct the jury that the law raises a presumption of due care in such cases is to offset by a legal presumption the declaration of the statute that the burden is on the plaintiff in such cases to show that due care was used by him.

[15] *Liability of Road Officials.*—The most important question, in its application to a new trial of this case, is the construction of the Pridham Act, together with the rulings of the California courts, on the conditions under which public officers are liable for negligence in the care and repair of streets and highways. The general rule in this state, if there may be said to be one established, is that public officers are liable for their negligence where the duty imposed upon them is ministerial in character and not judicial or discretionary. Such a rule of liability is first suggested, though not determined, in Huffman v. San Joaquin County, 21 Cal. 427, where Mr. Chief Justice Field, in holding that no cause of action was created against the county by negligence of its officers in the performance of their duties, said, by way of dictum, that—

"If any remedy exist for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the road overseers or supervisors personally."

Later decisions have laid down the general rule of liability, limiting it to negligence in the performance of ministerial duties, or, as the rule has been stated, that before a public official becomes liable for a breach of duty the duty must exist, and it must be such as not to involve the exercise of discretion on his part. Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; South v. San Benito County, 180 Pac. 354; Dobbins v. City of Arcadia, 186 Pac. 190.

[16] The main perplexity in the case of public officials, such as city trustees or the supervisors of a county, whose responsibilities include and blend almost indefinably the judicial, legislative, and administrative functions, is to determine where the ministerial and imperative duties end and the discretionary powers begin. It is said by some of the authorities that a public official is absolved from liability for negligence if the act is such as to involve "any discretion on his part either as to its performance or the manner of its performance." This statement of the law obviously requires some modification, as it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail. It would seem a fair application of the rule would be that any duty is ministerial which unqualifiedly requires the doing of a certain thing. To the extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance may be discretionary. Words and Phrases (Second Series) gleans from numerous authorities cited the following definition:

"A 'ministerial' act is one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the thing being done."

In the matter of repair of streets and highways, there seems to be no longer a question, under the decisions of this state, that a street superintendent or road supervisor upon whom is imposed by statute or ordinance, or under the express direction of the legislative or administrative authority of the city or county, the duty of keeping in repair and making safe for public use the streets and highways, and to whom the means of carrying out this duty is available, is liable for a negligent performance of his duty; with the further proviso, under comparatively recent legislation, that he has had certain specified notice of the condition of the street or highway demanding attention. Wurzburger v. Nellis, 165 Cal. 48, 130 Pac. 1052; Stockton Auto Co. v. Confer, 154 Cal. 402, 97 Pac. 881; South v. San Benito County, supra; Dobbins v. City of Arcadia, supra; Doeg v. Cook, supra. In the case last cited it is indicated that there may be a concurrent negligence which will involve a liability both on the part of the supervisorial body—in that case the city trustees—and the officer whose immediate duty it is to make the repairs. In Lynn v. Adams, 2 Ind. 143, the court refused to hold the defendant, a supervisor of highways, liable, because the responsibility of keeping the road in repair was divided between him and the overseers, and there was no definite absolute duty on either. But ordinarily it would appear that the duties of these separate functionaries are separable and distinct. If the supervisors are empowered and required to provide for the care and repair of the highways by general rules and orders delegating the specific execution of the work to a road overseer or superintendent, and they have failed to do this, and damage to third parties results from defects in the highway of which they have notice, they, and not the road overseer, would seem to be liable. On the other hand, if the supervisors of the county have made and given the necessary general provisions and directions to impose this specific duty on the road overseer, he alone is responsible for the negligence.

[17] In the case before us, the supervisors of the county of Los Angeles, under the coun-

ty charter, are relieved of the duty of caring for the roads in the respective districts. The charter provides for a road commissioner, who will have charge of the roads throughout the entire county, subject to the general direction of the supervisors. Section 27, art. 12, of the charter reads as follows:

"The road commissioner, subject to such rules and regulations as shall be prescribed by the board of supervisors, shall have direction and control of all work of construction, maintenance and repair of roads, highways and bridges, other than work done under contract, and it shall be his duty to examine and inspect contract work as the same progresses, and see that the same is properly performed, and when completed to file his written approval thereof with the board of supervisors. He shall also have the control and management of all county rock quarries and gravel pits, and all other materials, property and instrumentalities necessary for and connected with the construction, maintenance and repair of roads and highways."

The road commissioner, whose duties are thus fixed by law, is one of the appointive charter officers of the county. We think that when the supervisors have, by appropriate general rules, regulations and directions, provided for the maintainance and repair of the highways by the road commissioner, in the absence of specific knowledge of his failure to perform his duty in some particular case, they are relieved from responsibility for the results of his negligence.

[18, 19] It is contended here, however, that the supervisors did have notice of the dangerous condition of this bridge, and that it was not being safeguarded or repaired—indeed, that it could only be repaired by contract work, through action to be taken by the board; and that the negligence, therefore, was that of the supervisors for failing, within a reasonable time, to provide for such repairs. The Pridham Act of 1911 provides that—

"No officer who has charge of or whose duty it is to care for or repair any street, highway, public building, public work or property shall be liable for any injury to person or property arising from the dangerous or defective condition thereof or failure to repair the same, unless such officer shall have had actual notice of such defective or dangerous condition, and shall have failed, for a reasonable time after such actual notice, to repair the same; provided that such officer had authority to remedy such condition, or to make such repair at the expense of the state or political subdivision thereof, and funds were available therefor."

It may be observed, in passing, that this act does not seem to have been enacted to create or enlarge any liability of public officers for negligence in the performance of their duties beyond the liability already existing at law, but to limit such liability. It is conceded here that the extensive repairs required on this bridge could not be made by the road commissioner without special action first taken by the board of supervisors, and such commissioner was therefore absolved from liability for delay in repairing the bridge. The jury found, by its verdict, that the supervisors, respondents here, had actual notice of the damaged and dangerous condition of the bridge, and that they failed to provide means for its repair within a reasonable period. The evidence shows that they had notice by March 9, 1914, and that the repairs had not been made on April 12, 1914, the date of the accident. It is admitted that the cost for making the necessary repairs was about $1,400. Section 4041 of the Political Code requires that, when the cost of construction of a bridge exceeds $500, such work shall be done by contract, and let under prepared and adopted plans and specifications to the lowest responsible bidder, or, in case of emergency, by unanimous consent of the board, the work may be done by day labor. It is claimed by respondents that it was a matter of discretion with the supervisors whether they should make the repairs by contract or by day labor, and that there had not sufficient time elapsed when the accident occurred to have done the work under the contract provision. There does not appear to have been any move to do it either way. We agree, however, that it was a matter of discretion with the supervisors, not only as to the method of repair which they might adopt, but as to when the repairs should be made, or whether made at all. The season of the year, or the prevalence of heavy rains and high waters, may have rendered it advisable to postpone the work. The character of the damage and the material of the bridge might suggest the advisability of replacing it with a more substantial structure of steel or concrete. We are satisfied that the discretionary powers and duties of the supervisors in the matter of replacing the bridge, absolved them from liability for this delay.

If a cause of action existed here, either against the commissioner or the supervisors, or both, it was for failure to safeguard the approach to the dangerous break in this bridge by barriers or warning signals, if there was such failure. The trial court eliminated this question from the case, however, by excluding all evidence offered by plaintiffs to show negligence of the defendants in this respect; and, as the question of error in such ruling is not involved in this appeal, the issue thus suggested is not properly before us. We are constrained to say, however, that it is difficult to conceive a theory that would excuse public officials, whose duty it is to maintain a highway in a reasonably safe condition, from providing the most simple and obvious safeguard by erecting a barrier or putting out warning lights at night, at such a death trap on a traveled highway. Though the highway authorities may not

have been bound to immediately replace this bridge in a safe condition for use, the common dictates of prudence require that it should not be left a menace to the life and limb of every unwary traveler. Liability for want of care in providing such warnings and safeguards has been universally applied by the courts, on general principals of the law of negligence, and irrespective of special enactments. Such rule of liability, as applying to highway and street officials, is recognized in Doeg v. Cook, supra, and Dobbins v. City of Arcadia, supra. Doubtless the ground on which the ruling of the court was made in this instance was the construction placed on the provisions of the Pridham Act. Literally applied, it gives support to such ruling. The language is that—

"No officer who has charge of, or whose duty it is to care for or repair, any street, highway * * * shall be liable for any injury to person or property arising from the dangerous or defective condition thereof or failure to repair the same, unless such officer shall have had actual notice of such defective or dangerous condition and shall have failed for a reasonable time after such actual notice to repair the same."

Literally interpreted, it is declared that no liability shall attach from the dangerous condition of the highway until sufficient time has elapsed to make the necessary repairs, which in this case was shown to be a period of several weeks, at least. Surely the courts are not required to construe this provision of the Pridham Act to mean that such a place of danger may, with immunity, be left unguarded and without barriers or warnings until it can conveniently be repaired. The Legislature was evidently dealing here with the question of liability for failure to make the repairs, and not with that of liability for failure to give necessary warning of the dangerous condition of the highway.

Because of the various errors in the trial of the case, herein pointed out, the order granting a new trial is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

On Petition for Rehearing.

PER CURIAM. Appellants have asked for a rehearing on this appeal in order to obtain a more explicit statement of the opinion of this court as to the liability of the county supervisors for failure, if there was such, to place barriers or warning signals at the place where a portion of the bridge was washed out by the floods.

[20] This part of the opinion is expressly shown to be by way of dictum, and was only intended to make clear the point that we were not in accord with the contention that the Pridham Act absolved those in charge of the care and maintenance of highways from liability for negligence in failing to place warnings or barriers at dangerous breaks in the road until such time as it might be convenient to repair the break in the highway. We were not undertaking to say upon whom such liability would rest. Moreover, in another part of the opinion it is expressly stated that—

"Where the supervisors have, by appropriate general rules, regulations, and directions, provided for the maintenance and repair of the highways by the road commissioner, in the absence of specific knowledge of his failure to perform his duty in some particular case, they are relieved from responsibility for the results of his negligence."

The petition for a rehearing is denied. But perhaps in the denial of the application we have sufficiently illuminated the "guidepost," which petitioners ask us to "repaint," to enable them to decipher the inscription thereon.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, we are not to be understood as expressing or intimating any view as to the correctness of that portion of the opinion which relates to the matter of neglect of the commissioner or supervisors with regard to safeguarding the approach to the dangerous break on the bridge by barriers or warning signals. As is expressly stated in the opinion, this question is not involved in this appeal and that portion of the opinion is purely by way of dictum.

The application for a hearing in this court is denied.

ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; OLNEY, J.; and KERRIGAN, Judge pro tem., concur.

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AUSTIN v. NEWTON. (Civ. 3050.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1920. Hearing Denied by Supreme Court May 6, 1920.)

1. Appeal and error ⟸995—Appellate court reviewing evidence recognizes control of facts by physical laws.

In reviewing evidence, appellate court must recognize that certain facts are controlled by immutable physical laws, and cannot permit verdict of jury to change such facts.

2. Appeal and error ⟸995—Appellate court must cautiously apply common sense and knowledge of physical laws to facts.

Appellate court is under duty to exercise great care and caution in applying test of common sense and common knowledge of physical laws to a given state of facts.

3. Municipal corporations ⟸706(5)—Finding that automobile driver's negligence proximately caused accident sustained.

In action against automobile driver for injuries to plaintiff riding tandem on a motorcycle with his son, evidence *held* sufficient to support finding that defendant's negligence in crowding plaintiff and his son off macadamized pavement of roadway was proximate cause of accident.

4. Evidence ⟸588—Not impossible that one riding motorcycle at a speed of 15 to 20 miles per hour could be thrown over a wall.

Appellate court cannot hold that plaintiff and his son, riding tandem on motorcycle which went off macadamized road into soft ground of ditch, could not have been thrown over a wall into orchard if motorcycle was traveling only 15 to 20 miles an hour, instead of 60, as defendant, the driver of automobile, claimed.

5. Appeal and error ⟸995—Court need not see that details of accident as testified to consist with physical facts and laws of science.

It cannot be laid down as a rule of law that plaintiff in a personal injury case cannot recover unless appellate court can see that every detail of the accident as testified to by plaintiff and his witnesses is consistent with admitted physical facts and laws of science.

6. Appeal and error ⟸1071(3)—Judgment affirmed after discarding findings unsupported by evidence.

Judgment will be affirmed where findings sufficient to sustain it remain after discarding findings unsupported by evidence.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by E. E. Austin against A. M. Newton. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon F. Moss, of Los Angeles, for appellant.

Kendrick & Ardis and Dailey S. Stafford, all of Los Angeles, for respondent.

FINLAYSON, P. J. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff while riding on a motorcycle, driven by his son, on Citrus avenue, near the town of Covina, in Los Angeles county. Plaintiff recovered judgment. Defendant appeals, contending that plaintiff's version of the accident, as described by himself and his witnesses, is so irreconcilable with the admitted physical facts that it is inherently impossible that plaintiff could have been injured in the manner that he and his witnesses described.

Citrus avenue runs northerly and southerly. It is intersected by Ciennaga avenue, a highway running at a right angle with the direction of Citrus avenue, and which, though entering Citrus avenue from the east, does not extend beyond the westerly line of that highway. Citrus avenue, at this locality, is bordered on the west by an orange orchard. Between the orchard and the macadamized pavement of Citrus avenue, at the intersection of the latter with Ciennaga avenue, and for a short distance north and south of Ciennaga avenue, there is a board wall running parallel with and west of Citrus avenue. This wall has a dirt top, about 2 feet wide. Between the board wall and the hard macadamized pavement of Citrus avenue there is a ditch, about 8 feet wide, filled with soft dirt and stones. The top of the board wall is about 2½ feet above the ground on either side.

Plaintiff's theory of the accident, as disclosed by his complaint, is substantially as follows: While plaintiff was riding a motorcycle on the right-hand side of Citrus avenue, near where Ciennaga avenue joins it, defendant so carelessly and negligently ran and propelled her automobile that the driver of the motorcycle, plaintiff's son, in order to escape being run over and crushed by the automobile, was compelled to run his motorcycle into the ditch, whereby plaintiff's leg was broken, and the only way that plaintiff could have escaped being crushed by the automobile was for the driver of the motorcycle to run it into the ditch.

Plaintiff and his witnesses, testifying to how the accident happened, described it substantially as follows: Plaintiff was riding on a tandem seat on the motorcycle, behind his son, who was driving. The motorcycle was proceeding southerly on Citrus avenue. At some distance north of the intersection of Ciennaga avenue with Citrus avenue the motorcycle was traveling at about 25 miles an hour. It slowed down to about 20 miles an hour as it approached the crossing. Defendant's automobile, traveling westerly on Ciennaga avenue, approached the intersection. When defendant's automobile started to make the turn into Citrus avenue, the motorcycle, proceeding southerly along Citrus avenue, was southwest of the automobile and

distant therefrom about 20 feet. The automobile did not make a "square turn," but "cut the corner," traveled in a southwesterly direction from the north side of Ciennaga avenue, caught up with the motorcycle, while the latter was traveling southerly on Citrus avenue, and crowded it off the macadamized pavement into the ditch immediately west of Citrus avenue. The automobile continued on its course along Citrus avenue, traveling in a southerly direction. Plaintiff testified:

"After we saw the automobile, it turned around the corner southwest and came clear across Citrus avenue, there taking the right of way from us and coming up beside us, and then we went into the ditch. During the time when the automobile was making the turn into Citrus avenue, our motorcycle was just a foot or two inside the macadam, keeping well on the macadam."

Plaintiff testified that while the motorcycle was traversing the ditch, and before it came to a stop, he slid off behind the motorcycle, and that as he slid off he was dragged by and on his feet. It was conceded by all the witnesses that he was thrown over the board wall into the orchard immediately west of the wall. He lay there with his head toward the wall, about 5 feet distant therefrom, his body extending toward the west.

In describing how his leg was broken, plaintiff testified:

"My leg was broken just below the knee by striking the board wall. * * * The ditch is narrow, and we had a rough journey through there. We went back and forth. [That is, from side to side.] We did not go straight, of course. Probably we might have went up against the bank of the curb [meaning the board wall] a time or two after we struck the wall."

Asked how far he traveled along the ditch before he slid off the motorcycle, plaintiff replied:

"I suppose we went 60 or 75 feet. It seemed to me we did, but it was all done so quickly that I couldn't tell exactly. * * * It [the motorcycle] came to a stop before it was overturned. I don't know what overturned it. I was off the motorcycle and on the ground before the motorcycle stopped. * * * I don't know what particular thing made me get off. I know the ditch was rough, and there were stones in the ditch and holes washed out, and I stayed on it as long as I could. * * * I simply slipped off. * * * I slid off behind. * * * As near as I can remember, it didn't seem but a short distance after I struck, after I went into the gutter, that I went over the wall—it didn't seem but a short time, and a very short distance. * * * I let go and went off the motorcycle and I don't know what caused me to do it, but I went off, and as near as I can remember I drug by on my feet as I slipped off the motorcycle, and I fell to my right onto the dirt bank, and went over the bank, part way down into the orange orchard, and I lay there with my head partly toward the bank, partly up the bank, and my feet were down toward the orange orchard."

Plaintiff and his son both testified that when the motorcycle left the macadamized pavement and went into the ditch it was traveling at a speed not to exceed 15 miles an hour. Both landed in the orchard and were rendered unconscious. The complaint alleges that plaintiff was rendered unconscious by being "violently thrown from said motorcycle." Plaintiff testified that he "went off" the motorcycle before it stopped, but that he did not know what it was that caused him to be thrown off. Louis Clark, a witness for plaintiff, testified that father and son "went off" the motorcycle at practically the same instant, or, as he put it, the "same second."

Plaintiff's right leg was broken just below the knee joint. The blow that caused the fracture was so violent that it fractured the bone clear through, breaking it into two parts. The leg was lacerated and torn on the inside. There was no bruise or contusion on the outside of the leg. The doctor whom plaintiff employed to set the broken bone testified that the leg appeared to him as though the injury was due to a blow struck on the inside of the leg, inside and below the knee. "The force that broke the leg was applied on the inside of the limb just below the knee joint."

According to defendant's version of the accident, the motorcycle, traveling at a great speed—60 miles an hour, according to one witness—overtook defendant's automobile after she had made the turn into Citrus avenue, and, endeavoring to pass it on the wrong side, i. e., on the right-hand instead of the left-hand side, went so close to the westerly edge of the macadamized pavement that it ran into the soft dirt in the ditch, and thus its momentum was arrested so suddenly that plaintiff and his son were pitched off the motorcycle and thrown over the board wall into the orange orchard west of Citrus avenue.

[1] Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because, as said in Quigley v. Naughton, 100 App. Div. 476, 91 N. Y. Supp. 491, to do so would, in effect, destroy the intelligence of the court. And when the undisputed circumstances show that the story told by a litigant and his witnesses cannot by any possibility be true, or when their testimony is inherently impossible, the appellate court should not hesitate to reverse the judgment, to the end that the cause again may be submitted to the determination of a jury or trial judge.

[2] On the other hand, as an appellate court, it is our bounden duty to exercise great care and caution in applying the tests of common sense and common knowledge of

physical laws to a given state of facts. Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence. Stokes v. Metropolitan Street Ry. Co., 173 Mo. App. 676, 160 S. W. 46. Unless, therefore, we can say that, under the undisputed physical facts, the accident could not possibly have been due to defendant's negligence as alleged in the complaint, we must affirm the judgment. It is not sufficient that the story told by plaintiff and his witnesses may be improbable. It is for the jury or the trial judge to weigh and balance probabilities. We cannot reverse upon the ground that the finding of negligence is contrary to the evidence unless we can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint.

[3, 4] Tested by the foregoing, we cannot say that the finding that defendant's negligence was the proximate cause of the accident is not supported by the evidence. We think the evidence shows beyond peradventure that plaintiff's injuries resulted from the motorcycle being crowded from the paved road into the ditch. There seem to be but two possible alternatives: (1) Either the motorcycle was crowded off the macadamized road into the soft dirt of the ditch by the automobile coming up behind it and forcing it off; or (2) the motorcycle overtook the automobile, as testified to by defendant's witnesses, and, endeavoring to pass on the wrong side, was crowded off for lack of space, but through no fault of defendant. One of these two alternatives must be adopted. The angle at which the motorcycle would leave the macadamized road and go into the ditch would be substantially the same under either of these two possible theories. The only difference would be that, in one case, that presented by the theory that defendant's automobile crowded the motorcycle off the hard pavement the motorcycle would be traveling at a speed not exceeding 15 to 20 miles an hour when leaving the hard macadam; while in the other case, that presented by defendant's theory of the accident, the motorcycle would be traveling at a much higher rate of speed when going off the hard pavement. It is conceded that plaintiff's leg was broken in the accident, that the motorcycle went into the ditch, and that plaintiff was thrown over the board wall and into the orchard where he was found unconscious. The witnesses on both sides agree as to these effects of the accident. The disagreement is as to the cause of the accident. In determining the question as to whether the accident could have been due to defendant's fault, in negligently crowding the motorcycle into the ditch, without doing violence to any of the universally recognized laws of the physical universe, we seem to be confronted, in the final analysis, with this question: Could plaintiff and his son have been thrown over the board wall into the orchard if their motorcycle was traveling at a speed of not to exceed 15 to 20 miles an hour when it went into the ditch? For, regardless of its speed, it must have gone off the road at approximately the same angle under either of the two possible versions of the accident presented by the respective parties to the action. Therefore, unless we can say that plaintiff and his son could not possibly have been thrown over the wall and into the orchard if the motorcycle was going at the speed described by plaintiff's witnesses, but that such an eventuality was possible if it was going at the higher rate of speed testified to by defendant's witnesses, we cannot say that the accident could not possibly be due to defendant's negligence. We are unable to say that, if the motorcycle went off the hard macadam at the speed testified to by plaintiff's witnesses, plaintiff could not have been thrown into the orchard and his leg broken. The manner in which plaintiff and his son were thrown over the board wall would suggest a considerable rate of speed on the part of the motorcycle. But it could hardly be held, as a matter of law or a demonstration of physics, that the results shown could not be accomplished at a rate of 15 to 20 miles per hour. The distance at which plaintiff and his son were found beyond the board wall may be accounted for on the theory that after being thrown over the top they slid or rolled down the embankment, which the evidence shows sloped toward the orchard.

The fact that the bruises on plaintiff's leg were on the inside and not the outside can be accounted for by the fact that the outer part of his leg came in contact with the comparatively smooth surface of the wall, while the inner side may have been struck at the time of the impact by some sharp or jagged part of the motorcycle.

[5] Probably appellant would not seriously contend that the accident could by no possibility be caused by defendant's negligence in crowding the motorcycle off the hard pavement, even though no bruises were found on the outside of plaintiff's leg, and notwithstanding the motorcycle riders were thrown over the board wall into the orchard. As we understand counsel's argument, what appellant does contend for is that there are certain details of the accident, as described by plaintiff and his witnesses, that are irreconcilably in conflict with certain admitted

physical facts. For example, plaintiff, in one part of his evidence, while trying to fix on a map the spots where the several occurrences happened, testified, in effect, that he slid off the motorcycle into the ditch at a spot about 90 to 100 feet distant from where he was found lying in the orchard as he regained consciousness. Such inconsistencies, however, would not necessarily prevent a recovery by plaintiff. It is not to be supposed that witnesses to an accident that happens in the twinkling of an eye should accurately observe all the details. Much less is it probable that one who is injured in the accident, and rendered unconscious, should be able to give a correct account of all the quickly happening events. It cannot be laid down as a rule of law that a plaintiff in a personal injury case cannot recover unless the court can see that every detail of the accident, as testified to by the plaintiff and his witnesses, is consistent with admitted physical facts and the laws of science. Undoubtedly where some of the details of an accident, as described by a witness, conflict with admitted physical facts, the whole story of the accident, as given by that witness, may be entirely discredited; but, as an appellate court, we cannot reverse unless we can say that the admitted physical facts are wholly irreconcilable with the negligence alleged in the complaint. To entitle respondent to an affirmance, it is sufficient if it can be said that, notwithstanding the admitted physical circumstances, the accident could have been caused by the negligence charged in the complaint. We hold that the reasonableness of plaintiff's version of the accident was a question of fact for the trial court, and that its finding thereon is conclusive here.

[6] It is claimed that those parts of the findings wherein the court finds, in effect, that defendant violated certain ordinances of the county of Los Angeles, are unsupported by the evidence, for the reason that no county ordinance was introduced during the trial. A sufficient reply to this contention is that these parts of the court's findings may be entirely discarded and the remaining findings still be sufficient to sustain the judgment.

There is no other point that merits discussion.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

46 Cal. App. 513

REGAN v. LOS ANGELES ICE & COLD STORAGE CO. (Civ. 3276.)

(District Court of Appeal, First District, Division 2. California. March 11, 1920.)

1. Negligence ⟹80—Contributory negligence bars recovery.

Contributory negligence of a plaintiff which directly contributes to his injury bars recovery.

2. Municipal corporations ⟹706(7)—Person run down in street not guilty of contributory negligence as matter of law.

A person standing in the street between a nearby standing automobile near the curb and approaching traffic on that side of the street cannot be said to have been guilty of contributory negligence as a matter of law in failing to observe approaching vehicles.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by James J. Regan against the Los Angeles Ice & Cold Storage Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sidney J. Parsons, of Los Angeles, for appellant.

W. J. Ford and Henry G. Bodkin, both of Los Angeles, for respondent.

BRITTAIN, J. The defendant appeals from a judgment for $824 and costs in a suit for damages for personal injuries sustained by the plaintiff.

There is only one question to be determined. It was raised by the defendant's motion for nonsuit, which was denied. It is as to whether or not the trial court should have determined, or this court can determine, as a matter of law that the plaintiff was guilty of contributory negligence under the peculiar facts of this case. The same question is presented by the contention that the evidence is insufficient to support the findings.

At the time of the accident an automobile, described as a Buick touring car, with its top up, was standing close to the curb on the south side of East Seventh street, about 150 feet east of Alameda street, in Los Angeles. It had been struck earlier in the morning and slightly injured, apparently before it was parked on East Seventh street. After it was parked it was headed east in the direction of traffic on the side of the street on which it stood. The plaintiff and two other men had crossed from the other side of the street to speak to a man in the machine, and, their attention being called to the abrasions on the left rear mud guard and on the spare tire irons and the spare tire at the back, they were examining the rear parts of the machine. They had been there about five minutes. The street at that point was 60 to 70 feet wide, and there were no obstructions between the standing machine and the north side of the street. The accident occurred in the morning of a clear day. At the moment of the accident the plaintiff was standing close to and back of the left rear mud guard of the machine. One of his companions, who escaped injury, was standing at his right, back of the body of the machine, and another, who was also struck and who subsequently died, was standing at the

plaintiff's right, on or with one foot on the running board. The plaintiff had not looked back to ascertain if another machine was approaching after crossing the street. There was a slight curve in the street, so that if an on-coming machine from the rear had followed a perfectly straight course it would have approached and run into the right-hand curb.

While the plaintiff was standing in the position indicated, a heavy truck owned by the defendant and operated by its employé approached and crossed Alameda street. Several boys were trying to climb on the truck, and the driver turned in his seat to tell them to get off. He crossed Alameda street without looking where he was going, and did not turn his face forward until the truck he was driving had struck the plaintiff, knocking him under the standing machine. The truck also struck the rear mud guard of the machine and hit the man who subsequently died.

[1, 2] The rules of law applicable to such cases are well established. The negligence of a plaintiff which directly contributes to his injury bars recovery. One using a public street is charged with the duty of observing approaching vehicles, it is true, but this rule is qualified and explained by the more general rule that, except in cases where the law itself fixes a standard of care, negligence is always relative and to be determined in view of all the circumstances of the particular case. Thus, if there was a plainly visible obstruction in a street, a person taking position on or immediately in front of it would be in a position of safety and might be relieved from the duty of observing traffic as he would be if he remained on the sidewalk. The standing automobile was a clearly visible obstruction in the course of the on-coming truck. Whether its driver simply continued in a straight course along the curving street, or, as some of the witnesses testified, swerved towards the obstruction, is of no importance. He heedlessly drove the truck upon the plaintiff. The plaintiff was in a position where, if it could not be said, as a matter of law, he had a right to assume he would not be run down, reasonably prudent men might have drawn that conclusion of fact. It certainly cannot be said as a matter of law that he was guilty of negligence. The rule of contributory negligence gives no support to the claim that the driver of an automobile or truck may heedlessly or wantonly run down those who are where they have a right to be, particularly if reasonable men may differ concerning the prudence exercised by the injured person.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 436

HAYNES et al. v. INDIO LEVEE DIST. et al. (Civ. 3177.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1920.)

1. Waters and water courses ⟹179(1)—Owner of land on which dam is being constructed held necessary party to action to enjoin construction.

In suit for a mandatory injunction requiring a levee district, which had constructed a dam across a natural waterway and made a new channel whereby plaintiff's lands were flooded, to restore the course of the river to its natural channel, the owner of the land whereon the dam and cut for the new channel were situated *held* a necessary party, since the relief sought could only be obtained by permitting the levee district to enter upon her land to perform the work of restoration.

2. Waters and water courses ⟹179(1)—Complaint in suit to restore natural channel held to negative presumption that diversion was authorized.

In a suit for a mandatory injunction requiring a levee district to restore a river to its natural channel, an allegation that the diversion of the waters was not done in pursuance of any plan or improvement adopted by the levee district or its trustees, and that the diversion was unlawful and wholly without right, *held* sufficient as against general demurrer to negative any presumption that the work had been done in pursuance of any legal authorization.

3. Waters and water courses ⟹162—Right to divert natural water course so as to flood lands depends on statute.

Neither a levee district nor any other municipal or quasi municipal corporation has authority to change the natural channel of a water course so as to turn the floods upon adjacent property not naturally subject to its flow without some express authority of law or of legal procedure, and even then the injured party must have his day in court.

4. Waters and water courses ⟹177(1)—Mandatory injunction lies to compel restoration of natural water course.

A levee district which has diverted the natural channel of a water course, thereby flooding plaintiff's lands, having committed trespass irreparable in character and of a continuing nature, may be restrained by a mandatory injunction and compelled to restore things to their natural and original condition.

5. Appeal and error ⟹917(1)—On appeal involving general demurrer, allegations of complaint are admitted as the whole truth.

For the purpose of appeal the appellate court, where objection was by general demurrer, must not only admit the allegations of the complaint to be the truth, but the whole truth, and it cannot on considering the sufficiency of the complaint infer or presume the existence of facts not pleaded.

6. Equity ⟸87(2)—Laches cannot arise where suit to restrain diversion commenced within statutory period.

Where suit to restrain a levee district from diverting the waters of a natural water course into a new channel, thereby flooding plaintiff's land, was begun within the period of the statute of limitations, no presumption of laches on the part of plaintiff can arise within that period, in the absence of special pleadings or facts demanding an early protest.

7. Estoppel ⟸108—Objection that equitable estoppel against plaintiffs exists may be raised by general demurrer.

In a suit to restrain diversion of a natural water course, that the complaint discloses a state of facts which would amount to an equitable estoppel on plaintiffs may be raised by a general demurrer; but, where the existence of the laches depends upon matters extraneous to the record, they should be presented by answer.

8. Dedication ⟸39—Owner of land devoted to public use may not object thereto when rights of third parties involved.

Where a person has suffered property belonging to him to be taken and devoted to a public use and the matter has gone on so far that the beneficiaries of such use rely on its continuance and adjust their affairs accordingly, such owner having knowledge thereof and making no objection, his conduct will be regarded as a dedication by him of the property to the particular public use, and he cannot thereafter interrupt or prevent the same; his only remedy being for compensation.

9. Estoppel ⟸108, 110—Must be pleaded, but not by general demurrer to complaint not clearly showing estoppel.

Estoppel is usually purely a matter of defense and cannot be raised even on the trial unless pleaded, much less by general demurrer to a complaint that does not clearly show facts constituting an estoppel.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by John R. Haynes and another against the Indio Levee District, Charlotte M. Price, and others for an injunction. From a judgment of dismissal on demurrer as to defendant Price, plaintiffs appeal. Judgment reversed and order sustaining demurrer set aside.

J. Wiseman Macdonald, of Los Angeles, and Sarau & Thompson, of Riverside, for appellants.

Adair & Winder, of Riverside, for respondents.

SLOANE, J. This is an appeal from a judgment of dismissal of the action as to Charlotte M. Price, one of the defendants. The order of dismissal was made upon plaintiff's refusal to amend after demurrer sustained to plaintiffs' second amended complaint.

The facts set out in the second amended complaint are substantially as follows: That the defendant Indio levee district, a regularly organized levee district under the laws of the state of California, by its trustees, constructed a dam across the natural channel of White Water river, a natural waterway, and also above this dam cut a new channel through a natural ridge which intervened between the course of the river and the lands of the plaintiffs, and which always theretofore had protected such lands from the flood waters as well as the ordinary flow of said river, and that the construction of this dam and the cut or channel through the intervening ridge turned the waters of the river, particularly in seasons of high water, into this new channel and upon and over the lands of plaintiffs, to their great damage. The dam and cut in question are situated upon the land of the defendant Charlotte M. Price. Defendants, other than the Indio levee district, are owners of contiguous property affected by the change in this water course, and were made parties defendant because of their refusal to join with plaintiffs in prosecuting the action. The relief sought by plaintiffs is a mandatory injunction requiring the defendant Indio levee district to restore the course of the river to its natural channel. The demurrer of defendant Price is a general demurrer.

[1] We think it is obvious that Charlotte M. Price is a necessary party to this action, if it can be maintained at all, by reason of the fact that the relief sought could only be obtained by requiring and permitting the Indio levee district to enter upon her land to perform the work of restoration demanded. Hence the only question to consider is whether or not the complaint states a cause of action against the levee district. We think it does.

[2-4] It is alleged in the complaint that the diverting of the waters of the river from their natural channel was not done in pursuance "of any plan or improvement adopted by the said Indio levee district" or its trustees, and that the diversion "is unlawful and wholly without right." As against a general demurrer, this, we think, is a sufficient allegation, if such was needed, to negative any presumption that the work had been done in pursuance of any legal authorization therefor. We know of no authority vested in a levee district, or any other municipal or quasi municipal corporation, to change the natural channel of a water course so as to turn the floods upon adjacent property not naturally subject to its flow, without some express authority of law or of legal procedure; and, even then, the injured party must have his "day in court." Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851; Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Heier v. Krull, 160

Cal. 441, 445, 117 Pac. 530. A trespass, irreparable in character and of a continuing nature, such as is alleged in the complaint before us, may be restrained by a mandatory injunction, thus restoring things to their natural and original condition. Allen v. Stowell, 145 Cal. 666, 79 Pac. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80; Rudel v. County of Los Angeles, 118 Cal. 281, 50 Pac. 400; Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570; Island Rec. Dist. v. Floribel Alfalfa Synd., 167 Cal. 467, 140 Pac. 4. In the case last cited the court says:

"* * * We know of no cases where a court has refused to consider the complaint for want of facts where it is alleged, as it is here, that the defendants have dammed the channel of a stream thereby forcing the flood waters to seek another outlet which in the nature of things will most probably injure the persons seeking relief. Both pleading and proof of plaintiff in this case come within the principles announced in Rudel v. Los Angeles County, 118 Cal. 283, 50 Pac. 400. One may not dam the natural flow of a stream to the detriment of his neighbor by causing the water to empty upon the latter's land. Prohibitory injunction will issue where the damage is threatened and mandatory injunction to remove the cause when some injury has been done. Allen v. Stowell, 145 Cal. 666, 104 Am. St. Rep. 80, 68 L. R. A. 223, 79 Pac. 371."

Respondent Price offers no argument against the doctrines stated. Indeed, the only point urged in respondent's brief against the sufficiency of the complaint is that the facts pleaded show an estoppel to maintain the action by reason of laches on the part of plaintiffs in protesting against the acts complained of. Stated in respondent's own words, her contention is that—

"Admitting the allegations of the second amended complaint to be true, yet appellants are not entitled to the mandatory injunction they seek since they have stood by while the development was made for public use, and have suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect their own property, and have allowed this respondent to acquire certain property rights, depending upon said improvement remaining permanent."

[5-8] For the purposes of this appeal we must not only admit the allegations of the complaint to be the truth, but the whole truth. In other words, we cannot, on considering the sufficiency of the complaint, infer or presume the existence of facts not pleaded. And we are unable to find in the complaint the basis for respondent's assertion that the work complained of was for public use, or that it was prosecuted at great expense, or that the property rights of the defendants would be greatly affected by plaintiffs' delay in commencing action. It is shown by the complaint that the dam and excavation work was done in the spring and summer of 1915, that the damage complained of occurred in January and February of 1916, and that the action was not instituted until January, 1917. But the action was begun within the period of the statute of limitations, and no presumption of laches can arise within that period, in the absence of special pleading of facts demanding an earlier protest. Furman v. Craine, 18 Cal. App. 47, 121 Pac. 1007; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Meigs v. Pinkham, 159 Cal. 104, 111, 112 Pac. 883. We do not question that if the complaint disclosed a state of facts which would amount to an equitable estoppel of plaintiffs' action the point could be raised by general demurrer. But where, as here, the existence of the laches depends upon matters extraneous to the record, they should be presented by answer. There can be no dispute as to the correctness of the doctrine affirmed by the authorities cited by respondent, and as particularly laid down in Miller & Lux v. Enterprise, etc., Co., 169 Cal. 415–429, 147 Pac. 567, 573:

"That where a person has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the matter has gone on so far that the beneficiaries thereof rely on its continuance and adjust their affairs accordingly, such owner having knowledge thereof and making no objection or protest, this conduct will be regarded by the courts as a dedication by such owner of the property to the particular public use, and he cannot thereafter interrupt nor prevent the same, his only remedy being to seek compensation for the property he has thus allowed to be taken."

[9] Such a state of facts, however, does not appear from the complaint demurred to; and it was not incumbent upon the pleader to allege his diligence in prosecuting the action. Estoppel is usually purely a matter of defense, and cannot be raised, even on the trial, unless pleaded, much less by general demurrer to a complaint that does not clearly show facts constituting an estoppel. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258.

The judgment of dismissal as to the defendant Price is reversed, and the order sustaining demurrer set aside.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 456

KEMPTON et al. v. FLORIBEL LAND & IMPROVEMENT CO. et al. (Civ. 3098.)

(District Court of Appeal, First District, Division 2, California. March 8, 1920. Hearing Denied by Supreme Court May 6, 1920.)

1. Corporations ⊂=264 — Limitations did not run against action against stockholder for payments to corporation until election to treat contract as rescinded.

Where corporation contracting to sell land could not convey title on completion of payments, and purchaser elected to treat the corporation's inability and refusal as a rescission of the contract and sued for the return of the payments, *held*, the action was not on the contract, but on the new obligation to repay created by plaintiff's election; and hence suit on stockholder's liability, brought within three years thereafter, was not barred by Code Civ. Proc. § 359, though brought more than three years after making of contract.

2. Vendor and purchaser ⊂=342—Purchaser's remedies on vendor's failure to convey stated.

When vendor will not or cannot convey according to contract terms, the purchaser may sue for breach, or in equity for specific performance or alternative damages, or may treat the contract as rescinded by consent and sue at law for purchase money paid, to be recovered as money had and received, and, if plaintiff is willing to waive all claims for equitable relief and damages, the contract is extinguished as fully as if performed under Civ. Code, §§ 1689, 1691.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by M. Gertrude Spearman Kempton and another against the Floribel Land & Improvement Company and others. Judgment for plaintiffs, and defendants Cerf Rosenthal and Samuel Savannah appeal on the judgment roll. Judgment affirmed.

Albert Picard, of San Francisco, for appellants.

Clarence E. Todd, of San Francisco, for respondents.

BRITTAIN, J. The appeal is on the judgment roll. The only matter to be determined is whether or not the plaintiff's cause of action was barred as to appealing stockholders of the defendant corporation under facts appearing in the complaint and findings.

The plaintiffs sued the corporation and the two principal stockholders. It was alleged that in 1911 the corporation entered into a contract set forth as an exhibit, to convey to the plaintiffs, upon their payment in installments of $750, a lot of land in Marin county. Payments aggregating $675 were made under the contract, and on July 16, 1917, the plaintiffs tendered the balance, demanding conveyance. The defendant corporation refused to convey, and it cannot do so. It was alleged "that plaintiffs now elect to treat said inability and refusal of said defendant to perform said contract as a rescission by said defendant Floribel Land & Improvement Company, a corporation, of said contract, as of date July 16, 1917." It was further alleged that up to the date of the so-called rescission the plaintiffs had performed all the obligations of the contract binding on them, and that in performance of the contract they had paid to the corporation the various sums of money aggregating $675, "which said sums, by said inability and refusal of defendant as aforesaid, became and are the property of these plaintiffs, in the hands of the defendant corporation." The prayer was in terms for the return of the money paid, with interest from the respective dates of payment. The findings, conclusions of law, and judgment followed the allegations of the complaint, except that interest was allowed on the aggregate amount of the payments from July 16, 1917. By demurrer the appellants pleaded the bar of the statute of three years against stockholders' liability. Code Civ. Proc. § 359.

[1, 2] The Code section has received frequent consideration by the Supreme Court in cases which have made familiar the clear distinction between the accrual of a cause of action on an existing obligation of the corporation and the incurring of the liability of the obligation by the corporation, from which latter point the time begins to run in favor of the stockholder on his collateral statutory liability. Under these cases the bar of the statute may be raised in favor of the stockholder before suit can be brought on an original contract of the corporation, which does not mature or is not broken by the corporation until more than three years after its date when the obligation is incurred. These cases were collected and reviewed in a very recent decision. Chambers v. Farnham (February 6, 1920) 187 Pac. 732.

In that case the suit was against the stockholders only; a prior judgment against the corporation being relied upon as establishing the amount of damages suffered by the plaintiffs from injuries caused their crops by the breach of a condition of a lease from the corporation to them. In reliance upon two other cases, the plaintiffs in that case contended the statute had not run against the stockholders, because, they asserted, the action was upon an implied contract which arose at the time the damages were sustained. Commenting on this claim, in his able opinion, Mr. Chief Justice Angellotti said:

"Nothing said in Yule v. Bishop, 133 Cal. 574, 62 Pac. 98, 65 Pac. 1094, or in Coulter Dry Goods Co. v. Wentworth Hotel Co., 171 Cal. 500, 153 Pac. 939, in discussing Yule v. Bishop,

supports counsel in this regard. The decision in Yule v. Bishop, supra, was based upon the ground that under our statutes and decisions the original obligation of the corporation had been extinguished by payment by the indorser of a note of the corporation, such a payment by a surety being held to be 'full performance' of the obligation within the meaning of section 1473, Civil Code. * * * Of course, there is no analogy between such a case and one where the plaintiff's only possible claim is for damages for a breach of an obligation created by a contract which has in no way been performed or extinguished." Chambers v. Farnham, 187 Pac. 733.

The present case is not one where the plaintiffs' only possible claim is for damages for the breach of the obligation, nor was the obligation one which had not been extinguished. When it becomes clear that the vendor will not or cannot convey in accordance with the terms of his contract, the vendee may sue for damages for the breach, or he may sue in equity for specific performance or alternative damages, or he may treat the contract as rescinded by consent and sue at law for the money theretofore paid on account of the purchase price of the land, to be recovered, not as damages, but as money had and received by the defendant to the use of the plaintiff. If the plaintiff is willing to waive all claims for equitable relief and for damages, the contract is extinguished as fully as it might have been by full performance. Civ. Code §§ 1689, 1691. As was said in an opinion written by Mr. Justice Shaw in 1917:

"The general rule, where performance of a contract to convey is due and the vendor refuses to perform it, or fails to perform on being duly requested to do so, is that the vendee may, if he chooses, treat such breach as an abandonment and termination of the contract and may then abandon it himself, and, 'the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.'" San Diego Construction Co. v. Mannix, 175 Cal. 548–553, 166 Pac. 325, 327.

In such a case the action is not on the original contract upon which the obligation of the stockholders, as well as of the corporation, was fixed at its date, but upon an entirely new obligation to repay the plaintiffs money which was not incurred until the plaintiffs elected to relieve the corporation from the old obligation. Thomas v. Pacific Beach Co., 115 Cal. 141, 46 Pac. 899; Hayt v. Bentel, 164 Cal. 680–685, 130 Pac. 432.

"A cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought." McCarthy v. Mt. Tecarte Land Co., 111 Cal. 328, 43 Pac. 956.

These authorities show that the present case is within the reason of the rule announced in Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, and not within that on which Chambers v. Farnham, 187 Pac. 732, was decided. The action was not on the old obligation to convey, but on the new obligation to repay money to which the plaintiffs were entitled. The action was brought within three years from the time that obligation was incurred by the corporation and the stockholders incurred as principals the same obligation at the same time. The application of these rules in the particular case works no injustice. The appellant stockholders in the form of a corporation in effect were carrying on what in substance amounted to a limited partnership. When the original contract was made when the plaintiffs during a period of six years were paying to the corporation the small installments on the purchase price of the lot, when the corporation refused either to convey or to pay back the plaintiffs' money, and up to the time of the judgment, the appellants in equal shares owned 29,980 shares of the 30,000 shares into which the corporate stock was divided.

The appellants had the benefit of the payments and should repay to them the plaintiffs' money as required by the judgment. It was in accordance with the law and is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 476

RECLAMATION BOARD v. CHAMBERS, State Controller. (Civ. 2120.)

(District Court of Appeal, Third District, California. March 10, 1920. Modified April 8, 1920.)

I. States ⊂=114—Appropriation for benefit of drainage district not gift of public money to individuals or corporations.

Act May 27, 1919 (St. 1919, p. 1209), making an appropriation for the benefit of Sacramento and San Joaquin drainage district in connection with a particular project of that district which is a public agency created by Act Dec. 24, 1911 (St. Extra Sess. 1911, p. 117), as amended and supplemented by Act May 26, 1913 (St. 1913, p. 252), Act June 9, 1915 (St. 1915, p. 1338), and Act May 27, 1919 (St. 1919, p. 1122), does not violate Const. art. 4, § 31, prohibiting gifts of public money to individuals or corporations, though before its passage an assessment on account of such project had

been made and assessors appointed, and though the prior law contemplated taxation of the landowners within the district.

2. States ⟹114—Work of reclamation board under act creating drainage district held public work.

The work of the reclamation board under the provisions of the act creating the Sacramento and San Joaquin drainage district (Act Dec. 24, 1911 [St. 1911, Extra Sess., p. 117], as amended) is a public work inaugurated by the state for a public purpose primarily to aid navigation, and also to prevent floods and the destruction of property and reclaim land, especially in view of Reclamation Act 1915, § 7, declaring that the state and the people thereof had a primary and supreme interest in such work.

3. Constitutional law ⟹70(1) — Amount of contribution to public improvement a legislative question not reviewable by court.

The amount that the state should contribute toward the cost of a project of the Sacramento and San Joaquin drainage district is a matter solely for the determination of the Legislature, and not subject to review by the courts.

4. Drains ⟹10—Manner of paying for improvement by drainage district within legislative discretion.

As the work done by the reclamation board in behalf of the Sacramento and San Joaquin drainage district is carried on by the state, and all property acquired is state property, the manner of paying for it is solely a matter of legislative discretion, and the state may, if it elects, pay all the cost, or place it upon land specially benefited, or divide it between the landowners and the state in such proportions as it deems equitable.

5. Statutes ⟹95(1)—Appropriation for drainage district not invalid as releasing indebtedness of landowners to district.

Act May 27, 1919 (St. 1919, p. 1209), making an appropriation for a project of the Sacramento and San Joaquin drainage district, does not violate Const. art. 4, § 25, prohibiting local or special laws releasing or extinguishing any indebtedness of a municipal corporation, though prior to its passage an assessment on account of such project had been made and assessors appointed, as under Reclamation Board Act, §§ 13 and 14, there is no lien on land or legal liability on the owner of land in the district until the benefits are apportioned on each tract of land, and the landowners have an opportunity to object, and the list has been deposited with the county treasurer.

Original application by the Reclamation Board for a writ of mandate directed to John S. Chambers, as Controller of the State of California. Writ granted.

Frank Freeman, of Willows, and Devlin & Devlin, of Sacramento, for petitioner.

James L. Atteridge (Wesley E. Marten, of Los Angeles, of counsel), for respondent.

NICOL, Presiding Judge pro tem. This is an original application for a writ of mandate to compel the respondent, as state controller, to draw his warrant in favor of the petitioner for the sum of $100, payable out of the appropriation of $10,000 made by the act of the Legislature approved May 27, 1919. Stats. 1919, p. 1209.

This act was passed, as expressed in section 1 thereof, for the purpose of co-operation in the construction of the public works included in and provided for by that certain project heretofore adopted by the reclamation board, known as Sutter Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district. The act appropriates for the benefit of the said district, in connection with the said Sutter Butte by-pass project No. 6, the sum of $3,000,000, payable over a term of years, $10,000, however, of which appropriation, by the provisions of said act, was to take effect and be available immediately upon said act becoming a law.

The refusal of the respondent to draw his warrant in favor of the petitioner for the amount named in the petition is based on the claim that the money appropriated by this statute is a gift, and that the said appropriation of $3,000,000 is in violation of section 31 of article 4 of the Constitution, which provides that:

"The Legislature shall have no power * * * to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever"

—and also upon the further claim that the appropriation violates section 25 of article 4 of the Constitution, which declares that:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * 16. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this state, or to any municipal corporation therein."

It appears from the petition that the Sacramento and San Joaquin drainage district is a public agency or mandatory created by an act of the Legislature of the state of California, approved December 24, 1911 (Stats. 1911, Extra Session, p. 117), as amended and supplemented by the act of May 26, 1913 (Stats. 1913, p. 252), and as further amended and supplemented by the act of June 9, 1915 (Stats. 1915, p. 1338), and as further amended and supplemented by the act of May 27, 1919 (Stats. 1919, p. 1122), which original act of December 24, 1911, as amended and supplemented by the acts hereinbefore mentioned, is known, designated, and referred to as the "Reclamation Board Act," as provided in section 31 of said act so amended and supplemented. That the reclamation board re-

ferred to in the petition was created and exists as provided for by said Reclamation Board Act, and that the management and control of the Sacramento and San Joaquin drainage district is vested in the reclamation board.

It further appears from the petition that the reclamation board, in accordance with the provisions of section 13 of the "Reclamation Board Act," did on the 6th day of November, 1917, adopt and determine upon a certain portion or project of the plans to be carried out by the said board in the said Sacramento and San Joaquin drainage district, and did designate the same by the name and number of "Sutter Butte by-pass project No. 6," and did make and adopt its order and resolution for the levying of an assessment in the sum of $14,993,190 upon the lands embraced within the Sacramento and San Joaquin drainage district to be benefited thereby as might be determined in the manner provided by law, and did direct that the said assessment be known and designated as "Sutter Butte by-pass assessment No. 6," and did appoint three assessors for the purpose of making said assessment, as provided by the Reclamation Board Act.

The said plans and resolution were amended in sundry particulars, and on December 27, 1918, the reclamation board did pass and adopt amended plans and estimates for said "Sutter Butte by-pass assessment No. 6." By this amendment the board reduced the amount of said assessment from $14,993,190 to the sum of $10,624,552.25. This assessment was again amended and revised by the board on the 11th day of August, 1919, when the same was fixed at the sum of $11,995,578.71.

As appears from the foregoing, an assessment had been ordered and assessors duly appointed prior to the passage of the act of May 27, 1919, making the appropriation now in question. Section 15 of the act of June 9, 1915, after providing for the deposit of money collected and the paying out of the same on warrants of the state controller, contains the following provision:

"Drafts of the reclamation board may be presented to the controller and warrants drawn, as aforesaid, against the funds to be raised by an assessment as soon as the reclamation board has passed its order or resolution for the levy of such assessment and appointed the assessors therefor." Stats. 1915, p. 1351.

In view of this provision it is contended by the respondent that, inasmuch as the reclamation board had prior to the making of this appropriation, to wit, on December 27, 1918, ordered an assessment of $10,624,522.25 to be levied and assessed upon the lands within the Sacramento and San Joaquin drainage district to be benefited thereby, and had appointed the assessors therefor, a liability was thereby imposed upon the landowners, and that this debt and liability had accrued as the debt and liability of the landowners prior to the time at which the Legislature made the appropriation now in question. That this appropriation of $3,000,000, made after the debt and liability of the landowners had been thus established in favor of the reclamation board, was a gift, in that it was the voluntary payment by the Legislature of the legally accrued debt and liability of these landowners, and as such "a gift of public money" in violation of the Constitution of the state.

[1, 2] With this contention of the respondent we cannot agree. In no manner can we hold that this appropriation is in violation of section 31 of article 4 of the Constitution, which prohibits the Legislature from making a gift or lending the credit of the state to "any individual, association, municipal or other corporation whatever." The work being done by the reclamation board, under the provisions of the act creating the Sacramento and San Joaquin drainage district, is a public work inaugurated by the state of California for a great public purpose, which public purpose is primarily to aid navigation and restore the Sacramento river to its former navigable condition, and also for the purpose of the prevention of disastrous floods, the prevention of the destruction of property, and incidentally for the reclamation of land.

In speaking of districts of the character of the one here, the Supreme Court, in the case of People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, said:

"It is unnecessary to repeat the reasons set forth in the decisions in those cases [cases cited], by which the conclusion there reached was expressed, to the effect that such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose, the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the Legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors."

That the Sacramento and San Joaquin drainage district is more closely related to the state than the ordinary drainage district clearly appears from section 7 of the Reclamation Act of 1915, which declares that:

"The state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained, and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels and

basins mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed or subject to overflow by said streams, and confining the waters of said rivers, tributaries, by-passes and overflow channels and basins within their respective channels and boundaries, and it shall be the duty of the reclamation board at all times to enforce on behalf of the state of California and the people thereof the erection, maintenance and protection of such levees, embankments and channel rectification as will, in their judgment, best serve the interests of the state of California. The purposes and objects of this act are to carry into effect the plans of the California débris commission with such modifications and amendments and such additional plans as have been or may hereafter be adopted by the reclamation board for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and said basins, and to vest in said reclamation board control and jurisdiction over said plans." Stats. 1915, p. 1340.

As said by this court in Argyle Dredging Co. v. Chambers, 181 Pac. 84:

"We then have an institution, a state agency, created by the state, under the exclusive control and management of the state, administered by officers appointed by the Governor of the state, and engaged in an enterprise of statewide concern—the act itself providing that 'the state of California and the people thereof are hereby declared to have a primary and supreme interest' in its objects and purposes."

The passing by the reclamation board of an order of assessment and the appointment of assessors prior to the date of the passage of the act making this appropriation, and the fact that the law in force at that time contemplated that the moneys necessary to do this public work should be raised in a certain manner, to wit, by taxing the landowners within the district, did not, in our opinion, deprive the Legislature of the power to change this mode of taxation and to provide other or different methods to raise the whole or part of the funds necessary to carry on and complete such work.

[3, 4] The amount that the state should contribute toward the cost of the work provided by the Sutter Butte by-pass assessment No. 6 is a matter solely for the determination of the Legislature, and is not subject to review by the courts, and that the Legislature in this matter had the power to make this appropriation we entertain no doubt. The power to construct these works is vested in the state, the work is carried on by the state, and all the property acquired by purchase, condemnation, or otherwise is state property, and the method of paying for the same is solely a matter of legislative discretion. The state, if it elects, may pay all the cost, or place the same upon the lands specially benefited by the work, or it may in its discretion divide the burden between the landowners and the state in such proportions as the state may deem equitable. The making of this appropriation was a legislative determination that the amount thereof was the proper sum for the state to bear for the benefits to be received by the state from this work.

That the Legislature had the power to pass the act of May 27, 1919, making the appropriation in question, thereby changing in part the policy that was theretofore adopted by the state as to raising the funds necessary to carry on this work, we think, is settled by the case of the County of Sacramento v. Chambers, 33 Cal. App. 142, 164 Pac. 613, which was a proceeding for a writ of mandate to compel the controller to draw his warrant in favor of the county of Sacramento in payment of a claim arising under the provisions of an act of the Legislature of 1915 for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; the act providing that any county establishing a tuberculosis ward or hospital should receive from the state $3 per week for each person in the active stages of tuberculosis and unable to pay for his support. The respondent refused to draw his warrant in favor of the petitioner, upon the claim that the statute, in so far as it authorized the payment of the sums specified therein to cities, counties, etc., for the purposes stated in the act, was in violation of sections 22 and 31 of article 4 and section 13 of article 11 of the Constitution. His contention was that the maintenance and support and control of county hospitals constitute duties and burdens which the law casts upon the supervisors and taxpayers of counties, and that the expense necessary to be incurred in supporting such hospitals is a county charge; that, the state having by the provisions of the Political Code transferred to counties the duty and burden of maintaining hospitals for the care, support, and treatment of the indigent sick, an appropriation of any money from the state treasury for the purposes mentioned amounted to a gift, and was therefore in violation of the Constitution.

This court sustained the constitutionality of the act, and, as to the Legislature having the power to change the policy of the state in reference to county hospitals, said:

"There is no doubt that the Legislature, by the legislation above referred to, intended to and did transfer from its own shoulders and so placed upon the counties the duty and burden of caring for, supporting, and treating the classes of persons mentioned. But this does not mean that the state has thus forever surrendered all control over those matters or the right itself to exercise full and complete and exclusive jurisdiction and control over hospitals for the indigent sick. * * *

"As above declared, the state may, if it so elects, assume entire control of the matter of caring for and supporting and administering aid to the classes of persons for whose benefit

county hospitals are established and maintained. It has the right and power to establish and maintain, under its own exclusive control and management, hospitals for such purposes, and so entirely relieve counties of that duty and burden. And, having the right and the power to take upon itself entire responsibility for the support and the treatment of all such persons, it has the undoubted right and power to take exclusive or only partial control and assume corresponding liability for the care, treatment, and support of a portion or a certain class of such persons, or those only who are afflicted with a particular kind of malady."

[5] The respondent also claims, as before stated, that this appropriation violates section 25, subd. 16, of article 4 of the Constitution, which declares that:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * 16. Releasing or extinguishing in whole or in part the indebtedness, liability, or obligation of any corporation or person to this state, or to any municipal corporation therein"

—his contention being that—

"The present appropriation attempts to specially release in part the existing liability of a quasi public corporation."

Conceding that this provision of the Constitution applies to legal obligations and debts arising from an assessment levied under the Reclamation Board Act, nevertheless we are of the opinion that the said provision of the Constitution has no application to the matter now before us. The passing of the order for the assessment and the appointment of the assessors did not create a lien upon the lands within the district in any manner whatever, and no lien on said lands could be created until the benefits were apportioned upon each tract of land and the landowners had an opportunity after notice given to make objections to the steps taken to fix such lien. At the time this appropriation was made the reclamation board had gone no further than to make the order of assessment declaring the amount to be raised, and appointed three assessors, whose duty it was to define the territory to be charged with the assessment. Section 13 of the Reclamation Board Act provides as to the proceedings to be taken by the assessors, and as to the hearing of objections by the reclamation board, and section 14 of said act provides that after such hearing has been had the assessment list shall be certified by the secretary of the board to be correct, and the list shall then be deposited in the office of the county treasurer, and "such assessment shall thereafter constitute a lien upon the lands so assessed. * * *"

In Argyle Dredging Co. v. Chambers, 181 Pac. 84, this court, in passing upon the constitutionality of the act of the Legislature of January 30, 1919 (Stats. 1919, p. 5), held that the Legislature had the power to authorize the state board of control to purchase warrants of the Sacramento and San Joaquin drainage district "issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass," and that the state by said act "has simply added another class of securities in which the board of control may invest state funds." These warrants are the legal obligations of the district and will be paid out of assessments, when collected, and, when paid, the money goes back into the state treasury just as it would upon payment of any bonds purchased by the board of control. But there is no lien created upon the land of any landowner until an assessment list has been prepared, a hearing had, and the list deposited in the office of the county treasurer, and no legal liability rests upon the landowner until such mode has been followed and completed. It is unnecessary for us to decide whether the Legislature has the power to make an appropriation for the purposes mentioned after a lien has attached to the land. But, as no lien has yet been created upon the land, it is sufficient to say, under the facts as they exist, that the Legislature has full power to change its policy with respect to the method by which the public work being performed for the state, through the officers of the reclamation board, shall be paid.

In no view of the case can we see that the act making this appropriation violates any provision of the Constitution. The demurrer interposed by the respondent to the petition is hereby overruled, and it is ordered that the peremptory writ of mandate prayed for be issued.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 415

In re PATTERSON'S ESTATE. (Civ. 2091.)

(District Court of Appeal, Third District, California. March 4, 1920. Hearing Denied by Supreme Court May 3, 1920.)

1. Descent and distribution ⊜62—Either husband or wife may by agreement relinquish inheritable interest in estate of the other.

Under Civ. Code, §§ 158–160, authorizing husband or wife to enter into agreement with the other or a third person respecting property, each may, by agreement with the other, relinquish his or her inheritable interest in the estate of the other.

2. Frauds, statute of ⊜56(7) — Agreement of husband with wife, relinquishing inheritable interest in her estate, need not be in writing.

Agreement between husband and wife, authorized by Civ. Code, §§ 158–160, whereby one relinquishes his inheritable interest in the

estate of the other, need not be in writing, being controlled by no statute of frauds; section 159 merely requiring an agreement for immediate separation to be in writing.

3. Descent and distribution ⊂62—Husband's agreement with wife, relinquishing his inheritable interest in her estate, shown by evidence.

Agreement between husband and wife, whereby he relinquished his inheritable interest in her estate, *held* sufficiently shown by the evidence.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Ralph Charles Hennigan and H. M. Patterson each petitioned for letters of administration on the estate of Mildred L. Patterson. The petition of Hennigan was granted, and that of Patterson denied, and Patterson appeals. Affirmed.

Harry Davids, of Chico, for appellant.

Carleton Gray, of Oroville, and W. H. Carlin, of Marysville, for respondent.

HART, J. Ralph Charles Hennigan and H. M. Patterson filed separate petitions asking for letters of administration upon the estate of Mildred L. Patterson, deceased. After a hearing, the petition of the former was granted, and that of the latter denied. The appeal is by said H. M. Patterson from the order granting letters of administration to said Hennigan and from the order denying letters to himself.

Mildred L. Patterson was formerly the wife of one Hennigan, who died in 1896, leaving five children, of whom Ralph Charles Hennigan was the oldest son. In April, 1900, she married H. M. Patterson, and one son, Orval Patterson, was born to them. Mrs. Patterson was a resident of Butte county, and died therein on January 27, 1919, leaving an estate, consisting of real and personal property of the value of about $15,000, and leaving no will.

The court found:

"That H. M. Patterson was not entitled to administer said estate, for the reason that he was not entitled to succeed to the personal estate of Mildred L. Patterson, deceased, or some portion thereof, and that the said H. M. Patterson had, during the lifetime of the said Mildred L. Patterson, deceased, and on or about the 15th day of May, 1911, entered into a valid contract with the said Mildred L. Patterson, deceased, according to and by the terms of which the said H. M. Patterson relinquished, released, and waived all rights, including his inheritable rights and interests in and to the property and estate of Mildred L. Patterson, deceased."

Appellant states in his brief "that the only issue to be passed upon is whether or not the evidence sustains the court's finding to the effect that appellant had relinquished his right to inherit as an heir of his wife," and contends that said finding is not so sustained. This contention is based, not alone upon the proposition that the evidence itself, assuming it to be competent, was insufficient to justify said finding, but also upon the proposition that an agreement between a husband and wife, by which the one agrees to relinquish his or her inheritable interest in the other's estate, cannot be shown by parol. In other words, the last stated point is that such an agreement, to be valid, must, under the terms of our statute of frauds, be reduced to writing. Upon this position the argument is advanced that the appellant is an heir of the deceased, and that therefore he is entitled, under the provisions of section 1365 of the Code of Civil Procedure, to letters of administration of his deceased wife's estate. The facts of this case are:

Prior to the marriage of the parties the appellant had worked on the farm of Mrs. Hennigan for two or three years. It appeared in evidence that at the time of the marriage deceased had personal property and real estate which varied in value "from a few hundred dollars probably to a couple thousand dollars," as claimed by appellant; to over $21,000 as contended by respondent. The second marriage proved to be an unhappy one. According to the testimony of the respondent, appellant, soon after the marriage, began asking his wife "to put her bank account in his name, so he could draw the checks." Finally she put her funds into a joint account, and there was some trouble because appellant failed to fill out the stubs in the check books when he drew money.

In January of 1901 the spouses purchased some land, a portion of which was afterward sold, and in 1903 a tract of 50 acres was purchased and held in their joint names. Shortly after the purchase of this property appellant began demanding of deceased that she deed to him one-half thereof, and threatened to bring an action to compel her to do so. He began drinking heavily, and would stay away from the home for two or three days at a time. In May, 1911, at the request of Mrs. Patterson, appellant, who had then been away for three or four days, came to the house to talk matters over. There were also present at that time Ralph Charles Hennigan, Robert Daniel Hennigan, another son, and Edythe Leona Beeny, a daughter of the deceased. Mrs. Patterson said that she and the children had come to the conclusion "to accede to his demands, and try and bring about peace in the family in general, and have a general understanding between us all, and that her chief aim was to keep a father for the boy, to avert a separation on account of the boy, and save him from a drunkard's grave, if she could." The result of the consultation was that Mrs. Patterson deeded to

appellant 25 of the 50 acres standing in their joint names, he deeded the balance to her, and the bank account was divided between them. The agreement was that Mrs. Patterson should take care of her children by her first marriage, and that appellant would do the same by his son. Robert Hennigan testified that appellant said—

"he wanted one-half of that property in full settlement of his claims. He said he was going to have 25 acres of that land before he would come there and live, and that at her death he would have no claims on her property—or our property. That was to be our property then and always, whether she should die or not, and he was to have the 25 acres which had the bearing orchard on it for his and Orval's part. He wanted Orval to be his sole heir. He spoke of the money in the bank at that time. He was to have no claim on the personal property whatever. * * * Mr. Patterson said he was to waive the claim to the personal property because he got the bearing half of the orchard."

Ralph C. Hennigan testified that appellant said—

"he wanted it fixed, and a clear title to this property, so that at his death it would go to his son alone, and that we would have no claim against it whatever, and that her part that she kept would go to us solely, and that he wanted a half of it, instead of waiting until her death. Q. Was there any discussion at this meeting between Mr. and Mrs. Patterson as to the children being present and their not being present? A. There was. She told him that she wanted us there; she was morally bound to have us there and take part in this agreement and division of the property, because this property that she owned had come from money left by our father from leases on land and farming opportunities left to her by our father, and that we had a right to be there and to take part in the discussion in the settlement of these property rights. It was simply and nothing else but a settlement of inheritable rights on the part of the children on both sides; he insisting that he wanted his part of this property to be so Orval would be his sole heir at his death, and that we would be her sole heirs at her death. That was his declaration there."

Other witnesses—children of Mrs. Patterson by her first husband—testified that they were present when the real property mentioned was divided, and corroborated Ralph and Robert Hennigan as to the declarations by Patterson that he would relinquish his interest in the estate of his wife, and that he did so agree. It was further shown that, after the agreement and division of the 50-acre tract between Patterson and his wife, one of the children of the latter by her former husband assisted in farming her land, and that Patterson, after said agreement and division, never made any claim that he had any interest in her share of the property. In fact, it appears that, about one year after the settlement between appellant and his wife, the former left the premises of Mrs. Patterson, and that, on the 14th day of January, 1919, he filed a complaint in divorce, pending which Mrs. Patterson died.

The above comprises a sufficient statement of the facts for the purposes of the decision herein.

[1, 2] 1. That either a husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, "subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other," is expressly confirmed by sections 158, 159 and 160 of the Civil Code. Section 159 provides:

"A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

Section 160 provides that the mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in section 159. It follows, of course, from said Code provisions, that a husband and wife may enter into an agreement whereby the one or the other or both may relinquish his or her inheritable interest in the estate of the other. This proposition, however, is not disputed here, nor could it be, since the disposal of one's inheritable interest in the estate of another is no less an act involving a contract or an engagement respecting property than where such act involved the transfer of property in tangible form or property having a present tangible existence. In re Davis, 106 Cal. 453, 456, 39 Pac. 756; Wren v. Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; Kaltschmidt v. Weber, 145 Cal. 596, 599, 79 Pac. 272; Cullen v. Bisbee, 168 Cal. 695, 698, 144 Pac. 968.

Nor have we been able to find any provision in our law requiring that an agreement between a husband and wife, whereby the one relinquishes or transfers to the other his or her inheritable interest in his or her estate, shall, to be valid or of binding force, be in writing; and counsel for the appellant frankly say that, after considerable research, they have not succeeded in finding any California cases holding it to be the rule that such an engagement between husband and wife must be reduced to writing to be valid and enforceable.

Section 159 of the Civil Code, supra, more nearly than any other Code section or law to which our attention has been directed approaches to the requirement of a writing in such agreements between husband and wife as the one involved herein. This, though, may even be stating the proposition too

strongly, for it is more conservative, and, indeed, more correct, to say that it is the only section specifically relating to contracts between a husband and wife respecting property, save the section as to the transfer under certain circumstances of the community property (section 172), which requires a contract between them to be in writing. But it is very clear that that section does not apply to the facts of this case. As shown, the agreement herein was not one of separation between the husband and wife. There was, in other words, no agreement between them to separate and to live apart from each other. The agreement was a part of a transaction resulting in a division between them of a certain tract of land which, it may be conceded for the purposes of this case, as counsel for appellant contend was true, they owned and held as tenants in common, and neither their agreement to divide between them said land, nor the agreement whereby each relinquished his and her inheritable interest in the estate of the other, contained a covenant or involved an understanding that they were thereafter to live separate and apart from each other or cease their marital relations. Section 159 of the Civil Code, so far as it requires any engagement which a husband and wife may enter into to be in writing, provides only that an agreement to an immediate separation must be evidenced in that formal manner. There is no other matter referred to in said section, as we read it, which is required thereby to be reduced to writing except an agreement between them to an immediate separation. It is very clear, therefore, that, if section 159 is the only Code section upon which appellant can rely for the support of his position that the agreement with which we are here concerned must be in writing, he is entirely without a foundation to sustain him. Nor is such an agreement within any provision of our statute of frauds, or within the fair import of any language thereof.

But we think the question has virtually been settled by our Supreme Court in a number of cases. See Kaltschmidt v. Weber, 145 Cal. 596, 599, 79 Pac. 272; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719, 103 Pac. 190; Cullen v. Bisbee, 168 Cal. 695, 144 Pac. 968. See, also, Galbraith v. McLean, 84 Ill. 379; Kershaw v. Kershaw et al., 102 Ill. 312. In Perkins v. Sunset, etc., Co., Mr. Justice Melvin, speaking for the court, says:

"Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby one may release to the other all interest, both present and in expectancy. Crum v. O'Rear, 132 Ill. 443, 24 N. E. 956; In re Davis, 106 Cal. 453, 39 Pac. 756; Von Glahn v. Brennan, 81 Cal. 264, 22 Pac. 596; Wren v. Wren, 100 Cal. 279, 38 Am. St. Rep. 287, 34 Pac. 775; Kaltschmidt v. Weber, 145 Cal. 598, 79 Pac. 272."

Again, in the same case, it is said:

"It will be seen by an examination of the authorities cited above that the utmost freedom of contract exists in California between husband and wife and *that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses* with reference to their property in determining the existence or nonexistence of a contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it. In the case at bar there was both positive evidence and also testimony as to facts and circumstances tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been the community property, was, and had been in existence for a long period of years."

Thus it will be observed that, while the California cases above cited and considered do not deal directly with an agreement of precisely the same character as the one here, nevertheless what is said in those cases applies with equal force to the case here, and upon the doctrine of said cases we feel persuaded that we must predicate the decision of the point under consideration here, particularly in view of the fact that, as we have shown, there is no express provision of our law requiring such agreements to be put in writing or nothing in the language of any provision of our law treating cognate subjects from which the conclusion may reasonably be deduced that the Legislature intended that they should, to be enforceable, be reduced to writing.

[3] 2. We think that the evidence as received is sufficient to support the finding that the appellant agreed to relinquish his inheritable interest in the estate of the deceased, if, indeed, he ever had any such interest. We need not recapitulate the positive evidence, of which a fair conspectus is above presented herein, in support of this conclusion. It is sufficient to say that the evidence, considered together with the conduct of the parties towards each other long anterior and down to the date of the division between them of the land mentioned, and the immediate circumstances surrounding the transaction eventuating in the division, appear clearly enough to be sufficient to have warranted the conclusion arrived at by the trial court, as evidenced by its findings, that an agreement was made by the appellant, as a part of the transaction resulting in the division of the land, that he would forever waive or relinquish any inheritable claim to or interest in the estate of the deceased. What appeared to be uppermost in his mind, in insisting on a division of the land, was the future welfare of his own son by deceased, he repeatedly saying that he wanted it understood that, upon his death, his share of the land should go to said son solely and that the children of deceased by her former marriage should not receive, upon his death, any

part of his estate or of the land which he received by the division. The fact that he left the deceased about a year after the division of the land was effected, and the fact that he brought suit for divorce against the deceased, and in the complaint in said action, the record of which is in evidence here, he made no claim of any interest in the deceased's estate, merely referring to the fact of the division of the land, and describing both parcels, and alleging that each parcel so described was the sole and separate property of each spouse, were circumstances which the trial court could well have considered, and no doubt did consider, as tending to strengthen and support the positive evidence that the appellant, at the time the tract of fifty acres was divided between him and the deceased, agreed to relinquish his inheritable interest in the estate of the deceased.

Then there is some evidence tending to show that all the property of the deceased, including the money appropriated to the purchase of the tract taken and held in the joint names of the appellant and the deceased—the tract divided between them—was inherited in part by the deceased from her former deceased husband, the father of respondent, and partly acquired as of her community right in the estate of her former husband. This evidence might well be held to tend in some measure to support the claim of respondent that an agreement to relinquish his inheritable interest in the estate was made by appellant, since, considering the probabilities of such a situation, if it in fact existed (and it was for the trial court to determine whether it did exist), the court below could well have concluded or inferred therefrom that the appellant would readily assent to a waiver of a claim to any interest in property or an estate in which he in fact had no actual interest. In addition to the foregoing, we may call attention to the appellant's testimony, which would seem to go far towards confirming the claim that he did agree to surrender or relinquish any inheritable interest he might set up in his wife's estate. He testified:

"I had this conversation about inheritable rights with my wife probably six months after we separated. It took place on a bench in the city park in Chico, and I told her that unless she agreed to sign such paper I was afraid I would have to get a divorce, and it was probably six months afterwards that she finally told me she would not sign. This last conversation we had somewhere along in 1913. I don't remember the exact date, and the conversation was started by myself, because I wished to have the inheritable rights in both families absolutely settled in case of her death or my death, so there would be no come-back from either branch of the family, and that was my idea all along. I had that idea in my mind at the time of the division of the property."

We may also refer to the further testimony of the appellant that he had approximately $1,600 when he and the deceased intermarried, in April, 1900, and that the land they bought and took in their joint names, and subsequently divided between themselves, was "worth probably $12,000 or $15,000."

From the foregoing consideration of the evidence, both positive or direct and circumstantial, we think we are perfectly safe in the conclusion that the finding that the appellant agreed to surrender any inheritable right or interest he might have or claim or put forth in the estate of the deceased derives sufficient support from the evidence. At any rate, we cannot say, as a matter of law, that said finding is not sufficiently supported; and we are constrained to add that, all the facts and circumstances of the case considered, the conclusion of the trial court in that particular and the order following therefrom granting letters of administration to a son of the deceased, are not alone legally well grounded but involve a disposition of the controversy in harmony with the principles of abstract justice.

The order is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

(46 Cal. App. 516)

CORNISH v. SUITER et al. (Civ. 2745.)

(District Court of Appeal, Second District, Division 1, California. March 12, 1920.)

Vendor and purchaser ⇐334(2) — Misrepresentation that defendants were agents held to entitle plaintiff to recover payments made to them.

Under Civ. Code, § 1572, defendants, though not knowingly corrupt, were guilty of actual fraud upon plaintiff inducing him to contract to purchase land through them as agents for a supposed company by positively asserting in manner not warranted by their information that they were duly authorized agents for such company, and that the company owned the land, both of which representations were untrue, so that plaintiff was entitled to recover from them what he had paid.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Thomas J. Cornish against M. B. Suiter and B. F. Suiter. From judgment for plaintiff, defendants appeal. Affirmed.

Thomas Scott and George E. Whitaker, both of Bakersfield, for appellants.

Kaye & Siemon, of Bakersfield, for respondent.

CONREY, P. J. From the findings of fact made in this case it appears that at various times between the 1st day of January, 1911, and the 10th day of July, 1911, the defendants represented to the plaintiff that they were the duly authorized agents of the owner of a certain tract of land in Modoc county, Cal., which land had been subdivided under the name of Willow Ranch Orchard homestead tract, and that said land was owned by the Tri-State Land Company. Believing and relying upon such representations, the plaintiff paid to the defendants on June 7, 1911, the sum of $250, and on July 10, 1911, the sum of $250, for and on account of the purchase of a ten-acre parcel of land in said tract. The Tri-State Land Company was not a corporation, but said name was in fact a fictitious name under which one Bernard C. Sitz pretended to be operating and conducting a business of advertising and selling and improving said land, as the defendants at all times well knew, but the defendants failed and neglected to disclose to the plaintiff that the said name of the Tri-State Land Company was a fictitious name, or that said Sitz was the person carrying on said business under said name. Neither in his own name nor in the name of the Tri-State Land Company was the said Sitz at any time the owner of said tract of land or of any part thereof, and he was not, nor were the defendants, at any time the agent or agents of the owner of said tract of land or any part thereof. At all the times of making the representations mentioned the information and knowledge which the defendants had did not warrant the making of said representations. The defendants well knew that one Kirkpatrick was in fact the owner of all of said land, and that Sitz, operating under said name of Tri-State Land Company, was not the owner, and that defendants did not have authority from Kirkpatrick to sell or dispose of the land or any part thereof. Prior to the making of said representations the defendants knew that Sitz would not be able to deliver deed for the land unless Kirkpatrick was first paid therefor. Prior to the making of such assertions and representations, Kirkpatrick notified the defendants that, unless Sitz first paid him for the land and received conveyances thereof, parties purchasing from the defendants would not get deeds for their land. Prior to the time when defendants made said representations to the plaintiff, Sitz presented to them a false and forged abstract of title which showed a fictitious and forged deed purporting to convey said tract of land from Kirkpatrick to Bernard C. Sitz, and purporting to be a copy of the records of the office of the county recorder of Modoc county, and the defendants believed the same to be genuine and relied upon the same. Said forged abstract of title was presented to the defendants about the month of July, 1910, and did not purport to show any conveyance of such land to the Tri-State Land Company. At two different times subsequent to seeing said forged abstract, and prior to June, 1911, the defendants were at the county seat of Modoc county, but made no investigation or inquiry concerning the true state of the record title to said tract of land. "As early as January, 1911, defendants knew that said purported abstract of title was false and forged, and that said tract of land was in fact owned by the said Kirkpatrick." Said representations were made by the defendants to the plaintiff for the purpose of inducing the plaintiff to enter into a contract with them as the agents of Sitz to purchase the said parcel of land. The plaintiff was not informed at any time prior to July 11, 1911, as to the identity of the defendants' principal in any manner, except that they were the agents of the Tri-State Land Company. The plaintiff had no knowledge of the said Sitz, but believed the Tri-State Land Company to be a corporation, and the defendants to be agents thereof. In August, 1911, plaintiff offered to pay the defendants an installment of $20 on account of the purchase of said land, being an installment mentioned in the contract delivered by the defendants to the plaintiff in the name of Tri-State Land Company on July 11, 1911, but defendants refused to accept the payment of $20 and informed the plaintiff that their principal was and would be unable to convey or perform the contract for the conveyance of said land, and that the said owner of said land had refused to recognize or be bound by the acts of said defendants as the agents of said Sitz. Upon the facts found as above stated, judgment was entered in favor of the plaintiff for said sum of $500 with interest, from which judgment the defendants appeal.

The appeal, as presented by counsel for appellants in their brief, rests chiefly upon the claim that the findings are not sustained by the evidence. The findings of fact as made by the court are numbered I to VII. The so-called specification of insufficiency of the evidence, as contained in the bill of exceptions, merely states "that the evidence does not support the following findings filed in the action, to wit: 1, 2, 3, 4, 5, 6, and 7." This specification is coupled with an assertion that all of the evidence in the case shows "that plaintiff knew that he was dealing with Bernard C. Sitz, who represented the Tri-State Land Company." As to the last-named proposition, there is no doubt that the defendants caused the plaintiff to believe that he was dealing with a corporation. This is confirmed by the fact that when, on the 11th day of July, 1911, they delivered to the plaintiff a contract, that document purported to be executed by the Tri-State Land Company as a corporation.

The so-called specification of insufficiency

of the evidence does not point out any particular in which the evidence is insufficient to support any designated fact found. Turning to the brief for appellants in order to ascertain what particulars of that nature are relied upon by counsel, we find that they have quoted five sentences or parts of sentences selected out of the findings, and as to each of them counsel assert that there is nothing in the evidence to support the finding shown by the words quoted. These assertions by counsel are not in any instance accompanied by any quotations from or designation of any portion of the transcript to which we are invited to refer in order to ascertain what evidence actually was given bearing upon the point stated. Assuming without deciding that the specifications are sufficient to raise a question as to the sufficiency of each of the findings, the court is not under obligation to closely search through an extensive transcript for the purpose of overturning what seems to be a just judgment. Nevertheless we have read all of the evidence. It sufficiently appears that in taking the plaintiff's money the defendants pretended to be representing a cer'ain corporation which did not exist; that the individual whom in fact they did represent as agents was, as they well knew, operating under the name of a corporation pretending to do business when such corporation did not exist. One of the findings selected for attack states "that as early as January, 1911, defendants knew that said purported abstract of title was false and forged, and that said tract of land was in fact owned by said Kirkpatrick." It appears that defendant B. F. Suiter visited the tract of land in the early part of 1910, and that the abstract and deed, which afterwards turned out to be forged, were shown by Sitz to the defendants before Mr. Suiter made that visit to the land. It does appear that Sitz had some kind of contract with Kirkpatrick, the owner of the land, and that as early as January, 1911, the defendants received from Kirkpatrick a letter in which it was very clearly implied, if not in direct terms stated, that no deed had yet been made. This was a circumstance which should have caused defendants to investigate the genuineness of the supposed deed which had been shown to them before they would take the responsibility of representing an ownership supposed to be based upon such deed.

Appellants claim that they should not be held liable in this case, because they were not guarantors of the title of their principal; that they merely received this money as agents for their principal to whom they accounted for the money so received. The fact is, according to their own testimony, that they sent to Mr. Sitz $300 of the money which they received from the plaintiff, and retained for themselves the other $200 as commission. In our opinion, this is not the ordinary case of an agent representing a vendor of real property. Assuming that defendants were not knowingly corrupt in the matter, they were none the less guilty of actual fraud because they induced the plaintiff to enter into the contract by positively asserting, in a manner not warranted by their information, that which was not true. Civ. Code, § 1572. They made it appear to the plaintiff that they were receiving his money as agents for a corporation when in fact such corporation did not exist. Under the circumstances, the defendants acted upon their own responsibility in accounting to Sitz as their principal in the transaction. The plaintiff is entitled to hold the defendants as principals to whom he paid money for which he has received no consideration. There are no errors in the court's rulings on evidence offered which would control the decision on this appeal.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

46 Cal. App. 593

BERTOLA v. ALLRED et al. (Civ. 3282.)

(District Court of Appeal, First District, Division 1, California. March 17, 1920. Hearing Denied by Supreme Court May 13, 1920.)

1. Vendor and purchaser ⟸141—Purchaser's letter held a sufficient specification of defects, where so considered by vendor.

Where the vendor and his agent treated a letter written by the purchaser as a sufficient specification of defects in the title, it will be so considered, regardless of informality.

2. Vendor and purchaser ⟸141—Complaint as to title received by vendor sufficient, though contract required report to agent.

Where the purchaser made complaint of defects in title direct to the vendor, instead of to his agent, as provided in the contract, the vendor cannot complain, where he made no objection on that ground until after institution of action.

3. Vendor and purchaser ⟸143 — Purchaser held not to have waived defect in title, in view of vendor's representations.

Where the vendor and his agent assured purchaser that she would be allowed to maintain physician's office on the premises, despite covenant restricting the use of the land to residential purposes, and that the restrictions would be removed, the purchaser, though knowing of the restriction, did not waive it.

4. Vendor and purchaser ⟸134(4)—Covenant restricting use of property constitutes incumbrance.

Where the vendor informed the purchaser that she could maintain physician's office on the premises, despite a covenant restricting the

use of the property to residential purposes, but the vendor was unable to secure modification of the restrictive covenant, it constituted an incumbrance on the title, and warranted the purchaser in refusing to carry out the contract of purchase.

5. Vendor and purchaser ⟸340—Purchaser entitled to recover all of down payment, though vendor had paid agent's commission.

Purchaser, where vendor was unable to secure removal of a restriction continuing an incumbrance, was entitled to recover from the vendor the full amount of the down payment, although vendor paid his agent his commission immediately upon the purchaser's making a down payment.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mariana Bertola against C. S. Allred, with W. W. Kirby as cross-defendant. From a judgment for plaintiff, defendant Allred appeals. Affirmed.

I. M. Peckham, of San Francisco, for appellant.

R. Clarence Ogden, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor for the sum of $500 in an action brought by her to recover from the defendants said sum for their alleged failure to perform the terms and conditions of a contract for the sale to said plaintiff of certain real estate. The cause was tried before a jury, and the facts of the case, upon which the jury rendered their verdict in the plaintiff's favor, were briefly these:

The plaintiff, being desirous of purchasing a residence in Ingleside Terrace tract, in the city and county of San Francisco, saw an advertisement in a paper to the effect that the defendant W. W. Kirby had houses to sell in said tract. She called upon Kirby, who introduced her to the defendant Allred as his principal, and together they went to view the premises. The plaintiff, who was a physician, informed the defendants that she desired to use the premises, if purchased, for her residence, and also for an office for the practice of medicine. She was shown at the time certain building restrictions imposed upon the tract at the time of its original subdivision, which provided "that no building or structure, except a dwelling house, or appurtenances thereto, designed to accommodate one family only, or which shall be used exclusively as a dwelling house, and not more than one such building upon any one lot, shall at any time be placed upon the above-described real property," and which further provided "that said real property shall not at any time be used for any purpose other than residential purposes." She inquired whether these building restrictions would be applied to the practice of medicine, and was assured by both defendants that they would not. A few days later a written contract for the purchase by the plaintiff of said premises was prepared and presented to her for signature. It called for an initial payment of $500, and provided among its several terms that 14 days from the date thereof were to be allowed the purchaser to examine the title to the property and to report in writing all valid objections thereto to the defendant Kirby, which objections, when so reported, the defendants were to have 90 days to remove. The defendant Kirby, who acted throughout as the agent of the defendant Allred, was by the terms of the contract expressly authorized to extend the time for the examination of the title and for the making of objections thereto for a period of not to exceed 30 days.

Upon reading this contract, the plaintiff saw that the word "office" therein had been erased, and the word "study" inserted, and upon objecting to this change was assured that said change would be sufficient to avoid the restrictions, and that everything would be all right. On October 10, 1918, the plaintiff signed said contract, but presently learned that its terms were not sufficient to so affect the restrictions upon the use of the property as to enable her to maintain an office thereon. She had several interviews within the next few days with both of the defendants, who repeatedly assured her that the objections would be removed. On October 23d she was called to attend the defendant Kirby professionally, he being confined to his bed with influenza, and she then talked with him about the removal of the restrictions, and he orally agreed with her that the time for making her objections to the title should be extended, in order to enable himself and his principal to accomplish the removal of the restrictions to her use of the property in part for office purposes. She also on the same day saw the defendant Allred, who assured her that the restrictions would be removed. On the following day she wrote to the defendant Allred a letter in which, among other things, she stated that—

"Our agreement to extend the time of final adjustment, as the agent, Mr. Kirby, is ill, will give time to settle the point you spoke of yesterday, namely, the restrictions on office and placing of garage. Have you seen the company about it yet?"

Shortly thereafter the defendants brought to the plaintiff a letter from the Urban Realty Company, which appears to have made the original subdivision of the property and imposed the building restrictions thereon, which letter was to the effect that the maintenance of a doctor's office upon the premises would be in direct conflict with the intent

and meaning of the restrictions, which neither the manager nor the board of directors of said company had any power to change. It thus appearing that the restrictions upon the use of the property for other than residential purposes could not be removed, the plaintiff commenced this action for the recovery of the deposit which she had paid upon her signature of the contract for its purchase. From the judgment which followed in her favor, the defendant Allred prosecutes this appeal.

[1] The first contention of the appellant is that there is no sufficient evidence to support the plaintiff's claim that her objections to the title to the property were presented within the time specified in the contract, and that there was no sufficient or competent evidence that her time to present said objections had ever been extended. We are of the opinion that this contention is without merit. Almost immediately after the date of the execution of her contract for the purchase of said premises the plaintiff began insisting upon a more specific removal of the restrictions upon her use of the premises for office purposes than would be accomplished by the appellant's attempted evasion of the terms of said restrictions through the insertion of the word "study" for the word "office" in the plaintiff's contract. So far as her objections to the title could be made orally and could be made specific, she had urged these objections during the 10 days immediately following the date of execution of her contract, and during that time the defendants both assured her that they were endeavoring to bring about a removal of her specific objection to the title thus made. On October 24, 1918, within the 14 days provided for in her contract, the plaintiff wrote to the appellant Allred the letter from which the above excerpt is taken. While it is true that this letter is somewhat vague and uncertain as a statement, standing alone, of the plaintiff's objections to the title, it does specifically refer to the two points of objection which had been the subject of frequent oral discussions between the plaintiff and the defendants during the preceding 10 or more days, and, this being so, we think it was permissible for the plaintiff to show what the oral conferences between herself and the defendants had been, in order to explain whatever uncertainties may appear upon the face of her written communication. The main objection which the defendants urged to the admission of this letter in evidence was that it was insufficient as a specification of defects in title; but we think this objection was not well founded in view of the evidence in the case, which showed that after its receipt the defendants both treated it as a sufficient specification of the plaintiff's objections to the title, and continued for some time thereafter their endeavors to have the obnoxious restrictions removed.

[2] The appellant makes the further objection to the introduction of this letter that it was not addressed or sent to the defendant Kirby, the contract having provided that objections to the title were to be reported in writing to him. It is undisputed, however, that Kirby was merely the agent of the appellant Allred in the transaction, and hence that any report which was required to be made to him by the wording of the contract would be made to him as such agent only. This being so, the plaintiff's report to the principal directly, instead of to him through the medium of his agent, would amount to a sufficient compliance with the terms of the contract, and as to this also the appellant made no objection until after the institution of the action.

[3] The appellant's next specification of error is based upon his contention that, since the plaintiff's own testimony showed that she knew of the building restrictions upon the premises at the time of the execution of her contract to purchase the same, she must be held to have waived her objections to the title upon this ground. This contention might have some merit, were it not for the facts, as disclosed by the undisputed evidence, that the plaintiff was continuously and repeatedly assured by both of the defendants that the obnoxious restrictions would be removed, and that it was only in consequence of these assurances and in reliance thereon that she was induced to execute the contract for the purchase of the premises. This being so, it may not be contended that the plaintiff waived objections to the title upon which she was thus constantly insisting and was being repeatedly assured would be removed.

[4] The appellant further insists that the trial court was in error in its refusal to give to the jury a set of several instructions requested by the defendants, and which were based upon the proposition that the plaintiff's maintenance of an office for the practice of her profession upon the premises would not amount to a violation of the restrictions which had been imposed upon the use of said premises for other than residential purposes. That such restrictions constitute such incumbrances upon the title to real property as will justify a purchaser in seeking a recovery of his partial payment in the event of the refusal or failure of the seller to bring about their removal has been expressly held by the Supreme Court in the case of Tandy v. Waesch, 154 Cal. 108, 97 Pac. 69, and by this court in the case of Whelan v. Rossiter, 1 Cal. App. 701, 82 Pac. 1082, and in view of the law as laid down in these cases the trial court was justified in its refusal to give the defendants' requested instructions.

[5] It is finally urged by the appellant that the amount of the respondent's recovery was excessive in view of the fact, as shown by

the evidence, that the defendant Kirby had retained out of the plaintiff's initial payment to him of the sum of $500 the amount of his commissions, viz. the sum of $230, and hence that the plaintiff's recovery against this appellant should not have been in excess of $270. We think, however, that the plaintiff, having paid to the appellant through his agent the sum of $500 upon a contract which both the appellant and his agent have failed or refused to carry into effect, would be entitled to a recovery of the whole sum paid by her regardless of any division of said sum which might have taken place between the appellant and his agent Kirby, and with which the plaintiff had nothing to do.

It follows that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

46 Cal. App. 576

DYSERT et al. v. WEAVER et al. (Civ. 3176.)

(District Court of Appeal, Second District, Division 2, California. March 16, 1920.)

1. Bills and notes ⊂⊃470—Complaint sufficient to allege nonpayment.

A complaint, alleging that $91 interest had been paid, but that no other or further sums had been paid thereon, is sufficient to allege nonpayment of the note involved; the expression "thereon" obviously referring to the note and not to the interest.

2. Bills and notes ⊂⊃467(2)—Unnecessary to allege that payee of note in possession is owner.

As it is presumed that the payee of a note in possession is the owner, a complaint, alleging execution and delivery of a note to the payee, is sufficient to state a cause of action without alleging that the payee was the holder and owner.

3. Costs ⊂⊃260(1) — Damages awarded for frivolous appeal.

Where defendants' appeal was wholly frivolous and could not have been taken with reasonable hope of success, damages should be imposed on affirmance of the judgment.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Walter V. Dysert and another against William K. Weaver and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

James B. McCracken, of South Pasadena, for appellants.

Waldo, Root & Dysert, of Los Angeles (George E. Waldo, of counsel), for respondents.

FINLAYSON, P. J. This is an action upon a promissory note executed by defendants. Plaintiffs are the payees named in the note.

[1] Upon the trial, when plaintiffs sought to introduce their evidence, defendants objected upon the ground that the complaint does not state a cause of action. It is claimed that there is no sufficient allegation of nonpayment. The complaint alleges that "$91.87, the interest on said promissory note to October 7, 1916, has been paid, and that no other or further sum has been paid thereon." Appellants contend that the word "thereon" modifies the word "interest," and that this allegation amounts to no more than an averment that no more has been paid on the interest than $91.87. We cannot assent to this construction of the plain and unambiguous language of the complaint. We think it quite clear that the word "thereon" refers to the words "promissory note," and that the allegation is equivalent to an averment that all the interest that accrued up to October 7, 1916, has been paid, and that no other or further sum has been paid on the note.

[2] There is no merit in the contention that the complaint should have alleged that plaintiffs are the "owners and holders" of the note. In an action by the payee against the maker, it is sufficient to allege the execution and delivery of the note to plaintiff, without alleging that he is the owner and holder. It will be presumed that the payee of a note, in possession thereof, is the owner. Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Locke v. Klunker, 123 Cal. 231, 239, 55 Pac. 993; Yellow Jacket, etc., Co. v. Holbrook, 24 Cal. App. 687, 142 Pac. 128; 8 C. J. p. 886, title "Bills and Notes," par. 1159.

[3] The appeal is wholly without merit. It is inconceivable that it could have been taken with any reasonable hope of success. Because the appeal is manifestly frivolous, appellants, we think, should pay respondents such damages as may be just. We consider $100 a proper sum to be charged.

It is ordered that the judgment be affirmed, and that respondents recover of appellants the sum of $100 as damages.

We concur: SLOANE, J.; THOMAS, J.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

46 Cal. App. 582

HERZER v. LEE et al. (Civ. 3152.)

(District Court of Appeal, First District, Division 1, California. March 16, 1920.)

1. Pawnbrokers and money lenders ⊂⊃9—Plaintiff held not seller, but merely to have advanced funds to enable defendant to purchase automobiles.

Relative to usury in a transaction, evidence *held* insufficient to warrant finding that plaintiff sold automobile to defendants, but to show that he advanced funds to enable them to make purchase from another.

2. Pawnbrokers and money lenders ⊂⊃6—Where lender did not get broker's commission there was no usury.

Where plaintiff made a loan to enable defendants to purchase an automobile and defendants paid a broker a commission for procuring the loan, but it appeared that, while the amount of the commission was added to the amount defendants were to pay plaintiff, there was no showing that plaintiff received any benefit and the broker received the full amount of the commission, the transaction cannot be attacked as usurious within the Personal Property Broker's Act because of payment of commission.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by George A. Herzer against H. E. Lee and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Welles Whitmore, Abe P. Leach, Curt C. Darrow, and Frank J. Gordon, all of Oakland, for appellants.

Carl F. Wood, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by him to recover possession of an automobile.

As to the facts of the case there is very little, if any, dispute, and they may be briefly summarized as follows: The defendant Lee wished to buy an automobile, and went to one Nelson, a dealer in automobiles, for that purpose. Nelson had such a machine as he wished to buy, the purchase price of which was $962.50. Lee had $300 in cash, which he was ready to apply upon the purchase price, but desired time and terms for payment of the balance, which Nelson refused to give, insisting upon a cash transaction. Lee thereupon applied to one H. P. Drueke, who maintained an office for loans and investments under the name of Auto Securities Company, for assistance in completing the purchase of the car. Drueke looked over the machine, and agreed that he would finance the transaction for Lee for a commission of $75, to which Lee agreed. Drueke then went to the plaintiff herein who, while not in any way connected with the Auto Securities Company, was accustomed to loan money in aid of transactions for the purchase of automobiles. It was admitted at the trial that during the year prior to the transaction under review the plaintiff had made as many as 500 loans of this character through various brokers who, from time to time, applied to him for such loans. Drueke was among the number of these brokers, and he had frequently, though not exclusively, consummated automobile sales through the use of plaintiff's money. The plaintiff appears to have had confidence in the judgment of Drueke with respect to the value of the security offered in such transactions, but does not otherwise appear to have ever paid him commissions for placing his money nor to have in any way shared in such commissions as Drueke received from time to time in these matters. The plaintiff, having in the present case agreed to furnish the money needed to finance the purchase of the automobile by Lee, the parties, including the plaintiff, the defendants Nelson and Drueke, met at the office of the latter, whereupon the following proceedings were had: A bill of sale of the car in question from Nelson to Herzer was drawn up and executed by the former upon receipt by him of the sum of $300 in cash from the defendant Lee, and of the sum of $662.50 in the form of a check from Herzer to Nelson. A contract of conditional sale of the automobile from the plaintiff to the defendants was then executed, which recited that the purchase price to be paid by the defendants to the plaintiff for the car was the sum of $1,037.50, upon which there was credited the sum of $300, and upon the balance of which, namely, the sum of $737.50, the defendants agreed to pay certain monthly installments, and also agreed to pay 2 per cent. per month interest upon deferred payments. Upon the execution of this contract Drueke received possession of the automobile from Nelson, who, shortly thereafter and on the same day, delivered the same to the defendants. The sum of $75, which Drueke was to receive as his commission for negotiating this transaction, was handed to him by the plaintiff, the same being the balance remaining in his hands after the payment of the sum of $662.50 to Nelson. The defendants having failed to make the payments required to be made by the terms of their contract with Herzer, he brought this action upon said contract and breach thereof to obtain possession of the car. The trial court entered judgment in his favor, and from such judgment the defendants prosecute this appeal.

The only contention which the appellants make upon this appeal is that the transaction, as between themselves and the plaintiff, was usurious within the meaning and effect of the act generally known as the Personal Property Brokers' Act, as approved

April 16, 1909 (Stats. 1909, p. 969), and as amended April 21, 1911 (Stats. 1911, p. 978). The gravamen of this contention rests upon two propositions: First, that the transaction between the plaintiff and the defendants, while in form and upon the face of the writings a contract for the purchase of an automobile, was in truth and fact a loan by the plaintiff to the defendants of the sum required to make the actual purchase of the machine from its owner, Nelson, for which loan the conditional sales contract with the plaintiff was merely the security, and hence that the plaintiff must be held to have been a personal property broker within the intent and meaning of said act; second, that the payment of the sum of $75 to the broker Drueke by the plaintiff, Herzer, as a portion of the total sum advanced by the plaintiff to the defendants, and upon which total sum they were required to pay interest at the rate of 2 per cent. per month, rendered the transaction usurious within the meaning and intent of said act.

In deciding the case in favor of the plaintiff the trial court made its findings in which the facts, as above set forth, were briefly stated, but from which the court concluded that the transaction was one in which the plaintiff had agreed to sell an automobile to the defendants for the sum stated therein, and was not such a loan to the defendants upon security as would bring the plaintiff within the terms of the act mentioned.

[1] With this latter conclusion of the trial court we are unable to agree, for while in form the transaction was such as the court has described it to be, the undisputed evidence in the case shows that it was never the intent of the parties that the plaintiff should become the owner of or should sell the automobile in question to the defendants. He never for a moment had possession of or any control over said automobile prior to said transaction, or thereafter up to the time of the institution of this action. The defendants throughout were intent upon purchasing the automobile in question from said Nelson, and the amount in cash which they were prepared to pay, and did pay, thereon was paid by them directly to said Nelson. From every aspect this transaction impresses us as one in which the plaintiff was engaged, as he had been upon at least 500 occasions during the year preceding, in putting out his money to would-be purchasers of automobiles from other parties upon the security of the purchase of the machine.

If the decision of this case depended solely upon the correctness of the trial court's conclusion as to the nature of this transaction it would follow that the judgment which it entered should be reversed; but the decision of that court does not depend solely upon its conclusion upon the foregoing facts, but upon the further consideration as to whether or not the transaction was in fact usurious within the meaning and intent of the Personal Property Brokers' Act.

[2] The part of the transaction which would render it usurious under the appellants' contention is that which relates to the payment of $75 to the broker, Drueke, for aside from such payment the plaintiff is not shown to have charged an amount of interest in excess of that permitted by said act. The appellants, however, contend that the broker Drueke was the agent of the plaintiff Herzer in the transaction, and that the payment to Drueke of said sum was none other than the payment of a commission due from the plaintiff to Drueke for services rendered in the course of the transaction.

Neither the evidence in the case nor the findings of the court support this contention, since it clearly appears that the sum of $75 which Drueke received from the plaintiff at the conclusion of the transaction was the amount which the defendants had agreed to pay him for his services in financing on their behalf the purchase of the automobile from Nelson; and it further clearly appears that while this payment to Drueke came through the plaintiff and was included in the amount of his loan to the defendants, it was not made by plaintiff to Drueke as a payment for any services rendered by him to the former, and that as to said payment the plaintiff himself neither received nor retained any portion.

Upon this state of facts we are unable to distinguish this case from the case of Niles v. Kavanagh, 179 Cal. 98, 175 Pac. 462, 1 A. L. R. 831, wherein the Supreme Court holds, upon a state of facts almost identical with those of the instant case, that the transaction is not to be held to be usurious by reason of such a payment having been made to the broker negotiating the loan unless it shall appear that the lender was in some way beneficially interested in the charge through either receiving back some portion thereof, or through having the same applied, in whole or in part, to commissions due from the lender to the broker for services rendered in the transaction. No such facts have been shown in the instant case. The total sum to be received by the plaintiff for his loan of the money in question was the 2 per cent. per month interest upon the principal thereof, and with the amount which the broker Drueke was to receive as commission under his agreement with the defendants the plaintiff had neither interest nor concern except as the amount of said commission was to be included in the total sum due from the defendants upon said loan. This being so, while the conclusions of the trial court as to the nature of the transaction were, we think, erroneous, its judgment

was correct. It should therefore be affirmed; and it is so ordered.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

(46 Cal. App. 485)

STANSBURY v. FRAZER et al. (Civ. 2106.)

(District Court of Appeal, Third District, California. March 10, 1920.)

1. Highways ⇐113(4) — Materialman's lien good as against assignee who financed contractor.

Where a road contractor entered into an agreement whereby he assigned the contract to one who financed him and who was to receive a specified portion of the proceeds, the lien of one furnishing material to the contractor, and who filed with the county the notice of claim required by Code Civ. Proc. § 1184, entitles the materialman to bonds due from the county to the contractor as against the assignee.

2. Highways ⇐113(4)—Assignment by contractor who took subcontract does not defeat lien for supplies to subcontractor.

Where a road contractor assigned his contract to one who furnished the money to finance it and took a subcontract under his assignee, one who furnished materials to the subcontractor is entitled to money due from the county as against the assignee.

3. Highways ⇐113(4)—Assignee of principal contractor who had received full payment cannot contest lien of subcontractor.

An assignee of the principal contractor who had received all that he was entitled to claim under his assignment cannot contest the claim of one who furnished materials to the contractor to funds due from the county.

4. Judgment ⇐683—Denial of injunction held binding on assignee.

A decree, denying an injunction, prayed for by a contractor and his assignee, to restrain the county from delivering bonds due under the contract to a materialman, bars subsequent contest by the assignee of the materialman's right to the bonds.

5. Judgment ⇐950(1)—Admissible as bar to defense after court struck reply pleading bar.

After the reply pleading a former judgment as a bar to the defense set up in the answer was stricken by the court because no reply was required, the judgment was thereafter properly received in evidence, though ordinarily the bar of a judgment must be pleaded.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Charles Stansbury against James L. Frazer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John B. Haas, of Los Angeles, for appellants.

Hocker & Austin, of Los Angeles, for respondent.

BURNETT, J. The controversy is over the satisfaction of a claim of plaintiff for the sum of $2,332. On December 29, 1915, one James L. Frazer entered into a contract with the county of Los Angeles for the construction of a highway known and designated as "Road Improvement District No. 39." For the work to be done by said Frazer the said county of Los Angeles promised to issue its bonds in the amount of $19,495 as provided in the certain act known as the Road District Improvement Act of 1907 (St. 1907, p. 806). The work was completed by Frazer, and was accepted by the board of supervisors of said county; the bonds were issued and the proper fund created, and all the bonds were delivered in payment for said work, except bonds for the amount of $4,000, which at the beginning of this action were in the possession of the county treasurer. After said contract was executed between said Frazer and said county an agreement was entered into between Frazer and the plaintiff herein, whereby plaintiff agreed to furnish teams, tools, and other appliances required in the construction of said highway. Plaintiff complied with his agreement, and the evidence shows without any controversy—in fact, it is virtually conceded by appellant—that said services were worth the sum claimed for them. Before said contract of Frazer and the county had been completed by the former and accepted by the latter, and while the said $4,000 in bonds remained as aforesaid in the possession of the county treasurer, plaintiff served a notice in proper form upon said county and the treasurer thereof of his said claim, and demanded that a sufficient amount of said bonds be withheld from the contractor to satisfy his said claim. Thereupon an action was brought by plaintiff against said Frazer, said county, said treasurer, and the Pacific Coast Casualty Company to secure judgment for said amount, and to subject said bonds to the satisfaction of said claim. Thereafter on motion of defendants one Fred Hoffman and one W. M. Ledbetter were brought in by order made by said superior court. The cause was tried before the court without a jury. Findings were filed and thereafter judgment rendered:

"That the plaintiff, Charles Stansbury, do have and recover of and from the defendant James L. Frazer the sum of $2,332, with interest from the 13th day of November, 1916, and that the plaintiff have and recover of the defendant James L. Frazer, and the intervener Fred Hoffman, costs in this behalf expended.

"That plaintiff has a lien on the highway bonds in the hands of the defendant, John N. Hunt, county treasurer of Los Angeles county, state of California, for the satisfaction of said judgment.

"That said bonds be deposited by said county treasurer with the clerk of this court, and on payment of the judgment rendered herein in

favor of plaintiff, Charles Stansbury, and the satisfaction thereof, said bonds be delivered to the intervener, Fred Hoffman."

There are other provisions in the judgment, but they are not involved herein. The only appellant in the case is said intervener, Hoffman, and the principal point made by him is based on the position that he became the assignee of Frazer's contract with said county of Los Angeles, and that he was therefore entitled to the entire consideration that was to be paid for said work, to the exclusion of said Stansbury for services performed by him under said agreement with Frazer. The theory of Hoffman is that he virtually became, by said assignment, the contractor for the performance of said work; that he was so recognized by the said county of Los Angeles; that he entered into a subcontract with Frazer, who was to perform all the work for the same consideration, less $1,200; that there was no contractual relation whatever between appellant and respondent; and that respondent's notice to the county and the treasurer to withhold said bonds was without any force and effect whatever.

The written instruments by which it is claimed said assignment and subcontract were made between Hoffman and Frazer are set out in the transcript. We deem it unnecessary to reproduce them. It is sufficient to say that the court found that the contract was not assigned absolutely as claimed by appellant, but that the agreement was that Hoffman was to finance the work according to the terms therein set forth, and that in consideration therefor he was to be paid the sum of $1,200. It may be added that to secure Hoffman for the money to be advanced by him a bond was required from Frazer. This accounts for the fact that the Pacific Coast Casualty Company was made a party to the action. The judgment, however, was in favor of said company, and it is therefore not interested in this appeal.

[1] We think the court was entirely justified in so interpreting the contract between Frazer and Hoffman. There is no doubt that Frazer performed the work and was recognized by said county as responsible therefor. Plaintiff, therefore, having been employed to perform said services by said Frazer, by serving said notice upon the county he effected an equitable garnishment of the balance that remained due to said contractor from said county. Section 1184, Code Civ. Proc.; Miles v. Ryan, 172 Cal. 205, 157 Pac. 5; Goldtree v. City of San Diego, 8 Cal. App. 509, 97 Pac. 216; Olson-Mahoney L. Co. v. Dunne Inv. Co., 30 Cal. App. 332, 159 Pac. 178; Associated Oil Co. v. Commary-Peterson Co. et al., 32 Cal. App. 582, 163 Pac. 702.

[2] But, if we grant that the lower court was in error in holding that the contract between Hoffman and Frazer did not amount to an assignment, then the result will be the same under a proper construction of said sections of the Code of Civil Procedure. It can make no difference to Stansbury whether Frazer remained the contractor or became a subcontractor. He would have in either case the same claim upon the fund remaining in the hands of the treasurer. Hoffman, by assignment from Frazer, could secure no greater right to the remaining bonds or fund than if he had been the original contractor. But if the contract had been made by him and the county and he had entered into a subcontract with Frazer, and the latter had employed Stansbury, would it not be equally true that plaintiff, by the notice which he gave, could subject the remaining fund to the burden of his claim? As far as plaintiff is concerned the legal effect of the two situations would be the same. In either case we would have a fund in the hands of the treasurer due for public work performed, but unaffected by any other claim or burden, and thereupon subjected to garnishment at the instance of one who had been employed either by the contractor or subcontractor to contribute to said public work. We feel satisfied that said statute, enacted to protect the interest of laborers and materialmen, is broad enough to cover such a case.

[3] Moreover, it appears without conflict that appellant has not been aggrieved by the judgment in favor of plaintiff. Upon either assumption as to his relation to Frazer, he was to make a profit of $1,200. The record shows that he has paid out, under his contract with Frazer, the sum of $15,550.75. Under the judgment herein he is denied only the sum of $2,332 out of the entire issue of bonds of $19,495. In other words, he obtains $17,163, or a profit of $1,612.25, an excess of more than $400 over the agreed consideration. In view of this situation he surely should not be permitted to contest respondent's claim for payment out of the residue of the fund.

[4] Again, the very question of the right of respondent to subject these bonds to the payment of his claim was litigated in a former action wherein Hoffman was plaintiff and Stansbury and others were defendants. The prayer of the complaint therein was:

"First. That a preliminary injunction be granted, restraining the said board of supervisors, John N. Hunt, treasurer of the county of Los Angeles, Cal., and Walter A. Lewis, auditor of Los Angeles county, Cal., from recognizing the said assigned claim of Charles Stansbury, or, in any way acting in accordance with the notice of claim filed by G. S. De Garmo, the assignee of Charles Stansbury, and restraining the said Charles Stansbury and G. S. De Garmo and James L. Frazer from asserting said claim or from interfering with the issuance of said bonds.

"Second. That the court adjudge the claim of Charles Stansbury as assigned to G. S. De Garmo void and of no effect as a claim against

the bonds to be issued for the payment of the work as provided in the contract made and entered into by the county of Los Angeles with James L. Frazer, a copy of which is hereto attached and marked 'Exhibit A,' and that the court adjudge the claim of Charles Stansbury as assigned to G. S. De Garmo a claim against which said Charles Stansbury bound himself to hold said Fred Hoffman, plaintiff herein, harmless.

"Third. That the court grant a permanent injunction, restraining the acts for which a preliminary injunction is prayed for.

"Fourth. That plaintiff recover costs by him herein expended, and that the plaintiff have such other and further relief as to the court may seem meet and just."

Judgment was rendered therein in favor of defendants, and no appeal seems to have been taken. We deem it unnecessary to set out the pleadings in that case, but we think it is quite apparent that the foundation of the plaintiff's claim was identical with the basis of appellant's contention herein. The two actions, in other words, involved the same subject-matter, and exhibited all the identities that are required to constitute the former judgment a bar to a subsequent action. Freeman on Judgments, § 252; Sunkler v. McKenzie, 127 Cal. 554, 59 Pac. 982, 78 Am. St. Rep. 86; Suisun Lumber Co. v. School District, 19 Cal. App. 587, 127 Pac. 349; Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13.

[5] The rule is that the party relying upon a former judgment in bar must plead it where he has an opportunity. Wixson v. Devine, 67 Cal. 341, 7 Pac. 776. Plaintiff herein endeavored to comply with the rule by setting up said former judgment in an answer to appellant's pleading, but the court struck it out upon the theory that no such pleading was required in response to an answer; in other words, that a plaintiff is not required to plead a judgment in bar of a defense set up by a defendant. As stated in Wixson v. Devine, supra:

"It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and, as we have in our system of pleadings no replication to the answer, the estoppel could not properly be pleaded. Clink v. Thurston, 47 Cal. 30; Flandreau v. Downey, 23 Cal. 358."

The judgment roll in the former action was, though, introduced in evidence without objection. It is true that there is no specific finding as to the bar, but appellant has not complained of that, nor, indeed, could he, as the finding must have been necessarily against him.

We can see no merit in the appeal, and the judgment and order are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

46 Cal. App. 491

STANSBURY v. FRAZER et al. (Civ. 2119.)

(District Court of Appeal, Third District, California. March 10, 1920.)

Appeal and error ⊂=440—Trial court cannot, pending appeal, release part of bonds deposited to secure payment of judgment.

Where the trial court had rendered judgment for plaintiff and required the deposit of certain bonds until the judgment was paid, it could not, pending appeal from the judgment, release a portion of the bonds in excess of the amount of the judgment.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Charles Stansbury against James L. Frazer and others. From an order releasing certain bonds theretofore required to be deposited with the clerk pending payment of plaintiff's judgment, plaintiff appeals. Reversed.

Hooker & Austin, of Los Angeles, for appellant.

John B. Haas, of Los Angeles, for respondents.

BURNETT, J. On the 29th day of July, 1918, on the application of respondent Hoffman, the superior court of the county of Los Angeles made the following order:

"The motion of Fred Hoffman, by his attorney, John B. Haas, for the release of certain bonds now in the custody of the clerk of this court, having come on regularly to be heard on the 27th day of July, 1918, and, it satisfactorily appearing to the court that there is now being held by said clerk, $4,000 of street bonds and interest coupons attached thereto to satisfy a judgment in the sum of $2,332 obtained in the above-entitled action; and it appearing to the court that said amount is excessive and unnecessary to satisfy said judgment:

"Therefore it is hereby ordered, adjudged, and decreed that the said clerk release and deliver to said Fred Hoffman, or his attorney, John B. Haas, bonds in the sum of $1,000 from those certain bonds now being held in custody by him, being bonds in road district improvement No. 39, Los Angeles county, together with all interest coupons attached to all of the bonds so held by said clerk, and that the bonds herein ordered released and delivered shall be those last maturing."

This order was based upon an affidavit of John B. Haas, the attorney for said Hoffman, in which it was stated that a judgment had been rendered in said action against the defendant James L. Frazer for $2,332, and that an order was made by said court that certain street bonds in the custody of the county treasurer be delivered to the clerk of said court, and that in pursuance of said order said bonds were so delivered to said clerk, and that they are now held by him, together with the interest coupons attached

thereto, and "that said amount is far in excess of the amount necessary to satisfy said judgment against James L. Frazer; that the said defendant Fred Hoffman has appealed to the Supreme Court from the judgment rendered in the above-entitled action, and that said appeal is now pending. Wherefore, affiant asks that an order be made, directing the clerk to deliver to Fred Hoffman bonds in the sum of $1,000 and all interest coupons of the bonds now in his control and in his possession as aforesaid."

It is quite apparent that this order in effect modified the judgment in the action from which an appeal had already been taken to the Supreme Court. But it is equally apparent that, pending an appeal, the lower court is without power to proceed further as to matters embraced in the judgment. Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211; Wickersham v. Crittenden, 103 Cal. 582, 37 Pac. 513; Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949. In other words, the jurisdiction of the lower court in respect to the judgment is entirely suspended while an appeal is pending in the higher court. Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605; Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176; Estate of Dean, 149 Cal. 487, 87 Pac. 13. We may add that these propositions are advanced in the brief of appellant, and no reply has been made thereto by respondent, probably for the reason that he can find no answer to make.

The order is reversed.

We concur: HART, J.; ELLISON, Judge pro tem.

182 Cal. 530

SMITTON v. McCULLOUGH et al. (FABER, Intervener). (S. F. 8905.)

(Supreme Court of California. March 30, 1920. Rehearing Denied April 29, 1920.)

1. Equity ⊜60—Liens ⊜12—Priority in time not controlling except where claims otherwise equal.

Where successive conflicting interests, purely equitable in nature, are in all other respects equal, the equity prior in time prevails (Civ. Code, § 2897), but priority in time is not decisive where otherwise unequal, and is the last element for consideration when determining the priority of equitable claims.

2. Equity ⊜56—As equity regards substance rather than form, parol lien is not inferior to one in writing.

Since equity regards substance rather than form, if equitable interests in a subject-matter have been created, no inequality will result from the form or mode of creation, and an equitable lien created by parol agreement will not be inferior to an interest created by written assignment.

3. Assignments ⊜87 — Notice to holder of funds necessary to preclude bona fide purchaser.

Where a person entitled thereto assigns a fund in the hands of a third person, notice to holder thereof is necessary to render the assignment valid and effectual as against a subsequent assignee without notice and for valuable consideration.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Assignments ⊂=10—May operate on fund to be created if potentially existent.

Where pledgee of corporate stock was by pledgor's exercise of option required to purchase the stock, the fund in excess of the debt secured by the pledge was subject to assignment made by the pledgor to intervener, of which the pledgee had notice, prior to the exercise of the option, since the fund, though not actually in existence at the time of the assignment, had a potential existence.

5. Corporations ⊂=123(4)—Notice of subordinate lien to registered pledgee necessary but not notice to corporation.

Where, under Civ. Code, § 324, requiring entry of transferee's name on corporate books to make transfer valid against subsequent bona fide purchasers, the pledgee of stock having an option to purchase procured the same to be transferred to him as pledgee, other persons claiming subordinate equitable liens thereon were not required to give notice to corporation; notice to pledgee only being sufficient.

6. Corporations ⊂=123(9)—Rights of assignee of stock first giving notice to pledgee superior to prior lien.

The preference which priority of creation of a lien might otherwise have given plaintiff's claim is overcome by the fact that intervener, though a subsequent assignee, first asserted her right to possession by giving notice to defendant pledgee of the stock, provided intervener was an assignee for valuable consideration without notice of plaintiff's prior claim.

7. Assignments ⊂=87—Bills and notes ⊂=358—Chattel mortgages ⊂=139—Mortgages ⊂=155—Pledges ⊂=24—Antecedent indebtedness is "valuable consideration" for security.

An antecedent indebtedness constitutes a "valuable consideration," not only for a transfer in satisfaction and discharge thereof, but it is also a "valuable consideration," within the protection of the equitable doctrine of bona fide purchase, for a transfer merely as security for a pre-existing debt, as respects not only commercial paper, but also mortgages, pledges, and assignments.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

8. Liens ⊂=15—Policy of law against secret liens.

The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and incumbrancers.

In Bank.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by Ernest C. Smitton against Virginia McCullough, as executrix of B. T. McCullough, deceased, and another, in which Della E. Faber intervened. From a judgment giving other liens priority, plaintiff appeals. Affirmed.

John Ralph Wilson and W. G. Bonta, both of San Francisco, for appellant.

Fabius M. Clarke and Tirey L. Ford, both of San Francisco, amici curiæ.

Dave Cosgrave, of San Francisco, for intervener respondent.

Henshaw, Black & Goldberg, of San Francisco, and Hayes & Oliphant, of Oakland, for other respondents.

LENNON, J. The plaintiff in this action sued to establish an equitable lien on certain personal property, alleged to have been created pursuant to the provision of a parol agreement of the parties thereto, and to have the same declared to be prior and paramount to other liens which had been imposed upon the same personal property. Briefly stated, the undisputed facts of the case as revealed by the pleadings and proof are these:

In the month of September, 1916, one McCullough was indebted for money loaned to Smitton, the plaintiff, in the sum of $20,125. During said month of September, 1916, Smitton threatened McCullough with suit upon said indebtedness and subsequently agreed with McCullough not to sue; the consideration for Smitton's agreement to forbear to sue on the original indebtedness being McCullough's execution of a promissory note to Smitton, dated September 13, 1916, in the sum of $20,125, and McCullough's promise to give Smitton a lien on 28,500 shares of certain specified corporate capital stock as security for the payment of the note. For the purpose of perfecting said promised lien, McCullough, at the time of the execution of the note and the promise to give the lien, further agreed orally to forthwith transfer by assignment to Smitton 20,000 shares of the said stock and hold in trust for Smitton the remaining 8,500 shares of said stock and, as trustee for plaintiff, to sell said remaining shares and apply the proceeds to the satisfaction and discharge of an existing lien in the sum of $8,250, which had been previously imposed upon all of McCullough's shares of said capital stock. McCullough died without transferring to the plaintiff any of said shares of said capital stock, and never, by the sale of any portion thereof or otherwise, satisfied and discharged in whole or in part the pre-existing lien. Just before his death, on May 27, 1917, McCullough executed a written assignment of his interest in all of the said shares of stock to Della E. Faber by way of pledge to secure the payment of an antecedent indebtedness evidenced by a promissory note dated January 27, 1917, and executed to her by McCullough in the sum of $3,850. Della E. Faber intervened in this action, pleading her claim of lien and praying that it be decreed to be a lien on said shares of stock prior and paramount to any and all other claims or liens thereon save that of defendant Phillips. It

appears beyond dispute that defendant Phillips came into and held possession of 25,000 shares of said stock as pledgee pursuant to the provisions of a perfected pledge which was executed as security for and simultaneously with the execution of a promissory note to Phillips in the sum of $15,000. As a part of the same transaction and for the purpose of consummating the pledge, McCullough delivered to Phillips two certificates of the stock in question representing an aggregate of 25,000 shares of said stock, which then stood in the name of McCullough, unincumbered, on the corporation's books, and, at the same time and as a part of the same transaction, McCullough by an instrument in writing authorized and empowered Phillips to cause said stock to be transferred to him as pledgee on the corporation's books. Accordingly, and thereafter, there was issued to Phillips, in his name as pledgee, a stock certificate representing 25,000 shares of said stock, and the same was thereupon delivered into the possession of Phillips and all the while thereafter stood in his name on the books of the corporation. Coupled and executed simultaneously with the contract of pledge, McCullough gave in writing to Phillips an option to purchase the said 25,000 shares of stock at any time prior to the maturity of the promissory note for $15,000, which was the basis and consideration of the pledge, at the specified price of $25,000, and, by the same agreement, McCullough was given an option to require the purchase by Phillips of the said stock at the same price. The latter option, the evidence shows, was, subsequent to the death of McCullough, exercised by the defendant Virginia McCullough, as executrix, and Phillips accordingly purchased said stock at the price stipulated, which was $10,000 in excess of the sum due and owing to Phillips.

It is an admitted fact in the case that the lien of said defendant Phillips is superior to the claims of the plaintiff, Smitton, and the intervener, Faber. The defendant Virginia McCullough has no personal interest in the subject-matter of the litigation, and evidently was made a party to the action merely because of the fact that she, as executrix of the estate of McCullough, rejected the plaintiff's claim based upon the promissory note of the deceased which had been presented against the estate of the deceased. The trial court rendered and entered its judgment, based upon appropriate findings, establishing three liens upon the shares of stock in question in favor of (1) the defendant Phillips, (2) the intervener, Faber, (3) the plaintiff, Smitton, giving preference by way of priority in the execution and satisfaction of each lien in the order stated. The plaintiff alone appeals, and only from that portion of the judgment which declares that the plaintiff's lien "is inferior and subordinate to the lien of said intervener," and which further declares "that the proceeds of said shares of capital stock be applied to a discharge of said respective liens in accordance with and as ranked by the terms of the judgment." The record shows, and counsel for plaintiff concedes, that but a single question is involved in the appeal and that "the question is simply one of priority."

Admittedly the claims of lien in question were not perfected in accordance with the formalities required for the creation of statutory liens, but, apparently by the application of the doctrine of equitable liens, the trial court found that the claims in question had ripened into subsisting securities. This, of course, must have been upon the theory that every express executory agreement which contains a promise, or sufficiently indicated intention, to make some definitely described or identified property security for a debt or other obligation will be regarded in equity as creating an enforceable charge upon and against the specified property. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 3, §§ 1233–1235. Assuming, as we must upon the record before us, but not deciding, that both claims are entitled to enforcement as equitable liens, plaintiff's claim of lien is subordinate and inferior to that of intervener Faber.

[1] The fact that plaintiff's lien is prior in point of time is not, under the circumstances of this case, decisive of the question of priority. True, where successive conflicting interests, purely equitable in nature, are in all other respects equal, the equity prior in time prevails. Civ. Code, § 2897. The time of creation, however, is the last element for consideration when determining the priority of equitable claims, and plaintiff's claim can predominate by reason of antedating intervener's equity only if the two interests are in all other respects equal.

[2, 3] Interests are equal in equity when each is entitled to the same recognition and protection by reason of possessing to an equal degree those elements of right and justice which are recognized and aided by courts of equity. Since equity regards substance rather than form, if equitable interests in a subject-matter have been created, no inequality will arise based upon their form or mode of creation, and therefore in the present case if, as the trial court found, plaintiff has an equitable lien upon the subject-matter thereof, the mere fact that it was created by a parol agreement will not render it inferior to an interest created in favor of the intervener by an assignment in writing. Nor does the fact that the intervener acquired a subsequent interest without notice of the plaintiff's prior claim in and of itself give the intervener any right to preference. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, §§ 683, 684. Where, however, a person entitled there-

to assigns a fund in the hands of a third person, the rule is established in this state that notice to the holder of the fund is necessary to render the assignment valid and effectual as against subsequent assignees without notice and for a valuable consideration. Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26; Widenmann v. Weniger, 164 Cal. 667, 130 Pac. 421; Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, § 695. Such notice may be either written or oral. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, § 696.

[4, 5] Of course, there must be a specific fund, actually existing or to come into existence in the future, upon which the assignment may operate, but "the fund need not be actually in being if it exists potentially, * * * if it will in due course of things arise from a contract or arrangement already made or entered into" when the assignment is made. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 3, §§ 1280 and 1283. Defendant Phillips held the stock in question subject to certain options, previously noted, and the option to require the purchase of the stock by said defendant Phillips was exercised and consummated in due course in keeping with the purport of the pledge agreement. Clearly, the fund resulting from this purchase had a potential existence at the time of the assignment by McCullough to plaintiff and intervener, and therefore defendant Phillips was not a mere bailee, but the holder of a "fund" within the meaning of the above rule. Under the facts of this case notice to the corporation was unnecessary. By virtue of section 324 of the Civil Code, when certificates of stock are transferred the name of the transferee must be entered upon the books of the corporation to render the transfer valid as to subsequent purchasers without notice. Nat. Bank v. Western Pac. Ry. Co., 157 Cal. 573, 580, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 139. This requirement was fulfilled by defendant Phillips. No certificates of stock were ever transferred to either plaintiff or intervener; both being, at most, claimants of purely equitable liens. The corporation was responsible to Phillips, the pledgee, nor could plaintiff or intervener have secured any right against the corporation by notice to the corporation, or thereby have prevented Phillips from becoming the owner of the stock in accordance with his agreement with McCullough. While ordinarily notice of the assignment of shares of stock must be given to the corporation (Pomeroy's Equity Jurisprudence [4th Ed.] vol. 2, § 696), we can see no reason for requiring notice to the corporation under the facts of this case, which involves merely the rights, as between themselves, of two assignees of equitable interests; for the assignments in question were not simple assignments of direct interests in shares of stock, but were assignments of interests subject to the peculiar rights of an intervening third party. The rights of this third party were of such a nature that he, and not the corporation, was the direct holder of the fund upon which the assignment operated and notice to the corporation would have served no purpose. Notice to be effectual must be given to the person responsible to the assignor (Stephens v. Green [1895] 2 Ch. 148), and in this case the defendant Phillips was that person. The evidence shows that he, as the holder of the fund, had notice of intervener's claim, and does not show any notice to him of plaintiff's claim of lien.

[6] The preference, therefore, which the priority of creation might otherwise have given plaintiff's claim of lien is overcome by the fact that the intervener, even though a subsequent assignee, was the first to assert her right to possession, as far as was within her power, by giving notice to Phillips, the holder of the stock, of the assignment to her of McCullough's interest therein. The efficacy of this notice for the purpose of perfecting a priority of claim is, of course, dependent upon whether or not the intervener was an assignee for a valuable consideration without notice of the prior equities of the plaintiff. Dearle v. Hall, 3 Russ. 1, 38 Eng. Rep. 475.

[7] It is conceded that neither plaintiff nor intervener had, prior to McCullough's death, any notice of each other's claim of lien, but appellant contends that, since the assignment to intervener was made and executed merely by way of security for a pre-existing debt, intervener cannot claim the benefit of the above-mentioned equity for the reason, it is urged, that, while an antecedent debt may be valuable as a consideration between the parties, it is not a valuable consideration within the meaning of the equitable rule affording protection to bona fide purchasers and incumbrancers for value. The Elmbank, (D. C.) 72 Fed. 610; Citizens', etc., Bank v. Judy, 146 Ind. 330, 43 N. E. 259. Whatever may be the rule in other jurisdictions, that is not the rule in California. The law in this state on this question is well settled to the effect that not only does an antecedent indebtedness constitute a valuable consideration for a transfer in satisfaction and discharge of said indebtedness, but it is also a valuable consideration, within the protection of the equitable doctrine of bona fide purchase, for a transfer merely as security for a pre-existing debt. Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, § 749. The earliest cases in this state held that an antecedent indebtedness was a valuable consideration to support the transfer of commercial paper as security, and rendered the pledgee thereof free from equities between the original parties. Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94;

Naglee v. Lyman, 14 Cal. 450; Jones' Pledges and Collateral Securities (2d Ed.) § 128; Pomeroy's Equity Jurisprudence (4th Ed.) §§ 480 and 749. While these cases dealt with a bona fide purchaser under the law merchant, the reasoning there adopted for holding the antecedent debt a valuable consideration was not based upon the peculiar requirements of commerce and mercantile business, and in Frey v. Clifford, 44 Cal. 335, 342, the general rule was definitely laid down, and has never since been receded from in this state, "that a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded in this state as a purchaser for a valuable consideration," and a subsequent mortgage given in security for an antecedent debt was held to prevail over a prior unrecorded transfer. In Fowles v. Nat. Bank of California, 167 Cal. 653, 140 Pac. 271, after reviewing the authorities in this state, the court held that a pledgee of shares of stock which had been transferred as security for a pre-existing indebtedness was a pledgee for value, and as such had rights superior to the owner of the shares who had intrusted them to the pledgor. The rule that a transfer as security for a pre-existing debt is a transfer for value, not only as between the parties, but as to third persons as well, is too well settled in this state to be questioned.

[3] The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and incumbrancers. Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; Ruggles v. Cannedy, 127 Cal. 290, 297, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; Ferguson v. Murphy, 117 Cal. 134, 48 Pac. 1018. The intervener, having given notice to the holder of the fund, must, under the decisions in this state, be held, as against plaintiff, a bona fide incumbrancer for value, and the trial court therefore did not err in holding plaintiff's claim of lien inferior to that of intervener.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

182 Cal. 697

PEOPLE v. ONG MON FOO. (Cr. 2266.)

(Supreme Court of California. April 19, 1920.)

1. Criminal law ⟸1160—Truth of evidence determined for appeal by verdict and denial of new trial.

Question of truth in evidence in prosecution for murder is conclusively determined for purposes of appeal by verdict of jury and action of trial court in denying motion for new trial.

2. Criminal law ⟸829(3)—Refusal of instructions as to identity of defendant adequately covered harmless.

In prosecution for murder in first degree, where controlling question was defendant's identity with person who committed fatal shooting, in view of charges that unless defendant's guilt was shown beyond all reasonable doubt jury must acquit, etc., refusal of requested instructions directed particularly to question of identification of defendant as person who committed the crime, etc., was not prejudicial error.

3. Criminal law ⟸407(1)—Accusatory statements in connection with defendant's conduct admissible to show admission.

In prosecution of one Chinaman for murder of another, accusatory statements of deceased and his wife in presence of defendant under arrest shortly after shooting, under such circumstances it might fairly be inferred he understood nature of charge made, *held* admissible in connection with conduct on his part from which acknowledgment of guilt might be implied, though not if defendant for any reason, as ignorance of language used, did not understand charge.

4. Criminal law ⟸1169(12)—Error in admission of evidence not reversible.

In prosecution of one Chinese for murder of another, any error in admitting evidence as to accusatory statements by deceased and his wife when defendant was brought into their presence under arrest after shooting, without sufficient inquiry as to whether defendant understood English, in which statements were made, *held*, under Const. art. 6, § 4½, not reversible error, in view of same evidence given by other witnesses without objection, and fact appellate court is warranted in assuming defendant did understand English.

5. Criminal law ⟸720(5), 730(8)—Conduct of district attorney in making statement improper but harmless.

In prosecution of one Chinaman for murder of another, conduct of district attorney in stating to court, when objection was made to question asked witness for defendant as to whether he was a member of a certain tong or society that he would attempt to show by cross-examination witness was member of the tong, that deceased was ordered killed by such tong, and witness was delegated by tong to testify for defendant, *held* improper, but harmless, where court instructed that statements of counsel did not constitute evidence.

6. Criminal law ⟸1037(2)—Request for admonitory instruction essential to consideration of prosecutor's improper conduct.

Where any possible prejudicial effect of district attorney's conduct would have been obviated by proper admonitory instruction, formal assignment of matter as misconduct and request for admonitory instruction are essential to consideration of matter in appellate court.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Ong Mon Foo was convicted of murder in the first degree, and from the judgment and order denying motion for new trial, he appeals. Judgment and order affirmed.

Timothy Healy, of San Francisco (Bert Schlesinger, of San Francisco, of counsel), for appellant.

U. S. Webb, John H. Riordan, R. L. Chamberlain, A. L. O'Grady, and Frank J. Hennessy, all of San Francisco, for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder of the first degree for the killing of one Wong Kim Chong, and appeals from the judgment and from an order denying his motion for a new trial.

The deceased, who was a Chinese, was at work in his place of business, a small clothes dyeing and cleaning establishment on Clay street near Stockton street, San Francisco, between 5 and 6 o'clock p. m. on January 28, 1919, in the company of his wife and an employé, both Chinese, when a man, also Chinese, entered from the street and asked for a suit of clothes, giving his name as Mun Kee. The deceased instructed his employé to find the suit and turned again to his work at his ironing table with his back to the man. The man then produced a pistol and fired one shot at the deceased, the bullet entering the abdomen from the back and passing through the stomach, Leaving his pistol on the floor, he then fled. Deceased died February 6, 1919, from septic peritonitis resulting from the wound so inflicted. There is no dispute as to these matters. The killing of the deceased was a deliberate and premeditated murder, and the man who thus visited his place of business on January 28, 1919, fired the shot that inflicted the mortal wound, and then fled therefrom, is guilty of this murder. The sole question in dispute on the trial was whether this defendant was that man. According to his story told on the witness stand at the trial, the defendant was not in or about the vicinity of the store of deceased on that day. He said that he had come to San Francisco from Oakland, where he resided, late that afternoon to see a Chinaman who was working at a place of business on Merchant street, near Sansome street; that he went to this place direct from the ferry landing at the foot of Market street; that he there saw and talked with this man; that he ran from there to take a car at the corner of Clay and Sansome streets to go to the ferry again; that in trying to get on a car in motion at that point going toward the ferry he fell and was hurt, and, the car then stopping, he succeeded in reaching it and getting aboard; and that he was taken from the car by the police officer. As to his visit to the place on Merchant street near Sansome street, he was corroborated by the Chinese whom he there saw. There was some other evidence tending to show that the person who fled from the place of business of deceased was not the defendant, and that this person ran across Clay street and into Spofford alley, where he disappeared, instead of up Clay street to Stockton and back via Stockton street, Sacramento street, Waverly place, Clay street, and on down toward the city front, matters upon which the identification of the defendant as the guilty person are, in material part, based. At the time of the homicide the influenza was epidemic in San Francisco, and the assailant had on an influenza mask, thus rendering identification more difficult. There was no evidence whatever tending to show any motive for the killing. On the other hand, the wife and the employé of deceased positively identified the defendant as the person who did the shooting, and another witness, one Ellicott, a white man, identified him as a man he saw in flight from Stockton street down Sacramento street, pursued by the deceased for a block or so, and whom he followed to the place of arrest. The defendant, whom the officers say was perspiring when arrested and apparently had been running, was brought back by them to the place of business of deceased within a very short time after the shooting, and both deceased and his wife, in his presence and hearing, declared him to be the man who had done the shooting.

[1] The evidence implicating defendant was sufficient, if true, to sustain the conclusion that he committed the murder, and, of course, the question of the truth of this evidence is conclusively determined for all the purposes of the appeal by the verdict of the jury and the action of the trial court in denying the motion for a new trial.

It is urged that the trial court erred in refusing to give two requested instructions directed particularly to the question of the identification of the defendant as the person who committed the crime, and the testimony of the witnesses who swore that he was the one who did the shooting. One of these instructions, after stating that to justify his conviction his identity as the guilty person must be proved beyond every reasonable doubt, told the jury substantially that they were not bound to believe that a witness was able to identify with certainty because he swore positively thereto, and that they should not so believe if they were satisfied from the circumstances proved that there was a reasonable doubt whether he "was able to and did identify the defendant as the guilty person," and that, if they believed from the evidence and the circumstances proved that there was a reasonable doubt whether the witnesses might not be mistaken as to identity, they would not be authorized to convict unless "the corroborating circumstances tending to establish his identity" are such as, with other testimony, produces a

degree of certainty in the mind of the jury so great that they can say and feel that they have no reasonable doubt as to the identity of the defendant. The other was:

"The court instructs the jury that before they can convict the defendant in this case it must appear beyond a reasonable doubt that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, nor that the probabilities are that the defendant, and not somebody else, committed the crime, unless these probabilities are so strong as to remove all reasonable doubt as to whether the defendant or someone else is the guilty party."

The defendant was not entitled to an instruction directed specially to the credibility of the witnesses who identified the defendant as the assailant. The members of the jury were fully and repeatedly instructed that they were the sole judges of the weight of the evidence and the sole and exclusive judges of the credibility of the witnesses, and in view of the charge it is clear that they were most explicitly informed that they were not bound to accept as true the testimony of any witness upon any subject simply because it was positively given under oath, but that it was for them to consider all the evidence, giving to the testimony of each witness just such weight as in their judgment under all the circumstances it should be accorded, and that they could not convict the defendant unless satisfied beyond all reasonable doubt by the evidence of his guilt. In so far as any question of weight of evidence or credibility of witnesses was concerned, the general instructions covered the ground as fully as defendant had any right to insist. It would have been entirely proper to instruct the jury in so many words, as requested in the first of these instructions, that, to justify defendant's conviction, his identity as the guilty person must be proved beyond every reasonable doubt. However, it is impossible for us to imagine that, in view of the general instructions given, they could have thought otherwise. These instructions were clear and explicit to the effect that, unless the guilt of the defendant was shown to the satisfaction of the jury beyond all reasonable doubt, they must acquit him, and that if, after a full and dispassionate consideration of all the evidence in the case, they entertained a reasonable doubt as to whether the defendant committed the crime, they must acquit him, and it does seem to us that, in view of these instructions and under the circumstances of this case, no juror could be so stupid as to think the defendant could be held guilty unless he was in fact the identical person who fired the fatal shot. The jury were also told by the court, in an instruction relative to defendant's defense that he was not at the place of business of deceased at the time of the commission of the crime, that "if, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty."

[2] We are satisfied that, regardless of any question of their correctness, prejudicial error cannot fairly be based on the refusal to give either of the requested instructions.

[3] Over the objection of defendant, Officer Brady was allowed to testify to accusatory statements of deceased and his wife, made in the presence and hearing of defendant, when, immediately after being taken into custody, he was taken by the officers to the place of business of deceased, and to which he made no reply. According to Officer Brady, the deceased was lying on the floor, and, when confronted with defendant, said in the English language, pointing at defendant, "That man shot me," and defendant made no reply. Likewise decedent's wife, upon his entering the place with defendant, spoke first in Chinese, and then in English, pointing at defendant, saying in the latter language, "That man shoot my husband," and defendant made no reply. The objection was that the testimony was immaterial, irrelevant, and incompetent, and, substantially, that no foundation had been laid in that it had not been shown that the defendant understood the English language. While the defendant was then in the custody of the officers, he had not then been charged with the commission of any crime, and had been taken to the shop of deceased by the officers in order that they might ascertain what had happened there and whether any crime had been committed. While, of course, evidence of his then identification by the deceased or his wife as the person who had shot deceased was not in and of itself admissible, there being no claim that in so far as any statement of deceased was concerned it was by way of a dying declaration, the situation was such that any accusatory statement of either made in the presence and hearing of defendant, under such circumstances that it might fairly be inferred that he heard and understood the nature of the charge, was admissible in connection with evidence of conduct on his part from which acknowledgment or acquiescence or admission of guilt might reasonably be implied; the only legitimate purpose of such evidence being to show acquiescence or admission on the part of defendant in the face of the charge. See People v. Byrne, 160 Cal. 217, 116 Pac. 521; People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Lapara, 183 Pac. 545. Assuming that he understood what was said and done, the circumstances were such that the prosecution was entitled to prove that defendant remained silent in the face of the accusatory state-

ments, as tending to show an admission of the truth of the charge; the value of the testimony in this behalf being altogether a question for the jury in view of all the circumstances. The authorities we have cited sustain this view, and sufficiently state the reasons therefor. In view of the decisions in this state, the mere fact that the officers had him in custody did not bar such evidence. But it is necessarily true that such evidence would not be admissible in the event that the defendant, because of ignorance of the language used, or for any other reason, did not understand the charge made against him. There is absolutely nothing in the record to indicate that the defendant did not have sufficient knowledge of the English language to understand the words spoken by deceased and his wife, except the fact that when defendant was examined as a witness he testified through an interpreter. This is of little, if any, importance, as an interpreter might well be used notwithstanding defendant had sufficient knowledge of the English language to understand what was said by deceased and his wife. The record also shows that the wife, when called to testify, said she could not speak English, and testified through an interpreter. The witness Ellicott testified that when he overtook defendant he asked him "what he did back there in Stockton street," and defendant answered with the word "Nothing." No effort at all was made on the trial to show that the defendant did not sufficiently understand English to know, when taken to the place of business of deceased after the homicide, that he was accused by deceased and his wife of having shot deceased, and no attempt to explain why he remained silent in the face of the accusation testified to have been made. As we have seen, the only affirmative evidence on this question was that of Ellicott to the effect that defendant did have sufficient knowledge of the English language to answer with the word "Nothing" when asked in English what he had been doing. The record further shows that prior to the giving of Officer Brady's testimony Officer Miles had testified to the same effect as did Officer Brady without objection being made to the evidence, and that, after Officer Brady testified, Officer Wall gave substantially the same evidence without objection being made. So the matter of these accusatory statements and defendant's silence in the face thereof were before the jury from other witnesses than Brady, without objection, and without the slightest attempt at contradiction or explanation by defendant, who testified on the trial to a state of facts which, if true, completely exonerated him from the charge of having killed deceased.

[4] While it may be that, when the objection to Brady's testimony suggested that it had not been shown that defendant understood the English language, the trial court should have inquired further into the matter before overruling the objection, if the court committed error in this regard it is not such error as would warrant a reversal, both for the reason that the same evidence was given by the other witnesses without objection and without attempt at contradiction or explanation, and because, in view of the record, we are fully warranted in assuming that the defendant did sufficiently understand the English language to appreciate the nature of the charge made against him by deceased and his wife. The situation in this regard is such that the provisions of section 4½ of article 6 of the Constitution are clearly applicable.

[5, 6] In the opening brief it was claimed that the district attorney was guilty of such misconduct as requires a reversal, in stating substantially to the court when objection was made to a question asked one of the defendant's witnesses, "You are a member, are you not, of the Sen Suey Ying," that he would attempt to show by cross-examination that the witness was a member of the Sen Suey Ying tong, that the deceased was ordered killed by such "tong," and, the killing having been perpetrated, the witness was delegated by the "tong" to testify for the defendant. The objection to the question asked the witness was overruled, and the witness answered "No." In response to other questions he testified that he was not directed by any member of the Suey Ying tong to come to court to testify, that he had not discussed his proposed testimony with any member of such tong, and that his testimony was absolutely true. Of course, the district attorney had a right, on cross-examination, to inquire as to the interest of the witness and the reasons for his being in court as a witness, but we are somewhat at a loss to understand how he could reasonably have hoped to prove by this witness any of the matters set forth in his statement, except, possibly, his membership in the Sen Suey Ying tong. The statement was unnecessary, and, we think, improper. As to the particular question to which the objection had been interposed, viz. whether the witness was a member of the Sen Suey Ying, concerning which organization or its character there had not been a word of evidence, a simple statement that the question was merely preliminary would have sufficed. However, the district attorney did not assert as facts any of the matters embraced in his statement, simply saying that he would attempt by his cross-examination to prove them, and we think it must have been manifest to the jury, as it is to us, that the statement amounted to no more than an assertion that these things might be true. We do not see how the jury, instructed, as it was, that the case must be determined as to the facts solely on

the evidence introduced, and that statements of counsel did not constitute evidence, could have been influenced thereby to the prejudice of defendant's rights. Moreover, although defendant objected to the statements, they were not formally assigned as misconduct, and an admonitory instruction asked, and in a case where, as here, any possible prejudicial effect would be obviated by a proper admonitory instruction, it is settled that such assignment and request are essential to a consideration of the matter in an appellate court. See People v. Babcock, 160 Cal. 545, 117 Pac. 549.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; KERRIGAN, Judge pro tem.; LAWLOR, J.; OLNEY, J.

182 Cal. 675

In re RICCARDI. (Cr. 2302.)

(Supreme Court of California. April 16, 1920. Rehearing Denied May 15, 1920.)

1. Courts ⟸90(4) — Law involved in decisions for 35 years will not be changed without legislative action.

Decisions construing Code Civ. Proc. §§ 287–289, as not justifying disbarment of an attorney for conviction of a felony pending his appeal from such conviction, which have been accepted by the people and the Legislature for 35 years, will be followed.

2. Attorney and client ⟸39—"Conviction" requiring disbarment is final conviction.

Within Code Civ. Proc. § 287, providing for disbarment of attorney on conviction of a crime involving moral turpitude, "conviction" means final conviction, not the mere plea or verdict of guilty, as is its ordinary meaning; since the conviction is made sufficient to require disbarment, which, being a separate proceeding, would not be affected by a reversal of the conviction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conviction.]

3. Attorney and client ⟸58—Court must disbar attorney convicted of crime of turpitude.

Under Code Civ. Proc. § 299, an attorney who has been convicted of a crime involving moral turpitude must be disbarred; the provision for suspension not being applicable to proceedings on that ground.

Olney, Lawlor, and Lennon, JJ., dissenting.

In Bank.

Proceeding for the disbarment of C. Vincent Riccardi for conviction of a felony involving moral turpitude. Action deferred, pending appeal from conviction.

Rehearing denied; LAWLOR, LENNON, and OLNEY, JJ., dissenting.

J. F. Sullivan, of San Francisco, for petitioner.

ANGELLOTTI, C. J. [1] The disbarment of the attorney is sought in this matter upon production of a certified copy of the record of conviction of the attorney in the superior court of the city and county of San Francisco of a felony involving moral turpitude. Sections 287, 288, 289, Code Civ. Proc. It is conceded in the learned and exhaustive brief filed by the president of the San Francisco Bar Association that an appeal from such judgment of conviction is pending in the District Court of Appeal of the First Appellate District. The judgment of conviction, therefore, has not become final. We have, then precisely the case presented in People v. Treadwell, 66 Cal. 400, 5 Pac. 686, decided February 2, 1885. It was there squarely held that during the pendency of an appeal "there is not such a final conviction against the defendant as the law contemplates to justify his removal" merely upon "record of conviction," and that the proceeding there inaugurated had therefore been prematurely commenced. There has been no change in our statutes which is material in so far as this question is concerned; the law to-day being substantially as it was when this decision was rendered. The decision was unqualifiedly approved by the court in bank in McKannay v. Horton, 151 Cal. 711, 720, 721, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. By these decisions a construction was given to the statutes relative to this matter that we do not feel warranted in disturbing, whatever our views might be were the question a new one. For over 35 years this construction has been accepted by the Legislature and by the people of the state as giving to the statutes the meaning intended in their enactment. To now adopt a different construction would savor of the enactment of legislation by this court. We are satisfied that under the circumstances the decisions should be followed, and that if a change in our law in this respect is deemed desirable that appeal therefor should be made to the lawmaking power and not to the courts. We are not to be understood as intimating that we are of the opinion that these decisions are erroneous. It cannot fairly be said that they are obviously wrong, or that a sound public policy suddenly requires a different construction at the hands of this court, if indeed, that is a matter pertinent to the discussion.

[2] Much is said as to the meaning of the word "conviction," as used in various other sections of our statutes, with a view of showing that "as ordinarily used" with relation to criminal proceedings "in our constitutional and statutory provisions" it means the entry of the verdict of "guilty" or the plea of "guilty." This was stated in the concurring

opinion in McKannay v. Horton, supra; the statement being accompanied, in the very same sentence, by the words "and I can see no warrant for concluding that it was used in any other sense in the charter provision under discussion." The connection in which a word is used often sufficiently shows that it was used in a sense varying from that in which it is ordinarily used, and the effect of the decisions referred to is that it was used in these particular sections, providing for the absolute disbarment of an attorney upon the record of his conviction of a felony or misdemeanor involving moral turpitude, as meaning a conviction that has become final. Speaking of the Treadwell Case in McKannay v. Horton, supra, the court, speaking through Chief Justice Beatty, said: "The court held, and properly held, that the proceeding under section 288 of the Code of Civil Procedure could not be instituted until the judgment became final." And also: "The decision in Treadwell's Case was clearly right." While a plausible argument may be made in support of giving a different meaning to the word "conviction," as used in these sections, there are good reasons in support of the construction already given by the court, which, considering the procedure established by the statute and the effect of the judgment summarily given by the disbarring court upon the record of conviction in a superior court or before a justice of the peace, is certainly more in accord with the ordinary conception of fair play and the proper protection of the rights of individuals.

In the proceeding for disbarment based upon the record of conviction, the judgment which must be pronounced is one of absolute and final disbarment. This disbarment is not an "incident" of the conviction of felony or misdemeanor in the sense that such conviction ipso facto removes the attorney from his office, or is a part of the penalty prescribed by the law for the offense of which he was convicted. It is a separate and independent thing (see McKannay v. Horton, supra), and is not in the slightest degree affected by a setting aside or reversal of the judgment of conviction of felony or misdemeanor. So that unless a conviction that has become final was meant, notwithstanding that the judgment is reversed on appeal for substantial reasons, as, for instance, that evidence of guilt of any offense is absolutely wanting, or that the defendant has not been accorded a fair trial on the merits in the lower court, the judgment of disbarment based solely on the record of conviction still remains, and the attorney can be restored to his office as an attorney and counsellor only in the event that the court that has disbarred him sees fit to grant his application for restoration; something it is certainly not compelled to do solely because of the reversal or setting aside of the judgment of conviction. It will not do, in reply to this, to say that this court would have the power to restore and ought to restore in such a case, if it cannot be compelled to restore. Unless the attorney has the absolute enforceable right to be restored as a consequence of the setting aside or reversal of the judgment of conviction—in other words, unless the restoration ipso facto follows the setting aside or reversal of the judgment of conviction—he is dependent on the exercise in his favor of the discretion of this court, which may or may not be in his favor as he is looked upon as a fit or unfit person to practice law, entirely regardless of the matter of the conviction. Nor will it do to say that the rule that where a judgment is based on a previous judgment, and the previous judgment is reversed or set aside, the second judgment must be set aside, applies here. If the term "conviction" means, not the final judgment of conviction, but simply the rendition of a verdict of guilty or a plea of guilty, as is the whole contention of those who insist that People v. Treadwell, supra, was wrongly decided, the attorney is disbarred solely because of the *rendition* of the verdict or the *plea* of guilty, and those facts, viz., such *rendition* of verdict or *plea*, remain and constitute the basis of disbarment, whatever be the ultimate result in the case. There seems to us to be no answer to the proposition that the judgment of final disbarment would continue in force, notwithstanding the setting aside or reversal of the judgment pronounced on the conviction of felony or misdemeanor. It is unreasonable to assume that the Legislature intended to provide for obtaining this absolute and final disbarment of an attorney, thus permanently depriving him of a valuable property right, solely upon a conviction that is not final, and which in due course of review is subsequently declared invalid, in the absence of some provision for restoration as matter of course upon the conviction being set aside. The statute makes "the record of conviction" the basis of disbarment and conclusive evidence thereon. These words in this connection imply something other than the mere verdict of a jury, which may be vacated either by the trial court or an appeal, as entirely without support in the evidence. Under our settled practice of many years, they are considered as referring to the judgment pronounced by the trial court upon a conviction, and likewise, under our decisions, the statute is accepted as contemplating a judgment that has become final. To our minds this is not an unreasonable construction of our statutes on the subject, and no good reason appears for overruling the decision by which it was established and has been maintained for over 35 years.

[3] It has further been suggested that by reason of the language of sections 287 and

289, Code of Civil Procedure, "remove or suspend," the court may, upon the certified record of conviction, suspend the convicted attorney, instead of finally disbarring him. This claim has never been made before, and is not now made in the brief filed by the bar association. It has always been understood that conviction of an attorney of a felony or misdemeanor involving moral turpitude made disbarment incumbent, without any discretion in this court to give other judgment. And this, we think, must be so, in view of section 299, Code of Civil Procedure, which prescribes exactly the judgment to be given in such a case, viz.:

"That the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of the state," while in other cases the judgment "may be according to the gravity of the offense charged: Deprivation of the right to practice * * * permanently, or for a limited period."

We do not see how the Legislature could have more clearly expressed its determination that the only penalty in such a case is permanent disbarment. And certainly it would not be a wise rule that would invest the court with discretionary power in a matter where the sole evidence upon which it acts is a certified copy of a record of conviction. But we think the matter is definitely settled by section 299, Code of Civil Procedure. Of course, this matter goes only to the correctness of the argument we have made in support of the ruling in the Treadwell Case, for, whatever the penalty that may be imposed, that case holds that the proceeding therefor on the record of conviction may not be had until the judgment has become final.

It may freely be conceded that it would be advisable to provide for the suspension of an attorney as to whom a judgment on conviction of felony or misdemeanor involving moral turpitude has been given pending appeal or other review of such judgment. Of course, that is a question solely for the legislative department of the state, and the matter can easily be accomplished by appropriate amendment of the statute. All that is suggested as to the necessity of safeguarding the public, as well as the profession itself, so far as is practicable, against the admission or retention as members of the profession of unfit persons, is something upon which there can be no difference of opinion, and probably it would assist to some extent in the endeavor to attain this ideal if the law was so framed as to exclude an attorney from practice pending review of a judgment of his conviction pronounced in a superior court or by a justice of the peace. But we do not think that it would be just or proper to change the law in such a way as to require absolute and final disbarment upon a showing of judgment of conviction of a felony or misdemeanor in a trial court, notwithstanding the pendency of an appeal, unless at the same time provision is made for the restoration of the attorney as matter of course in the event of a reversal or vacating of such judgment.

It is ordered that action upon the certified copy of the judgment presented be deferred pending the determination of the appeal of the attorney from such judgment.

We concur: SHAW, J.; WILBUR, J.; KERRIGAN, Judge pro tem.

OLNEY, J. I dissent. The main opinion is based primarily upon the fact that the question involved is determined by People v. Treadwell, 66 Cal. 400, 5 Pac. 686. It also takes the position that that decision is not clearly wrong, advancing certain reasons in justification for it. It concludes that no good reason appears for overruling the decision. I can but take issue with the main opinion on all three of these points.

In the first place, the decision in the Treadwell Case is, it seems to me, directly opposed to a number of other decisions of this court upon the identical point involved, the meaning of the word "conviction," and that it is therefore not determinative now. In the second place, there is in my opinion no reasonable doubt but that the Treadwell Case is wrong. In the third place, I can see no doubt but that the rule it declares and the main opinion affirms is opposed to sound public policy, so that good reason does appear for overruling it. In addition, the rule it declares is not one under which rights have been acquired. Its overruling can have no other effect than that of now establishing definitely what, it seems to me, is plainly the right rule.

In regard to the first point: The final question is as to the meaning of the word "conviction," as used in section 287, Code of Civil Procedure, which provides that an attorney shall be disbarred upon his "conviction of a felony or misdemeanor involving moral turpitude." The Treadwell Case holds, in effect, that conviction does not mean the finding of a man guilty, but means the sentence which follows and is the final result and judgment which ensues upon the finding of guilt. Now, it is true that the Treadwell Case is the only decision of this court upon the meaning of the word as used in this particular section. But there is nothing whatever to indicate that as so used the word is used in any sense other than that in which it is repeatedly used in other sections of our Code. The word as used in our statutes has been construed a number of times subsequent to the Treadwell Case, and each time directly contrary to the ruling in that case.

Thus in Ex parte Brown, 88 Cal. 176, 8 Pac. 829, the defendant in a criminal action, who had been found guilty by the verdict of a jury, but upon whom judgment had not been pronounced, applied to be released on bail as a matter of right. He had this right unless section 1272 of the Penal Code provided differently. That section reads:

"After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: 1. As a matter of right, when the appeal is from a judgment imposing a fine only."

The defendant claimed that, not having been sentenced, he had not been convicted and did not come within the operation of the section. But, although the section is one very evidently intended to govern the matter of bail pending an appeal and an appeal cannot be taken until after sentence, so that the court might perhaps have been justified in concluding that conviction, as here used, meant the judgment from which an appeal could be taken, the court held upon a detailed discussion of the question that conviction meant the finding of guilt and not the appealable sentence or judgment.

Similarly, in People v. Ward, 134 Cal. 301, 66 Pac. 372, a witness under examination was asked if he had ever been convicted of a felony. It appeared that he had been found guilty of a felony but not sentenced. Section 2051, Code of Civil Procedure, provides that by way of impeachment it may be shown of a witness "that he has been convicted of a felony." It was objected that the witness had not been convicted within the meaning of the section, since he had not been sentenced. Again the court considered the matter at some length and again it decided that conviction meant the finding of guilt and not the sentence or judgment.

In McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146, a city charter provided that an office became vacant "when the incumbent * * * is * * * convicted of a felony." A similar provision was made by the Political Code (section 996). The mayor of the city had been found guilty of a felony, had been sentenced, and had taken an appeal, and the question was presented as to whether or not he had been convicted within the meaning of the charter and the Code, so that his office had become vacant, although an appeal was pending. In other words, the question is identical with the one presented here. But again it was held that conviction meant the finding of guilt, and not a final judgment, and that the office was vacant, although the appeal was pending. The main opinion in McKannay v. Horton attempted to distinguish the Treadwell Case, but the fact of the matter is that the conclusion reached by it is directly opposed to that of the Treadwell Case. The concurring opinion in McKannay v. Horton, written by Justice Angellotti and concurred in by Justices Sloss and Shaw, makes no attempt to distinguish the Treadwell Case and sums the whole matter up thus:

"One is 'convicted' of a crime when a verdict of guilty has been so given and entered against him, or when a plea of guilty has been given and entered. This is the well-settled meaning of the term as ordinarily used in our constitutional and statutory provisions. * * *"

These decisions are subsequent to the Treadwell Case and are to my mind wholly irreconcilable with it. In view of them I do not see how it is possible to say with reason that the Treadwell Case must be taken as a final and determining authority in the present case. It does seem to me that its authority has been taken from it.

Second, in regard to the merits of the Treadwell Case itself: It is admitted in the main opinion here, at least impliedly, that "conviction" in the ordinary sense means conviction of guilt, not the sentence or judgment which ensues upon such conviction. In any case there can be no doubt but that such is the ordinary meaning of the word. It is an elementary rule of statutory construction that a word shall have its ordinary meaning unless there is something to show that it was used in a different sense. The Treadwell Case puts a meaning on the word "conviction" different from its ordinary meaning. What, then, are the reasons given for this? According to the main opinion they are two: First, that the connection in which a word is used often shows that it is used in a sense other than its ordinary one, the implication, not plainly stated, being that in this case the connection in which the word "conviction" is used shows that it was not used in its ordinary sense; and, second, that if a lawyer were convicted and disbarred for that reason pending an appeal and the conviction should be reversed, his disbarment would nevertheless stand, and that this would be most unjust.

In regard to the first reason, it is, of course, true that frequently the connection in which a word is used shows that it was not used in its ordinary sense. But the implication that the connection in which the word "conviction" in the Code section as to disbarment is used shows that it was used in other than its ordinary sense is not justified. There is nothing whatever in the Code section to indicate that the word was not used in its ordinary sense. The material portion of the section reads simply:

"Sec. 287. An attorney and counselor may be removed or suspended by the Supreme Court, or any department thereof, or by any District Court of Appeal, or by any superior court of the state, for either of the following causes, arising after his admission to practice: 1. His conviction of a felony or misdemeanor involv-

ing moral turpitude, in which case the record of conviction shall be conclusive evidence."

What is there in this language which indicates in any way that "conviction" means something else than conviction in its ordinary sense?

In this connection I would add that the word "conviction" is used time and again in the Codes and so far as I am aware always in its ordinary sense of the establishment of guilt by the verdict of a jury or a plea of guilty. In fact, it is so defined by section 689 of the Penal Code. In a great many of the code sections the distinction between "conviction" and the judgment or sentence which follows upon it is plainly made. Sections 1097, 1103, 1104, 1108, 1110, 1111, 1157, 1161, 1162, 1192a, 1193, 1197, 1203, 1207, 1217, 1218, and 1227, Pen. Code. The same use of the word is found in our Constitution. Article 1, § 20.

As to the second reason given in justification of the Treadwell Case, that the disbarment would stand, even though the conviction were reversed on appeal, and that this would be most unjust, the answer is that the disbarment would not stand in such a case. In the first place, this court has full power to reinstate an attorney once disbarred. It is a power that has been exercised even in the case of an attorney whose conviction of a felony was final. It seems incredible that the court, having the power of reinstatement, would not use it as of course in any case where it appeared that the conviction upon which the disbarment was based had been set aside.

In the second place, it is the rule that wherever a judicial order or judgment is based upon a previous judicial order, judgment, or act, and such previous order, judgment, or act is reversed on appeal or set aside, the subsequent order or judgment based upon it must be set aside as of course. The party affected is entitled to this as a matter of right and it cannot be refused. The most common illustrations of this are where the subsequent order is in the same proceeding as the previous order or act, as where a foreclosure sale is had on a decree which is appealed from but whose execution is not stayed. If the decree is reversed, the sale fails as of course. Carpy v. Dowdell, 131 Cal. 499, 63 Pac. 780; Cowdery v. London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115; Turner v. Markham, 156 Cal. 68, 103 Pac. 319. But the rule is not limited to orders or acts in the same proceeding. Thus, where a money judgment is obtained against a person, and he appeals but does not stay execution, and pending the appeal an action is brought against him upon the judgment and a second judgment obtained, and then the first judgment is reversed on appeal, the judgment debtor is entitled to have the second judgment set aside as of course and of right. Heckling v. Allen (C. C.) 15 Fed. 196; Banning v. Taylor, 24 Pa. 297; Ætna Ins. Co. v. Aldrich, 38 Wis. 107; Mann v. Ætna Ins. Co., 38 Wis. 114. See, also, Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198.

There is no reason why this general principle would not be applicable to the case of an order of disbarment based and founded on a conviction subsequently set aside. On the contrary, such a case comes directly within the principle and there is every reason why it should apply. The main opinion attempts to take the case without the operation of the principle by two lines of argument. In the first place, it is said:

"This disbarment is not an 'incident' of the conviction of a felony or misdemeanor in the sense that such conviction ipso facto removes the attorney from his office or is part of the penalty prescribed by the law for the offense of which he is convicted. It is a separate and independent thing, and not in the slightest degree affected by a setting aside or reversal of the judgment of conviction of felony or misdemeanor."

Every word of this argument except the final conclusion that the disbarment would not be affected by the setting aside of the conviction is applicable to the case of a second judgment based upon a first which has been set aside, and yet the final conclusion, thoroughly well established, is just the opposite. The second judgment is not an incident of the first in the sense that it ipso facto follows upon it. It is a separate and independent thing. And yet it is not true that "it is not in the slightest degree affected by a setting aside or reversal of the judgment" upon which it is based. The rule is just the contrary.

In the second place, the main opinion says:

"Nor will it do to say that the rule that where a judgment is based on a previous judgment, and the previous judgment is reversed or set aside, the second judgment must be set aside, applies here. If the term 'conviction' means, not the final judgment of conviction, but simply the rendition of a verdict of guilty or plea of guilty, as is the whole contention of those who insist that People v. Treadwell was wrongly decided, the attorney is disbarred solely because of the *rendition* of the verdict or the *plea* of guilty, and those facts viz., such *rendition* of verdict or *plea*, remain and constitute the basis of disbarment, whatever be the ultimate result in the case." (The italics are those of the main opinion.)

The whole point of this is that when an attorney has been convicted by the rendition of a verdict or plea of guilty he remains "convicted," although the verdict or the plea, that is, the conviction, is subsequently set aside. But he does not so remain. The rule is elementary that when a conviction or other legal determination is set aside it is as if it had never occurred. In the eyes of the

law, it does not exist. We are dealing here, not with a "conviction" as a mere historical happening, but as a matter of legal consequences and effects, and so far as legal consequences and effects are concerned a conviction set aside is no conviction. The matter may be tested in a very simple way. It is held in People v. Ward, supra, that a conviction which has not become final is yet a ground for the impeachment of a witness. But assume that a witness is on the stand who has once been convicted but whose conviction has been set aside. Is there any doubt that he would not be open to impeachment by a showing of such conviction? At any rate, this court has so held. Davis v. McNear, 101 Cal. 606, 36 Pac. 105.

Now, as to the third point advanced by the main opinion, viz., that no good reason appears for overruling the Treadwell Case. In the first place, the Treadwell Case is, in my judgment, plainly wrong. This is certainly some reason for overruling it, particularly as it is not a decision under which any rights have been acquired so that its overruling would work any injustice. But very much more important than this, the rule of the Treadwell Case is opposed to sound policy, and its affirmance and perpetuation is harmful and it should be done away with. An attorney who has been actually convicted in the criminal courts of a crime involving moral turpitude should not be permitted to exercise the high privileges of his profession as long as that conviction stands against him unreversed. There is no relation in life outside the family which is more confidential in its nature than that of an attorney. There is no one in whom more implicit confidence must of necessity be placed. There is no profession in which the strictest probity is more necessary. There is no profession of which it is more true that the only safeguard possible to the public against imposition and wrongdealing is the character of those pursuing it. The fact that a member of the profession has been actually convicted of a crime involving moral turpitude should alone be sufficient to disqualify him from pursuing his profession while such conviction stands. To permit him, nevertheless, to continue to hold himself out as a worthy member of the profession and to invite the public to intrust him with their confidences and their affairs while he pursues an appeal, and not unlikely a dilatory one, is to break down the standard of professional character which is the public's chief safeguard. It was to prevent just this very thing that, in my judgment, the Legislature provided that a lawyer should be disbarred upon "conviction," without a word to indicate that it was not the conviction alone which was sufficient. I cannot subscribe to the statement of the main opinion that sound public policy does not require that this construction be put upon the statute, so that a lawyer convicted of crime shall not be permitted to practice while his conviction stands. I do not mean by this, of course, that a man disbarred because of crime should be forever barred from the practice of the law. No matter how clear his guilt may have been or how just his conviction, it is fitting and right that he have the opportunity to demonstrate by his after life and conduct that he is again a worthy member of society and merits the respect and confidence of his fellow men. When the time comes that he does demonstrate this, then he should be readmitted to practice, not grudgingly, but gladly. But this is not the present case. Here the question is, Shall a lawyer convicted of crime be permitted to practice while the conviction stands but he pursues an appeal? On this question I can see but one true answer, and that is that to permit him to do so is opposed to strong reasons of sound public policy.

In view of the reasons I have stated, I can see no reason for not overruling the Treadwell Case as wrongly decided and adopting a different rule. To do so would not be to legislate as the main opinion intimates. If this were so, a court could never reverse a former ruling. But there is no rule, so far as I am aware, that a court may not correct an error into which it has fallen, and the right, and, indeed, the duty, of the court in a plain case to do this cannot be questioned.

I concur: LAWLOR, J.

LENNON, J. I dissent from the reasoning and conclusion of the prevailing opinion. Section 287 of the Code of Civil Procedure provides that "an attorney and counsellor may be removed or suspended by the Supreme Court" upon his conviction of a felony involving moral turpitude; and section 289 of the same Code provides "the proceedings to remove or suspend an attorney * * *" because of such conviction following the receipt by this court of a certified copy of the record of conviction. This court has said that—

"Section 287 of the Code of Civil Procedure authorizes the suspension or removal of an attorney for various causes, including 'his conviction of a felony or misdemeanor involving moral turpitude.' * * *" Matter of Danford, 157 Cal. 425, 108 Pac. 322.

Section 299 of the Code of Civil Procedure, relating to the judgment to be imposed "upon conviction in cases arising under the first subdivision of section 287," cannot be made, as the prevailing court opinion purports to do, the sole measure of this court's power in the premises without ignoring, as does the prevailing opinion, save for a casual reference thereto, the provisions of sections 287

and 289. To hold that section 299 is exclusively controlling of the power of the court is to say that the law giveth and in the same breath the law taketh away. The code sections first referred to cannot, it seems to me, be ignored without doing violence to a cardinal canon of statutory construction which requires that the legislative intent, when ascertained, must govern, and that in the ascertaining of such intent all of the various provisions of legislative enactment upon the particular subject should be construed together and given effect as a whole. I am constrained, therefore, to say, partly in the language of In re Kirby (D. C.) 84 Fed. 606, 608, that "a proper respect for the public, the legal profession, and this court renders it imperative" that an attorney convicted of a felony should not be permitted thereafter to pursue the profession of an attorney and counsellor even while an appeal is pending from such conviction. I am also of the opinion, however, that if the appeal results in a reversal of the conviction of the attorney, the attorney thus convicted should be restored instanter to his privileges as an attorney and counsellor, for, obviously, it would be a grievous injustice to deprive him of his status as an attorney because he had been convicted in a trial court under circumstances which made it necessary for an appellate court to reverse the conviction.

It is not to be said that the record may show that the attorney is guilty, for, in that event, if the law allows it, he should be proceeded against, not upon the fact that he has been convicted, but upon the fact that he has been guilty of the conduct involved in the crime with which he was charged. I do not think his reinstatement upon a reversal of the conviction should depend upon the discretion of a court or judge. It should, in my opinion, occur automatically and of right.

If, therefore, this court had no power merely to suspend, but was limited to the power to disbar, I should concur in an order of disbarment only in the event that it contained a condition for its automatic revocation in the event the judgment was reversed on appeal. In view of the Code provisions which, to my mind, so plainly permit suspension, it would not be necessary to enter an order of disbarment. No good reason appears to me why this court should not adopt the practice of suspending attorneys immediately upon their conviction and of disbarring them when the conviction becomes final. The suspension, of course, should be during the pendency of the appeal only, and come to an end with the termination of the appeal, at which time there should be an order of disbarment upon affirmation, or an order revoking the suspension upon reversal of the conviction of the attorney. I feel that this court might very properly disregard anything to the contrary of the foregoing which may be found in People v. Treadwell, 66 Cal. 400, 5 Pac. 686, and McKannay v. Horton, 151 Cal. 711, 720, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146, as it cannot be said that rights have grown up under these decisions which should be protected under the doctrine of stare decisis.

182 Cal. 786

In re O'CONNELL. (Cr. 2306.)

(Supreme Court of California. April 16, 1920. Rehearing Denied May 15, 1920.)

In Bank.

Proceedings for the disbarment of Daniel O'Connell because of conviction of felony involving moral turpitude. Action deferred pending appeal.

Rehearing denied; Lawlor, Lennon, and Olney, JJ., dissenting.

J. F. Sullivan, of San Francisco, for petitioner.

PER CURIAM. The facts in this case are in all material respects the same as those in the Matter of Riccardi (Cr. 2302) 189 Pac. 694. The conviction of the accused was in the United States District Court of the Northern District of California, and was for conspiring to violate the acts of Congress of May 18, 1917, and June 15, 1917, and the case is pending on writ of error in the United States Supreme Court.

It is ordered that action upon the certified copy of the judgment presented be deferred pending the determination of the appeal of the attorney from such judgment.

OLNEY, J. I dissent for the reasons given in the dissenting opinion in the companion case of Riccardi.

I concur: LAWLOR, J.

LENNON, J. (dissenting). For the reasons given in my dissent from the prevailing court opinion in the Matter of C. Vincent Riccardi, I dissent from the prevailing court opinion in the instant case.

46 Cal. App. 538

BOWRING v. PRIME. (Civ. 2765.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1920.)

1. Corporations ⊜134—Attachment does not justify secretary in refusing to transfer stock.

An existing attachment furnishes no ground for refusal by the secretary of a corporation to make transfer of stock and issue new certificates therefor to escape liability under Civ. Code, § 324.

2. Corporations ⊜134—Party refused transfer on untenable ground could sue for penalty immediately.

Where secretary of corporation refused to transfer stock, when presented with proper indorsements, solely because of attachment thereon which did not in law prevent him from so doing, it was right of party requesting transfer immediately to commence action to recover penalty for refusal to transfer prescribed by Civ. Code, § 324.

3. Corporations ⊜134—Secretary refusing to transfer and sued for penalty cannot rely on matter not interposed to demand.

Where secretary of corporation when requested to transfer certain stock properly indorsed did not base his refusal on ground proper federal revenue stamps were not attached, fact is without influence in action by party requesting transfer to recover from secretary penalty for refusal prescribed by Civ. Code, § 324.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by Lynden Bowring against E. E. Prime. From judgment for defendant, plaintiff appeals. Reversed.

Bernard Potter, of Los Angeles, for appellant.

Charles E. Salisbury, of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiff from an adverse judgment.

Section 324, Civil Code, provides that, upon the refusal of any officer of a corporation to transfer shares of stock when required, such officer "shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved." Defendant herein was at the time material to the action the secretary of a corporation. The plaintiff was the transferee of certain shares in the same corporation and held certificate bearing proper indorsement of transfer. He presented the same at the office of the corporation and to the defendant, its secretary, who was in charge of the office, and requested the transfer to be made. At that time an action had been brought against the plaintiff and the transferror of the stock. Writ of attachment had been issued and served upon the defendant as secretary of the corporation. When the request for transfer of the stock was made by the plaintiff, the secretary communicated by telephone with the attorney for the plaintiff in the attachment suit and was advised by that attorney not to transfer the stock—that he had no right to do that. Defendant informed plaintiff of the situation and refused to make the transfer. Six days later the plaintiff served upon the defendant secretary a formal demand in writing requiring him to make the transfer requested. The defendant testified that thereupon he told the plaintiff that the situation was the same and that he did not think he could transfer it until he got further advice from the attorney; that he did consult with the attorney, and at the time summons in this action was served upon him, which was five days after the written demand had been delivered by the plaintiff, he was preparing or had prepared a letter to the plaintiff, which was dispatched that day, in which he stated his willingness to make the transfer. The trial court determined, in effect, that the defendant had a reasonable time as secretary of the corporation to investigate his rights and liabilities, and that he acted within such reasonable time by offering to make the transfer, and that no recovery of the penalty could be had.

[1-3] It is admitted that the fact of an existing attachment will furnish no ground for refusal on the part of the secretary of a corporation to make transfer of stock and issue new certificates therefor. Our Supreme Court has directly decided that question in an opinion by the court in bank, which was filed on December 15, 1917, and several months prior to the making of the demand in this case. Ramage v. Gould, 176 Cal. 746, 169 Pac. 670. In that decision it is announced as the law that shares of corporate stock are not negotiable; that the doctrine of caveat emptor applies upon the sale and transfer of the same; that the levying of an attachment may create a lien against the interest in the corporation of the holder of the shares, which lien will continue and follow the stock into the hands of whosoever it may go. Further, that the Code sections governing attachments of corporate shares differ from the provisions affecting the attachment of debts and credits generally, and that there is nothing in those provisions which authorize the secretary of a corporation to refuse to make transfers and issue certificates to transferees upon proper demand therefor. The decision cited clearly determines the right of the plaintiff to a judgment herein, unless it can be said that the secretary was authorized to take a reasonable time to make the transfer and issue the new certificates and that no more than a reasonable time was taken by the defend-

ant here. Upon different facts a case might be presented where a delay of five or ten days from the time of demand until the issuance of new certificates would not be unreasonable; that is, assume, for instance, the case of a large corporation having an active market on its shares and where a great many transfers were being demanded and required of its secretary. Such a case might be presented and one which would show that the secretary had acted with reasonable promptness in complying with the demand where he diligently attended first to the making of the transfers in the order of request. But that is not this case. The secretary here was presumed to know that under the law the levying of an attachment against the stock furnished no impediment at all to the transfer of the same upon the books of the corporation or the issuance of new certificates therefor. It was solely because of the fact that such an attachment had been levied that the refusal was made, for by his own testimony the secretary showed that he was ready to have immediately made the transfer upon the first demand of the plaintiff had it not been for the fact that he believed the attachment prevented him from so doing. Under such a state of the case, upon the first refusal of the secretary based upon the ground asserted, we think it was the right of the plaintiff to have immediately commenced his action to recover the penalty prescribed. The court included in its findings a statement that at the time the demand was made revenue stamps required by the federal law were not affixed to the certificate or tendered. We attach no importance to that finding as interfering with the right of the plaintiff to recover in this action, because the refusal of the defendant to act was not based upon any such ground; the demand was treated as sufficient and admittedly would have been complied with except for the attachment condition.

Our conclusion is that the evidence does not sustain the findings.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 521

BABSON v. SALISBURY. (Civ. 2714.)

(District Court of Appeal, Second District, Division 1, California. March 12, 1920. Hearing Denied by Supreme Court May 10, 1920.)

Factors ⊜63—Where property delivered to factor is sold owner cannot retake and convey title to third person.

Where the owner delivered automobile to a factor for sale, the factor was authorized to sell it under Civ. Code, §§ 2026, 2368, 2369, and the owner cannot, after the factor has sold the machine to a third person, lawfully retake the same and sell it to his own vendee, for while, if the factor, not having delivered possession after the first sale, sold to another, delivering possession, the prior sale would, under section 3440, be deemed fraudulent, and the last purchaser would be entitled to the car, that exception does not apply to the owner.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by S. E. Babson against H. G. Salisbury. From a judgment for defendant, plaintiff appeals. Reversed.

L. G. Shelton, of Los Angeles, for appellant.

Thomas C. Ridgway, of Los Angeles, for respondent.

SHAW, J. This action grows out of the following facts: Guy H. Campbell, as the owner of an automobile, left it with A. M. MacKusick, a dealer in used motor cars, with instructions to sell same for $500. MacKusick entered into a contract with Reese Bros. for a lease and conditional sale of the car, subject to payments therefor; the former retaining title and possession thereof. A few days thereafter he sold and assigned this contract to plaintiff, S. E. Babson, and at the same time made and delivered to him a bill of sale, transferring title to the car, possession of which was retained by the seller. Two or three days after this last transaction, and while the automobile was in MacKusick's garage, Campbell, while MacKusick was away, took it therefrom, and sold and delivered it to defendant Salisbury. Thereupon plaintiff brought this action in claim and delivery to recover possession of the automobile. Judgment went in favor of defendant, from which plaintiff appeals on the judgment roll, claiming the judgment is not supported by the findings.

The court, in effect, found that MacKusick's relation to Campbell was that of a factor; that the contract made by MacKusick with Reese Bros. was null, void, and ineffectual for any purpose; that MacKusick, by a bill of sale duly executed and for a consideration of $315, sold and transferred title to the automobile to plaintiff, who had no notice of the fact that Campbell was the owner of the car; that at no time was delivery of the automobile made to Babson, but the same was retained by MacKusick, who was offering the same for sale up to January 3d, on which day, in MacKusick's absence, Campbell took the car from the garage and sold and delivered it to defendant, who, as to the former transactions, was an innocent purchaser thereof; that on January 17th Babson, in proper proceedings therefor, caused the sheriff to take the car from Salisbury, who thereafter regained possession by filing

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with the sheriff the undertaking required by section 514, Code of Civil Procedure, and causing the sureties to justify on such undertaking, in which he employed an attorney to whom he paid the sum of $25, which was a reasonable sum for the service; that defendant was deprived of the use of the car from January 17th to January 20th, to his damage in the sum of $20.

There is no doubt, as appellant claims, that MacKusick, as factor in possession of the car, was, under sections 2026, 2368, and 2369, Civil Code, authorized to sell and deliver the same to Babson and receive payment therefor, and that by his act in so doing Campbell, as owner, was divested of all right, title, and interest therein, and the same was as fully vested in Babson as though the former had sold and delivered it. While no actual delivery of possession was made, nevertheless, as a constructive transfer, it was good and sufficient between vendor and vendee, as to whom the relation of bailor and bailee was created with the mutual obligations pertaining to such relation. With this, however, we are not here concerned; nor with the duty which MacKusick owed to Campbell, or that of the latter to Salisbury. The question presented concerns the right of Babson as against defendant. If the latter had as an innocent purchaser bought the car from MacKusick, in whose possession it was left, the prior transfer to Babson would, upon the facts shown and as provided by section 3440, Civil Code, be deemed fraudulent as to defendant, who therefore would be entitled to the car. But such is not the case. Defendant did not buy the automobile from MacKusick, and hence he is in no position to claim the benefit of this provision. He purchased the car from Campbell, who, as we have seen, had no right, title, or interest therein, and whose possession thereof at the time of his sale to defendant was by reason of his act in unlawfully taking it from the garage in the absence and without the knowledge of MacKusick, who was bailor for Babson as owner.

As we view the facts, the case is governed by the principle applicable to the purchase of stolen property. Campbell's act in taking the car, though not intended to be so, was as wrongful as would have been the unlawful taking thereof by an entire stranger. He had no title or interest therein, and hence nothing to transfer, and his purported act in so doing could no more divest Babson of his right and title to the property so unlawfully obtained by Campbell than had the purchase been made from a thief who had stolen the property.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

46 Cal. App. 574

WINTER v. DE SHIELDS, County Auditor.

(Civ. 2127.)

(District Court of Appeal, Third District, California. March 15, 1920. Hearing Denied by Supreme Court May 13, 1920.)

1. Counties ⟸3—Unconstitutionality of portions of charter does not affect other provisions.

Unconstitutionality of portions of charter of a county would not render whole charter void, and would have no bearing on question of validity of provision fixing salary of assessor.

2. Courts ⟸91(1) — Decision of Supreme Court as to effect of unconstitutionality of portions of county charter binding on appellate court.

Decision by Supreme Court that whole charter of county cannot be declared void because it contains certain provisions inconsistent with the Constitution of the state is decisive of such matter when before the appellate court.

Application for writ of mandate by Louis Winter against George M. De Shields, as Auditor of Tehama County. Writ denied.

H. D. Jerrett, of Red Bluff, for petitioner.

M. J. Cheatham, of Red Bluff, and Frank Freeman, of Willows, for respondent.

NICOL, Presiding Judge pro tem. The petitioner is the assessor of Tehama county and makes this application for a writ of mandate to compel the respondent, as auditor of said county, to draw his warrant in his favor for the sum of $300, which amount is claimed by the petitioner as his salary as such assessor for the month of December, 1919.

The petitioner contends that his salary is $3,600 per annum as assessor of said county, as fixed by section 4266 of the Political Code, Tehama county, being a county of the thirty-seventh class. He bases this contention on the ground that the charter of said county adopted by the electors in 1915 and ratified by the Legislature in 1917 (Stats. 1917, p. 1877), fixing the assessor's salary at $2,000 per annum, is unconstitutional, for the reason that the said charter "is inconsistent and does not substantially conform to section 7½, art. 11, of the Constitution."

It would serve no useful purpose and would unnecessarily prolong this opinion to enter into an examination of the many objections raised by the petitioner to the constitutionality of this charter. The character of these objections may be shown by the following brief statement of the reasons that he advances in dealing with the provisions of the charter, relative to the board of supervisors, to wit: That the charter makes no substantial provision for the constitution,

regulation, and government of the board of supervisors, nor for the qualifications of the members of said board, as required by subdivision one of section 7½, article 11, of the Constitution, and that section 4 of article 2 of the charter is not a substantial compliance with subdivision 4 of said section 7½, in this, that it does not set out in full the powers and duties of the board, and that sections 5, 9, 10, and 11, of article 2 of the charter are unconstitutional in that they contravene subdivisions 4 and 5 of said section 7½ of article 11 of the Constitution. Upon these and other objections not necessary to be enumerated the petitioner contends that the entire charter should be declared null and void.

[1] Without entering into an examination of the objections raised by the petitioner to the charter, it is sufficient to say, that, even if these objections possessed merit, still they would not render the whole charter of the county null and void and would have no bearing upon the question of the validity of the provision of the charter which fixes the salary of the assessor at the sum of $2,000 per annum.

The rule is well settled in California that, while a charter should be consistent with the Constitution of the state, the whole charter cannot be declared null and void because it may contain certain provisions that are inconsistent with the Constitution of the state at the time of its adoption. In the case of Brooks v. Fischer, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429, an attack was made upon the charter of the city of Los Angeles. At the time the decision in that case was rendered the Constitution then provided that the charter to be formed for a city government must "be consistent with and subject to the Constitution and laws of this state." The court, in passing upon the objection to the charter, said:

"It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws, but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force."

[2] This decision by the Supreme Court is decisive of the matter now before us, and the charter of Tehama county, having fixed the salary of the assessor of that county at the sum of $2,000 per annum, is conclusive. For these reasons we are of the opinion that the alternative writ of mandate heretofore issued should be vacated and the application for a peremptory writ of mandate be denied; and it is so ordered.

We concur: BURNETT, J.; HART, J.

46 Cal. App. 706

PEOPLE v. NORTHCOTT. (Cr. 869–2309.)

(District Court of Appeal, First District, Division 2, California. Feb. 2, 1920. Rehearing Denied Feb. 28, 1920; Opinion of Supreme Court in Bank Denying Hearing, April 2, 1920.)

1. Homicide ⟸23(1), 308(5)—Instruction as to murder held unnecessary when not in issue.

In a prosecution for homicide under the abortion statute, the court was required to instruct only with reference to the crime of murder in the second degree, and failure to instruct as to murder was not error, since homicide resulting from an unlawful operation is murder in the second degree.

2. Criminal law ⟸814(2)—Instructions should be based on facts proved.

In criminal prosecutions instructions are to be given with reference to the facts of the case proved.

3. Criminal law ⟸438—Photographs of place where body was found relevant.

In a prosecution for murder in the second degree, defendant being charged with performing an unlawful operation, a photograph of a secluded canyon or ravine where the body was found was properly admitted in evidence to explain the conditions under which the body was found; it being the theory of the state that it was necessary for the state to prove that the operation was unlawful, and not a necessary operation to preserve the life of the patient.

4. Criminal law ⟸1169(1)—Presence of lizard in picture of place where body found not prejudicial.

The presence of a small lizard upon a rock in a photograph of a ravine where the body of deceased, the subject of an unlawful operation, was found, was not prejudicial to accused in a prosecution for second degree murder, the picture being taken after the body had been removed, where the state, on objection, offered to permit the clerk to mark it off.

5. Homicide ⟸338(1)—Proof of more than required not prejudicial error.

Assuming that the burden is not upon the state in the first instance in a prosecution for murder in the second degree, by reason of death following an alleged unlawful operation, to show that the operation was unlawful, it was not prejudicial error for the court to permit the state to introduce evidence of the secluded ravine where the body was found as tending to show that the operation was unlawful.

6. Criminal law ⟸438—Photograph of body admissible in prosecution for second degree murder as tending to prove venue.

In prosecution for second degree murder under the abortion statute, where defendant

raised a question about the manner in which the body had been handled before being thrown into a ravine for the purpose of establishing that it was possible for the body to have been brought a long distance and from another county and yet be in the condition as testified to by a physician, provided it had been carefully handled and properly bandaged, the state was properly permitted to introduce in evidence a photograph of the body showing bruises on the head and face, as indicating that it had not been carefully handled, and that the unlawful operation took place within the county.

7. Criminal law ⟸438—Photograph of body admissible as tending to show cause of death.

In a prosecution for second degree murder, defendant being charged with performing an unlawful operation upon a female, where it appeared in evidence that certain abrasions were found upon the face and head, and a physician testified that they were inflicted after death, a photograph of the body was relevant to indicate that the nature of such bruises and injuries was not such as to have contributed to the death of the deceased.

8. Criminal law ⟸438—Photograph of body admissible to identify body by showing clothing worn.

In a prosecution for murder, a photograph of the body fully clothed, showing a coat and hat which were identified in the courtroom by a sister of the deceased as having been the garments worn by her sister when she was last seen by her, was admissible in evidence as tending to connect the body found with the clothing identified as having belonged to the sister of the witness.

9. Criminal law ⟸1169(1)—Not prejudicial to introduce in evidence ghastly photograph of body.

One accused of homicide cannot be heard to complain that, because a photograph of the body as it was found in a ravine was not pleasant to look upon, he was prejudiced because of the revulsion that may have been caused by the picture, the entire record being a succession of revolting, verbal pictures, the ghastly facts of the case being an inseparable part.

10. Homicide ⟸169(1)—Visit of alleged victim of unlawful operation to another physician held admissible.

In a prosecution for murder in the second degree, defendant being alleged to have attempted an unlawful abortion, testimony of another physician that prior to the date of the alleged unlawful operation the deceased had visited him and asked him to perform an abortion upon her, and that he had refused, and had given her the name and address of the defendant, was admissible upon the question of her physical condition and her desire to be relieved thereof.

11. Criminal law ⟸372(4)—Homicide ⟸160—Evidence of preparation of place to perform abortions held admissible.

In a prosecution for murder in the second degree, defendant being alleged to have performed an unlawful operation upon deceased, testimony of another physician to the effect that defendant had discussed with him the preparation of a place for the handling of abortion cases was admissible, if the securing of the place in question entered into the crime, and it did not become inadmissible by reason of the fact that it might have been used by the defendant for a number of similar operations if he had not been detected after the performance of the one in question.

12. Criminal law ⟸424(1)—Statement of coconspirator or accomplice after accomplishment of conspiracy inadmissible.

The statements of a coconspirator or accomplice after the object of the conspiracy has been accomplished are inadmissible.

13. Criminal law ⟸1169(7) — Introduction of statements of accomplice not prejudicial.

Admission in evidence of contradictory statements of one who was supposed to be an accomplice or coconspirator, which could not even by implication connect defendant with the crime was harmless.

14. Criminal law ⟸371(4)—Evidence of other crimes admissible to show intent in abortion case.

In a prosecution for murder in the second degree, defendant being charged with having performed an unlawful operation, evidence of previous abortion operations performed by the defendant was admissible to show the intent of the defendant to perform an unlawful operation in the case in question.

15. Criminal law ⟸1169(1)—Not prejudicial to prove more than necessary.

In a prosecution for second degree murder, defendant being alleged to have performed an unlawful operation, it was not prejudicial error for the state to introduce evidence to negative the idea that the operation may have been necessary, assuming that the state was not called upon to do so.

16. Homicide ⟸142(5), 325 — Variance between information and proof as to name of deceased not reversible.

The fact that by inadvertence the name of deceased in a prosecution for murder was given as "Elizabeth Inez Reed" in the information, while the evidence gave the name as "Inez Elizabeth Reed," could not have prejudiced the accused, and does not call for a reversal; defendant not making any motion in the trial court based upon the alleged variance, when it might readily have been explained and corrected.

17. Criminal law ⟸507(1)—Physician not accomplice of person performing unlawful abortion.

A physician who refused to perform an unlawful operation did not become an accomplice of another who performed an abortion, resulting in death, by simply giving the deceased the name of such other physician as one who might perform the operation for her.

18. Criminal law ⟸824(7) — Failure to instruct as to accomplice testimony not error in absence of request.

It was not error for the court in a prosecution for murder to fail to instruct as to ac-

complice testimony, where no such instruction was requested.

On Hearing in Supreme Court.

19. Criminal law ⊂⊃1179—Hearing in Supreme Court refused where record leaves no doubt of guilt.

Where the opinion of the District Court of Appeals states that "the record * * * leaves no doubt of the guilt of the defendant," the Supreme Court would not be warranted in ordering a hearing in such court, after an affirmance by the Court of Appeals, on account of erroneous admission of evidence, in view of Const. art. 6, § 4½.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Ephraim Northcott was convicted of murder, and appeals. Affirmed in appellate court, and hearing denied in Supreme Court.

Ross & Ross, of Redwood City, and Harry I. Stafford, Frank J. Mannix, William J. Kelly, Maxwell McNutt, and Edwin McKenzie, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. [1, 2] This is an appeal by the defendant from a conviction of murder in the second degree. A great number of alleged errors are urged by the attorneys for the appellant upon a record which leaves no doubt of the guilt of the defendant. The first contention is that the jury was not instructed as to what constitutes the crime of murder. The court instructed the jury with reference to the crime of murder in the second degree, and that was all that was necessary under the facts of this case. In the case of People v. Wright, 167 Cal. 5, 138 Pac. 351, our Supreme Court has said:

"Under our law, where death results from the performance of an unlawful abortion, the crime is murder in the second degree (Pen. Code, § 189), so if a defendant thus charged rests simply upon a denial of the offense, and no evidence of a lesser offense is before the court and jury, the instructions should go simply to murder in the second degree, and the verdict should be either guilty as charged or not guilty."

Instructions are to be given with reference to the facts of the case proved. People v. Byrnes, 30 Cal. 206, 207.

[3, 4] The next objections are to the introduction of certain photographs in evidence. One of the photographs was identified as showing the place where the body was found, with the surrounding brush and trees. Appellant objects that evidence of the place where the body was found had no relevancy. There was testimony from the physician who examined the body after it had been found that death had been caused by reason of the unsuccessful performance of an abortion operation. It was the theory of the respondent that it became necessary for the state to prove that the operation was unlawful; that is, that it was not a necessary operation to preserve the life of the patient. Upon this theory, as indirect evidence of this fact, it was relevant to show that the body had been placed in a secluded spot, where it was unlikely that it would be found. The circumstances surrounding the finding of the body all indicated that a crime had been committed, and that the woman had not died as the result of a lawful operation; for it is reasonable to suppose that, if the operation had been lawful and proper, the body of the woman would not have been found in a secluded canyon or ravine. The photographs were therefore relevant to explain the conditions under which the body was found. The particular objection of the defendant is that one of the pictures shows a small lizard upon one of the rocks. We see nothing prejudicial to the defendant in this. The picture of the scene was taken after the body had been removed. We have examined it with some care to find the lizard complained of, and by no stretch of the imagination does it conjure up any of the horrors which the attorney for the appellant fears may have resulted in the minds of the jurors. Furthermore, when objection was made to this picture the district attorney stated:

"Just a minute. There was an objection raised, and I want to say that there was an objection raised or made because of something crawling on this picture and I don't care about that. I didn't know it was there and it may be stricken off. I am willing to have the clerk mark it off or have her paste something over it."

[5] This objection, as well as several others urged by the appellant, involves the question of whether the state had the burden of establishing in the first instance that the operation was unnecessary for the purpose of preserving the life of the mother, or whether the burden of proving the affirmative of that proposition rested upon the defendant as an affirmative defense. It is therefore necessary for us to discuss that question here. In the case of People v. Balkwell, 143 Cal. 260, 76 Pac. 1017, the only case we have been able to find in this state upon this subject, the court says that there is a wide divergence of authority upon the question as to whether under a statute such as ours the burden of establishing that the abortion was actually necessary is an affirmative defense, or whether the proposition is to be negatived in the first instance by the prosecution. That case then proceeds upon the assumption that it was necessary for the prosecution to establish the fact that the operation was not necessary to preserve the life of the woman, and decides that, even though that be true, yet in the case

under consideration "the irresistible inference from the testimony is that it was not necessary to destroy the child to preserve the life of the mother." It appears, therefore, that this precise question has never been definitely decided in this state. We deem it unnecessary to decide the question here, for, assuming that the burden was upon the state in the first instance, the pictures introduced showing the conditions under which the body was found were relevant as circumstantial evidence; and if this burden was not upon the state, we merely meet the proposition that the state has done more than was required of it in its proof. This in itself cannot be a ground of reversal, and we find nothing in the pictures themselves which could have been prejudicial to the defendant.

[6] The other photograph objected to is that of the body taken shortly after it was found. As pointed out by the district attorney, this photograph was introduced only after the defendant had raised a question about the manner in which the body had been handled, as having some bearing upon the distance the body had been carried before being thrown down the embankment. It was necessary for the prosecution to show that the crime had been committed in the county in which the body was found and where the trial was had. The only apparent purpose of the line of questions pursued by the defendant upon this subject was to establish that it was possible for the body to have been brought a long distance and yet be in the condition as testified to by the physician, provided it had been carefully handled and properly bandaged. The photograph was then introduced by the state showing bruises on the head and face as indicating that the body had not been carefully handled, and that it was therefore unlikely that it could have been brought for any considerable distance without the loss of much of the blood that was found in the abdomen by the physician who examined the body.

[7] Furthermore, when the question of the manner in which this woman met her death was in issue and evidence appeared that certain abrasions were found upon the face and head, it became important to explain whether or not these abrasions were in any way connected with the cause of her death. The prosecution introduced testimony of the physician who examined the body to the effect that they were inflicted after death, and a picture taken after death, showing the face and trunk of the body, fully clothed, was introduced. We think it was relevant, to indicate that the nature of these bruises and injuries was not such as to have contributed to the death of the deceased.

[8, 9] And, furthermore, the defendant was not injured, because the picture was admissible for another reason: The body was fully clothed, and the picture clearly shows the coat and hat which were identified in the courtroom by a sister of Miss Inez Reed as having been the garments worn by her sister when she was last seen by her. The picture was of value in connecting the body found in the ravine with the clothing identified as having belonged to Miss Reed. The defendant cannot be heard to complain that, because the photograph is not a pleasant one to look upon, he was prejudiced in the eyes of the jury because of the revulsion of feeling that may have been caused by this picture. The entire record is a succession of most unpleasant and revolting verbal pictures, and whatsoever is ghastly in the facts of this case inheres in and is an inseparable part of such facts, and the defendant may not complain thereof.

[10] The next objection is to the testimony of Dr. Jordan that Inez Reed had visited his office some time during the week ending March 1st, and at that time she had told him she was in a condition of pregnancy of four or five months' duration, and she had asked him to perform an abortion upon her; that he had refused, and had given her the name and address of the defendant which she had written in his presence upon a card. This testimony was not admitted for the purpose of proving the abortion, and it is conceded that it is not relevant for such purpose. The district attorney stated that the purpose was to prove the intention of Miss Reed when she left Dr. Jordan's office. The trial judge stated in his charge to the jury that—

> "The declarations as to where the deceased was going prior to the act charged therein were not admitted in evidence as proof of the commission of the crime of abortion, but simply as to the condition of the woman and the purpose of her visit, if she made one, if they do show any light thereon."

In People v. Wright, 167 Cal. 1, 8, 138 Pac. 349, the court says, in speaking of the admission of similar evidence, that it is not proper as direct proof of the commission of the abortion; but it is properly admitted as evidence establishing the condition of the woman and the avowed purpose of her visit. The appellant argues that the purpose of deceased's visit to Dr. Jordan's office does not tend to prove her purpose in visiting the defendant, if she did visit him. This may be conceded, but the testimony is nevertheless relevant upon the important question of her physical condition shortly before her death and her desire to be relieved thereof. For such purposes, we think the testimony complained of in the present case was properly admitted.

[11] Defendant next objects to the testimony of Dr. Jordan to the effect that the defendant had discussed with him the preparation of a place "down the peninsula" for the handling of "long-time (abortion) cases." As the objection is stated in the appellant's brief, we gather that it is made upon the

ground that such a project is larger in its scope than the commission of the one abortion operation under examination here, and therefore it should not be admitted, because it is evidence tending to prove that the defendant was preparing to commit abortions generally. If the securing of this place entered into this particular crime, evidence in regard to it cannot become inadmissible by reason of the fact that it might have been used by the defendant for a number of similar operations if he had not been detected after the performance of the first one.

[12, 13] It is contended that the police should not have been permitted to testify as to the actions of Frances Cronin on the night of the arrest of the defendant, when she slipped up the elevator to the fourth floor of the building in which defendant's office was located, and then walked down to the second floor and entered defendant's office, and to the statements made by said Frances Cronin when questioned by the police officers, to the effect that she had never been to the house in San Mateo, where the crime was supposed to have been committed, and as to her conduct and appearance at the Hotel Turpin at about 2 o'clock in the morning of March 9th. The same objection is urged against the testimony concerning the statement of Miss Cronin when she was shown a pair of her shoes which she had left at the San Mateo house. This latter testimony was that Miss Cronin denied ever having been to the house in San Mateo, and, when shown her shoes, at first denied that they were her shoes, and, when the detective suggested that she try them on, admitted that they were her shoes and that she had been to that house. There was also testimony to the effect that, when she was asked about what she had been doing, she replied, "Oh, the only thing to do is to take a dose of poison." Appellant's position upon this question is that the statements of a coconspirator or accomplice after the object of the conspiracy has been accomplished are inadmissible. The correctness of this general statement is, of course, undisputed. While the language of our own Supreme Court in the case of People v. Rodley, 131 Cal. 240, 63 Pac. 351, might suggest that the efforts of coconspirators to "avoid detection and keep themselves out of the state prison" were a part of their conspiracy, we think the situation presented in the present case does not bring it within the meaning of the Rodley Case; but, even conceding appellant's claim that this was error, nevertheless it appears from an examination of all the testimony objected to upon this ground that Frances Cronin did not say anything which had any relation to the defendant or that could have been prejudicial to him. The questions of the police officers were directed to whether or not Frances Cronin had been to a certain house in San Mateo, and her answers were all a denial of this until she was shown a pair of her shoes which she had left at this house. In the case of People v. Winters, 125 Cal. 331, 57 Pac. 1069, it was said in speaking of the testimony of police officers as to their conversations with a man who had been a coconspirator of the defendant in an attempt to rob a hotel:

"Yet, upon a careful examination of those declarations, we find nothing therein stated which in any way was prejudicial to defendant. His name was not mentioned. Nothing whatever was said by Raymond which even by implication connected him with the crime. * * * Therefore the admission of this evidence was purely abstract, and furnished no ground for a new trial."

We have carefully read all the testimony covered by these assignments of error, and we are of the opinion that the error was not such as to call for a reversal of the case.

[14] Further objection is made to the testimony of Catherine Fisher in which she told of other abortion operations performed by the defendant previous to this case. While it is true as a general rule that upon a trial for a particular crime evidence which tends to show the commission of another and distinct offense by the defendant is inadmissible, the defendant has himself recognized and stated the exceptions to this rule, one of which applies to the present case. The exceptions are where it becomes necessary to show identity, intent, motive, etc. In the present case this evidence was introduced to show the intent with which the operation was performed, its motive, in order to negative the possibility that it was a legal operation necessitated by reason of the health of the woman. Because of the fact that the defendant denied ever having seen the woman, and because of the difficulties surrounding the proof in these cases generally, it was not possible to prove that this was a criminal operation except indirectly and by circumstantial evidence. Evidence was therefore introduced to show that the defendant was engaged generally in this business, and that he had previously performed other illegal operations. The precise point was discussed in the case of People v. Hagenow, 236 Ill. 514, 86 N. E. 370. The court there said:

"It was therefore necessary that the proof show and the jury find, in order to convict the plaintiff in error, that the miscarriage or abortion which was caused or produced upon Annie Horvatich was not caused by plaintiff in error to save the woman's life; and while the jury would have been justified in finding, from the condition of the woman when she went to the plaintiff in error's place and the testimony of the physicians who made the post mortem examination, that no cause existed for the causing of a miscarriage or the producing of an abortion upon Annie Horvatich to save her life, the state was not required to rely upon this class of testimony alone, but had the right to show,

if it could, that the plaintiff in error was not carrying on a hospital in a legitimate way for the treatment of women who were pregnant, but that she was a professional abortionist, for the purpose of rebutting the presumption that she in good faith caused the miscarriage or produced an abortion upon Annie Horvatich to save her life, and for the purpose of showing that she must have known Annie Horvatich was pregnant, and that she operated upon her with a criminal knowledge and intent to cause her to miscarry or to abort. * * * We think the view above expressed is fully sustained by this court in Scott v. People, 141 Ill. 195 [30 N. E. 329], Hagenow v. People, 188 Ill. 545 [59 N. E. 242], and Clark v. People, 224 Ill. 554 [79 N. E. 941], and by numerous text-writers and adjudicated cases. 1 Ency. of Ev. p. 54; Underhill on Crim. Ev. § 345; Regina v. Dale, 16 Cox's Crim. L. C. 703;" and other cases cited.

In the case of People v. Seaman, 107 Mich. at page 357, 65 N. W. 203, 61 Am. St. Rep. 326, the court held that evidence similar to that objected to in this case was admissible. To the same effect is the case of People v. Sessions, 58 Mich. at page 601, 26 N. W. 291.

[15] It is conceded by both the appellant and respondent that this evidence is admissible in this class of cases where the burden is upon the state to negative the idea that the operation may have been necessary. But the appellant contends in this connection, as in the connection hereinbefore discussed, that the burden of establishing the fact that the operation was a necessary one to preserve the life of the mother was upon the defendant, and that, as he did not put this defense in issue, and denied that he had performed any operation upon the deceased, or, indeed, that he had ever seen her, the state was not obliged to go into the question of the illegality of the operation, but the illegality would be presumed upon proof of the operation. But, since the appellant concedes that the proof is proper where the state is called upon to do more than appellant contends it is called upon to do in the present instance, we are in the position, as stated before, where the state has sustained a greater burden than required. There is no failure of proof, but merely an excess of proof. Assuming that the proof was sufficient to connect the defendant with the performance of the operation upon deceased, the facts in evidence leave no doubt that there was no legal justification for the performance of the operation. They raise an "irresistible inference," as said in People v. Wright, supra, of the criminal character of the operation. And surely, in view of the constitutional provision against setting aside judgments because of the improper admission or rejection of evidence unless it shall appear from an examination of the entire record that there has been a miscarriage of justice, we would not be justified in setting aside a verdict of the jury because the district attorney has proved more than was necessary in order to make out his case.

A number of errors are alleged upon the admission of evidence which was of minor importance, and we shall not discuss these matters in detail. It is sufficient to say that we consider these errors, if any, to be without prejudice to the defendant.

[16] Another assignment of error is predicated upon the fact that by inadvertence the name of the deceased was given as "Elizabeth Inez Reed" in the information, while the evidence gave the name as "Inez Elizabeth Reed." The defendant had been charged before a committing magistrate with the crime of the murder of "Inez Elizabeth Reed" in San Mateo county on or about March 7, 1919. He was held over, and later the information was filed with the name written as "Elizabeth Inez Reed" instead of "Inez Elizabeth Reed." A sister of the deceased, Mrs. Stevens, connected the two names in her testimony. She was asked if she knew Elizabeth Inez Reed in her lifetime, and she answered: "My sister's name was Inez Elizabeth Reed." There is no reason of which we are aware why the defendant was prejudiced by this inadvertence, or hindered thereby in any way in the preparation of his defense. In the case of People v. Lockwood, 6 Cal. 205, the court said:

"The only argument that could be adduced in favor of a contrary rule is that judgment in this proceeding would not be a bar to a future prosecution for killing J. T. Beatty. In such a case I apprehend it would be competent for the accused to establish by evidence aliunde that J. P. and J. T. Beatty were one and the same person. * * * In addition to all this, the statute requires that these cases should be disposed of on appeal, without regard to technicalities. Under our system we are disposed to regard the error assigned as more nice than substantial."

See, also, People v. Fick, 89 Cal. 149, 26 Pac. 759; People v. Ah Sun, 160 Cal. 791, 118 Pac. 240.

Furthermore, it appears that the defendant did not make any motion in the trial court based upon the alleged variance, when it might have been readily explained and corrected.

[17, 18] The further contention is made that the evidence shows Dr. Jordan to have been an accomplice, and that the jury should have been so instructed. The record does not show that this question was ever raised at the trial, and does not show that any request for such an instruction was made, and it would appear that the contention that the testimony of Dr. Jordan proves him an accomplice is being made for the first time upon appeal. While we are of the opinion that the record does not show facts sufficient to make Dr. Jordan an accomplice under the language of People v. Balkwell, supra, yet it is unnecessary for us to decide this point here, because failure of the court to give an instruc-

tion where such instruction is not asked is not ground for reversal. People v. Ah Wee, 48 Cal. 236, 239; People v. Fice, 97 Cal. 459, 460, 32 Pac. 531; People v. Haun, 44 Cal. 96, 100.

Under the entire record before us we are convinced that there has been no miscarriage of justice, and that none of the alleged errors complained of warrant a reversal of the judgment.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, we withhold any expression of opinion as to the admissibility, under the circumstances of this case, of the testimony of the witness Catherine Fisher concerning other abortion operations performed by the defendant previous to the alleged abortion involved in this case.

[19] In view of the fact that the opinion of the District Court of Appeal states that the "record * * * leaves no doubt of the guilt of the defendant," and in view of section 4½ of article 6 of the Constitution, we would not be warranted in ordering a hearing in this court after decision by the District Court of Appeal affirming the judgment of the lower court, on account of the admission of such evidence if the same was erroneously admitted.

The application for a hearing in this court is denied.

All concur.

46 Cal. App. 548

MAXWELL v. WESTERN AUTO STAGE CO., Inc., et al. (Civ. 2707.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1920.)

1. Trial ⊜397(1)—Finding on issue of contributory negligence made necessary by pleadings and evidence.

Where defendants were charged with negligence in the operation of an automobile stage with which plaintiff's car collided, defendants' plea of contributory negligence raised the issue of plaintiff's negligence for decision, and, there being evidence of such negligence, it was improper for the court to fail to find on the issue.

2. Appeal and error ⊜1071(6) — Highways ⊜184(2) — Evidence sufficient to warrant finding that plaintiff was negligent; failure to find on issue raised by evidence reversible error.

In an action by plaintiff, whose automobile struck defendants' motor stage, evidence *held* sufficient to warrant a finding that plaintiff was guilty of contributory negligence, and hence the failure of the court to dispose of that issue, which was raised by the pleading, was reversible error.

3. Highways ⊜184(2)—Evidence sufficient to warrant finding that driver of automobile stage was negligent.

In an action by a motorist whose car collided with an automobile stage, evidence *held* sufficient to warrant finding that the driver of the stage was negligent.

4. Appeal and error ⊜1050(1) — Erroneous admission of evidence held harmless in view of other evidence.

Where statements by the driver of defendants' automobile stage made after the accident agreed with his testimony on trial, the admission of such statements against the owner was harmless, even though technically erroneous.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by J. R. Maxwell against the Western Auto Stage Company, Incorporated, and another. From a judgment for plaintiff, defendants appeal. Reversed.

Duke Stone, of Los Angeles, for appellants.

Mattison B. Jones, of Los Angeles, for respondent.

JAMES, J. This appeal was taken from a judgment awarding damages to the plaintiff. It was alleged in the complaint that a collision which occurred between an automobile driven by the plaintiff and one driven by appellant Dukelow was the result of the negligent acts of Dukelow, who was employed as a driver by his codefendant. In their answer defendants denied the charge of negligence, and affirmatively alleged particular acts of negligence on the part of the plaintiff as contributing proximately to cause the alleged damage. The trial court found the facts in accordance with the allegation of the complaint, but failed to make any finding upon the issue tendered by the defendants as to the contributory negligence of the plaintiff. Several grounds are urged for a reversal, chief among which are: (1) That the evidence does not sustain the findings of the court as to the negligence of the defendants; (2) that the court erred in admitting testimony of statements made by defendant Dukelow immediately after the accident; (3) that the court erred in not making an affirmative finding upon the issue as to the contributory negligence of the plaintiff.

[1, 2] Immediately before the accident occurred, defendant Dukelow, driving an automobile in service as a stage, was traveling northward along a straight road in a suburban community. He approached a point where the road upon which he was traveling was entered by another highway from the right.

This latter highway gave entrance to and from the road upon which Dukelow was driving the stage, but did not cross it. Plaintiff, operating an automobile, was traveling down this connecting highway and was approaching the point where Dukelow's vehicle would pass the point of connection between the two roads. Dukelow turned his machine toward the left-hand side of the road upon which he was traveling, with the purpose of avoiding contact with the plaintiff's automobile, but the latter vehicle struck the stage, with the result that the stage was completely turned over, and the automobile of the plaintiff was damaged. The testimony of plaintiff was, in substance, that as he reached the point where the road upon which he was traveling entered the main highway, he looked to the left first and saw the vehicle of defendants approaching at a distance of about 150 or 160 feet; that, intending to turn to the left and down the main highway, he proceeded across the middle thereof for the purpose of making the turn, and that the defendants' automobile, having reached that point, swerved to the left and the collision resulted. He testified that he was traveling at a moderate rate of speed. On the other hand, Dukelow testified that just previous to reaching the point of the accident he had been traveling at a speed of 25 to 30 miles an hour, and that as he approached the corner where the two roads met he began to slow down, and that when he was about 20 feet from the nearest curb on the second highway he saw the plaintiff's automobile; that, considering that there was ample room for him to pass, he bore to the left-hand side of the roadway in order to allow the plaintiff sufficient space; that the plaintiff appeared to slow down at first, but that his machine suddenly shot forward as the stage was passing and struck the latter, with the result already mentioned; that it appeared to him that plaintiff was an incompetent driver, and that, instead of putting on the brakes of his machine, as he evidently intended to do, he had pressed the gasoline throttle which had the reverse action and caused plaintiff's machine to dart forward and so produce the collision. This brief, but incomplete, sketch of the evidence is sufficient to illustrate the propositions involved on this appeal. We think that it sufficiently showed that there was conflicting evidence, and that the case was of such a character as would have justified a decision for the defendants upon the ground that plaintiff committed acts which would amount to negligence contributing proximately to cause the damage suffered. By this we mean to say only that a case was presented which called for a decision of the court, not only upon the proposition of defendants' negligence, but as to plaintiff's also. This particularly to the point made by the appellants that the court failed to find upon a material issue. A plea of contributory negligence presents such an issue. There was evidence which, if believed by the court, would have been sufficient to sustain it. The claim for error on this ground is therefore well taken. Tucker v. United Railroads, 171 Cal. 702, 154 Pac. 835; Huntington v. Vavra, 36 Cal. App. 352, 172 Pac. 166.

[3, 4] On the statement made, the finding as to the negligence of the defendants is sustained by the evidence shown. Assuming the situation to have been as claimed by the plaintiff, plaintiff, approaching a point of crossing at the right of defendants' stage, had the right to cross in advance of the stage, and should have been allowed by the driver of the latter sufficient time to make the crossing. Had the stage been under such control as to enable the driver thereof to bring it to a stop before crossing the entering road, the collision doubtless would not have occurred. There was a hedge at the first right-hand corner which the stage was approaching, and the driver admitted that this obscured his vision of vehicles which might be coming from that direction. As before noted, he testified that he was within 20 feet of the first curb line when he first saw the automobile of the plaintiff. Upon all the evidence, it was for the trial court to say as to whether, under the circumstances, there was negligence on the part of either plaintiff or the defendants. Judged by the record before us, that question was solely for the trial judge; for no such clear case is presented as to make it appear as a matter of law that there was negligence or lack of it either in the conduct of the plaintiff or that of the stage driver. It is complained that the testimony offered and received as to statements made by the stage driver to third persons shortly after the collision occurred was incompetent, and that in admitting the same the court committed error. The testimony doubtless was incompetent as to the employer of the stage driver; but we find nothing in it which differed in material respects from that offered at the trial in the driver's deposition. At any rate, were the appeal to be determined by a solution of that question alone, we would unhesitatingly say that the error was not such as to indicate that justice had miscarried. The failure, however, of the court to find as to the contributory negligence of the plaintiff was a matter which cannot be thus answered, and for which defendants are entitled to a new trial.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 532

CONTINENTAL NAT. BANK OF LOS ANGELES v. STOLTZ et al. (Civ. 3216.)

(District Court of Appeal, First District, Division 1, California. March 13, 1920.)

1. Interpleader ⟸8(2)—Fund held an escrow, entitling holder to interplead claimants.

Where money was paid into a bank under an agreement that an individual should be credited with 5 per cent. thereof and the balance held for a corporation until a specified sum was procured, and thereafter the corporation notified the bank to withhold all further payments to the individual pending a settlement, such payments were held by the bank under the escrow agreement, not as a deposit by the individual, so that the bank could bring interpleader against the parties claiming the sum.

2. Appeal and error ⟸174 — Objection that plaintiff was interested in fund is waived by failure to plead it in trial court.

The objection that plaintiff is not entitled to interpleader because it was interested in the fund is waived, where none of defendants raised it by motion or answers, and the pleadings were made up and claims determined on the theory that the fund was held by virtue of an escrow agreement.

3. Appeal and error ⟸907(3)—On judgment roll appeal, insufficiency of findings cannot be reviewed.

Where the appeal is on the judgment roll alone, so that the evidence is not before the court, the objection that the findings do not cover all of the issues raised by the pleadings cannot be considered.

4. Appeal and error ⟸1071(5) — Indefinite finding as to immaterial issue does not require reversal.

The objection that certain of the findings were indefinite does not require reversal of the judgment, where those findings related to an issue which was not material under the pleading.

5. Trial ⟸395(3)—Where no affirmative defenses were raised, general findings held sufficient.

In an action of interpleader, where no affirmative defenses were interposed to the cross-complaint claiming the fund, findings which merely stated that the evidence supported, or failed to support, the cross-complaint and the answers are sufficient.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Interpleader by the Continental National Bank of Los Angeles against E. P. Stoltz, Corporate Finance Company, W. A. Reed, and others. From a judgment allowing defendant Reed to satisfy his judgment against defendant Stoltz out of the fund as against the claim of the Corporate Finance Company as assignee thereof, the last-named defendant appeals. Affirmed.

Geo. W. McDill, of Los Angeles, and Ray P. Saffold, of San Francisco, for appellant.

John W. Maltman and Ira F. Thompson, both of Los Angeles, for respondent.

KNIGHT, Judge pro tem. This is an action in interpleader, brought by plaintiff to determine the title to the sum of $2,080, which plaintiff claims to hold in escrow. Judgment was rendered in favor of defendant and cross-complainant W. A. Reed. Defendant Corporate Finance Company, a corporation, appeals, and the appeal is presented on the judgment roll.

The action was originally commenced against the defendants E. P. Stoltz, Continental Producing Company, a corporation, Robert Goldstein, and S. Goldstein, to require them to interplead and litigate among themselves as to the ownership of said $2,080. Afterwards W. A. Reed, a judgment creditor of the defendant Stoltz, caused a writ of garnishment to be levied on said fund, and thereupon plaintiff filed an amended complaint in interpleader, for the purpose of bringing in as parties defendant said judgment creditor Reed and appellant Corporate Finance Company, the latter claiming to be the assignee of Stoltz. All of the defendants answered the amended complaint. The defendant Reed, besides answering, filed a cross-complaint, in which he alleged that the assignment from Stoltz to the Corporate Finance Company was a fraud. Defendants Stoltz and Corporate Finance Company answered the cross-complaint by denying the fraud. The other defendants, viz., Continental Producing Company, Robert Goldstein, and S. Goldstein, defaulted. The defendants Continental Producing Company, Robest Goldstein, and S. Goldstein finally filed a disclaimer, in which it was alleged that they had made a settlement with Stoltz and the Corporate Finance Company, whereby the Corporate Finance Company, as the assignee of Stoltz, was paid all of the disputed money except the sum of $600, which was retained by plaintiff subject to the rights of the cross-complainant Reed. The controversy was thereby narrowed down to two issues: First, whether or not the plaintiff was a mere stakeholder of an escrow fund; and, secondly, whether or not the assignment from Stoltz to the Corporate Finance Company was a fraud as against Reed. Neither the answers to the amended complaint nor the answers to the cross-complaint present any affirmative defenses. They consist merely of denials.

The judgment decreed that plaintiff held said sum of $600 in escrow, and that it was the property of E. P. Stoltz. It further decreed that the assignment of said fund from Stoltz to the Corporate Finance Company was a fraud upon and void as against the

cross-complainant Reed, and that Reed was entitled to satisfy his judgment, which amounted to $492 with costs and interest, out of said escrow fund of $600.

[1] Appellant first contends that plaintiff cannot maintain this action as an interpleader, for the reason that the money involved in the action does not constitute an escrow fund, but that it belonged to the defendant E. P. Stoltz, as a depositor in said bank, and that said deposit was afterwards assigned by Stoltz to appellant. This contention is without merit. A copy of the escrow instructions under which the money was received and held by plaintiff is attached as an exhibit to the amended complaint. Said instructions were signed by the defendant Continental Producing Company, a corporation, and were delivered to plaintiff by said corporation and the defendant Stoltz, together with the stock certificate book of said corporation. According to said instructions, it was the duty of plaintiff to issue said stock to purchasers and to receive the money therefor, 5 per cent. of which was to be deducted and paid to "E. P. Stoltz or order, the fiscal agent of said corporation," and the remaining 95 per cent. to be held in escrow by plaintiff until that sum reached $75,000, at which time said sum was to be delivered to said corporation, provided it reached that amount on or before September 1, 1916, and in the event that said sum did not reach the sum of $75,000 on September 1, 1916, plaintiff was to redeem the stock for the amount written across the face of said stock by plaintiff.

The amended complaint contains certain allegations, which the court found to be true, as follows: That prior to August 30, 1916, the proceeds from the sale of said stock reached the sum of $34,400, of which 5 per cent. was paid to the defendant Stoltz; that "shortly prior to said 30th day of August, 1916," said corporation notified plaintiff that its contract with said Stoltz had been abrogated and annulled, and demanded that plaintiff pay no more money to said Stoltz; that "on or about said 30th day of August, 1916," the defendants Robert Goldstein and S. Goldstein purchased stock aggregating $43,680, and paid plaintiff the purchase price therefor; that under the terms of said escrow instructions there would have been due said Stoltz the sum of $2,080, and "that said Continental Producing Company, in order to protect the said plaintiff from any loss on account of the claim of said E. P. Stoltz, left on deposit with plaintiff the said sum of $2,080, with the understanding and agreement that the said sum shall be left with plaintiff until such time as a dispute between the said Stoltz and said Continental Producing Company should be adjusted."

The facts and circumstances above narrated presented a complete case for interpleader. Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105; Freitas v. Freitas, 31 Cal. App. 16, 159 Pac. 611; Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Youtz v. Farmers', etc., Nat. Bk., 31 Cal. App. 370, 160 Pac. 855.

There is nothing in the pleadings which indicates in the slightest way that the position of the defendant Stoltz was at any time considered that of a depositor. All of his rights in said escrow fund were shown to have originated in the terms of said escrow instructions, and were governed by them.

[2] The contents of the judgment roll discloses that neither appellant nor any of the other defendants ever made any objection, by demurrer, motion, or answer, to the trial court to the nature of the proceeding. The entire pleadings were made up, and the claims of the litigants were heard and determined, upon the theory that if Stoltz was entitled to any part of said sum of $2,080 he was entitled to it as a commission under the terms of said escrow instructions. By the acquiescence of Stoltz and of the appellant in the respects above mentioned they waived any objection they might otherwise have urged to the right of plaintiff to maintain the action as an interpleader. San Francisco Savings Union v. Long, 123 Cal. 107, 55 Pac. 708; Woodmen of the World v. Rutledge, supra; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

[3] The second contention made by appellant is that "the findings are insufficient, too vague and conflicting to support the judgment." In other words, it is claimed that the findings do not cover all of the issues raised by the pleadings. Appellant has taken this appeal in such form, however, as to render this point unavailable. The appeal here is upon the judgment roll alone. The evidence is not before the court, and it is the rule that a judgment will not be reversed for want of a finding unless it appears that there was evidence, or lack of evidence, which required the court to make a finding in favor of appellant. Terry v. Southwestern Bldg. Co., 185 Pac. 212; Bliss v. Sneath, 119 Cal. 529, 51 Pac. 848. In Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30, it is said:

"Besides, the issues which, as appellant claims, were not answered by findings were raised by its own affirmative allegations. The evidence not having been brought up, we must assume that the defendant offered no proof in support of these averments. The want of findings thereon is accordingly no ground for reversal. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Coats v. Coats, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441.

Notwithstanding that appellant has doubtless forfeited this point by its form of appeal, we have nevertheless examined the findings, in connection with the pleadings,

and we are of the opinion that the findings are sufficient in both form and substance.

The first finding is that all of the allegations of the complaint are true and are supported by evidence, excepting that the escrow fund was reduced from $2,080 to $600.

[4] The second finding, to which appellant particularly objects, is "that all of the allegations of the cross-complaint of defendant and cross-complainant, W. A. Reed, are true and are supported by the evidence, except that there is no evidence to support the following allegations, and the same are not true, to wit: The allegations to the effect that Corporate Finance Company has been or now is a mere dummy holding company for David Stoltz," and then follows a recital in abbreviated form of several allegations of fraud charged against said David Stoltz, and the finding concludes, "But said allegations are true in so far as the same are applied in the cross-complaint to the defendant E. P. Stoltz." That part of the finding concerning David Stoltz is predicated upon a number of immaterial and irrelevant allegations contained in the cross-complaint, wherein David Stoltz and E. P. Stoltz are jointly charged with fraud in this and other transactions, all of which allegations doubtless would have been stricken out by the trial court had proper motions been presented therefor. David Stoltz was not a party to this action, and, so far as the pleadings show, was not interested in any part of the fund in dispute. Therefore that part of the above finding which relates to him is of no consequence or importance. The essential issue was the alleged fraud of E. P. Stoltz in making said assignment. The court found that those allegations were true, which was all that was necessary for the court to do in order to render its decision in the case.

The third finding is "that none of the allegations of the answers of defendant and cross-defendants E. P. Stoltz and Corporate Finance Company is true or is supported by the evidence," and the fourth finding is "that defendants Continental Producing Company, a corporation, Robert Goldstein, and S. Goldstein have filed an answer to the amended complaint in interpleader herein, disclaiming any interest in or to the moneys referred to in said complaint."

[5] As above stated, the only issues of fact raised by the pleadings, and upon which the decision of the case turned, were the legal status of plaintiff as custodian of the fund and the charge of fraud against the defendants E. P. Stoltz and Corporate Finance Company, and since the answers of the defendants last named to the amended complaint and to the cross-complaint presented no affirmative defenses, the general findings adopted by the court were sufficient. Chatfield v. Continental Bldg. Ass'n, 6 Cal. App. 665, 92 Pac. 1040; Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766; Williams v. Hill, 54 Cal. 390; 2 Spelling's New Trial, § 593.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 551

HENNING v. CLARK. (Civ. 2690.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1920. Rehearing Denied April 12, 1920.)

1. Partnership ⊂⊃64 — Partners after agreement for dissolution held entitled to file certificate of names.

Though partners doing business under a firm designation not containing the names of all had agreed on the terms of dissolution, they may make and file and publish the certificate showing the names of all the partners as required by Civ. Code, §§ 2466, 2468, and recover on a partnership demand.

2. Appeal and error ⊂⊃1011(1)—Conflicts in the evidence to be determined by trial court.

Where an action is tried to the court, it has the right to resolve conflicts in the evidence.

3. Attorney and client ⊂⊃166(1)—Agreement fixing fee held not conditional on rendition of future services.

In an action by the trustee of persons who had formerly composed a firm of attorneys against a client, evidence *held* to establish that the client and the attorneys had agreed that the attorneys should receive and the client pay the sum of $600 for past services and that it was not conditional on the attorneys' rendition of future service.

4. Account, action on ⊂⊃6(3)—Where action is on agreed settlement, particulars need not be furnished as required in action on account.

Where the action was on an agreed settlement between attorneys and their client, plaintiff is not bound to furnish a bill of particulars of the items of account pursuant to Code Civ. Proc. § 454; the action being based on the settlement and not on the account.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. J. Henning, as trustee for A. J. Morganstern and others, against Rex B. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

H. W. Kidd, of Los Angeles (Eugene D. Williams, of Los Angeles, of counsel), for appellant.

L. S. Arnold, of Los Angeles, and W. H. Wylie, of San Diego, for respondent.

JAMES, J. Defendant has appealed from a judgment in favor of plaintiff for the principal sum of $650.

[1] It is alleged in the complaint of the plaintiff that Morganstern, McGee, Henning, Hendee, and Casebeer, prior to the 1st day of February, 1915, as attorneys and counselors at law, were engaged in the practice of their profession as copartners in the city of San Diego; that appellant Clark had been a client of the copartnership, and on the date mentioned a large amount of money was due the firm from appellant as fees for services rendered; that on August 6, 1915, the members of the copartnership settled and adjusted the accounts existing between the firm and appellant, and agreed that the indebtedness of Clark then was the sum of $650. It is further alleged that prior to the commencement of the action the individual members of the prior existing copartnership assigned and transferred to Henning, one of the members, all their right, title, and interest to the claim against Clark. The further essential allegation is contained in the complaint that demand had been duly made upon Clark for payment of the money and such demand had been refused. The name under which the firm of attorneys had been practicing contained the name of each of the copartners, except Casebeer. The complaint showed that fact, and further showed that prior to the commencement of the action a certificate, as required by section 2466 of the Civil Code, was duly executed, acknowledged, published, and filed in the office of the county clerk, showing the names of all the partners composing the copartnership. While the truth of the latter allegation was admitted by the answer, we may call attention here to the fact that the evidence showed that such certificate was filed on May 13, 1915, and published for the requisite number of times; the last publication being June 10, 1915. As one of the points made by appellant is that this action could not be maintained because the certificate had not been filed and published during the time that the copartnership was engaged in business, that matter may be first disposed of. It has been held that a copartnership, the trade designation of which does not include the names of all the copartners, may satisfy the requirements of sections 2466 and 2468, Civil Code, by making, filing, and publishing the certificate showing such names, even after suit brought and before answer. Roullard v. Gray, 175 Pac. 479. The fact that the copartners had agreed upon a dissolution of the firm prior to the filing and publishing of the certificate referred to, we think, does not ceate a different legal situation than was considered in the case cited. To hold to the contrary would mean that under the facts none of the debts due to the copartnership could ever be collected by suit. Plainly the Code provisions were not designed to work that result. We pass, then, to the other questions presented.

[2, 3] It is contended in the main that the evidence was insufficient to sustain the finding as made by the trial court that the sum of $650 was agreed upon between the copartners and Clark as being immediately payable on August 6, 1915. In this regard the contention of appellant is that the evidence showed that his agreement to pay the $650 was contingent in that said amount was not to be paid until some alleged unfinished matters then in the hands of the law firm were concluded, and that the evidence showed there had never been performance of this obligation on the part of the law firm. This contention appears to us to be without merit. Appellant was called as a witness on behalf of the plaintiff, and he testified that a meeting of this firm of lawyers of which he had been a client was held in his office in San Diego on August 6, 1915, and that the matter of his indebtedness to the firm, which was then being dissolved, was taken up; that he had been charged on the books of the firm with an indebtedness largely in excess of $650; and that, after discussing and considering the various items of his account, a final figure of $650 was reached. In response to questions by the court, he made the following replies:

"Q. What was that amount made up of, of the undisputed items? A. That was all for undisputed—for items that were justly charged to me. Q. For items that were justly charged to you and for services they had rendered? A. Yes, sir. Q. I understand you that a balance was struck there between you for services, what you did actually owe them of $650? A. Yes, sir. Q. For services? A. Approximately $650. We agreed on $650 as an even amount."

On cross-examination by his own counsel, the witness proceeded to qualify his former positive statement by adding the condition that his agreement to pay was contingent upon the performance of further services by the members of the firm. Several letters were introduced in evidence, as to the competency of which we have no doubt. One letter, under date of December 23, 1916, was written by Mr. McGee, a member of the former firm, to appellant, in which payment of the $650 was asked and in which the writer stated to the appellant that—

"After a very lengthy discussion, in which you questioned certain items, we agreed positively and definitely to accept $650. This you agreed to pay within a very short time, saying that you did not then have the available cash."

No reply was made to this letter. On February 6, 1917, the same writer again addressed a letter to appellant in an endeavor to secure payment of the money. This letter, among other things, contained the following statement:

"You know as well as I do that you agreed to pay $650 on a bill that was more than twice that amount. We have not desired to bother you. * * * But you must be convinced that

our only desire was to settle the matter amicably, and that is the reason we made the compromise in the first instance. And that is the reason, also, that you promised to pay it on several occasions."

This letter was replied to by appellant, and in this reply for the first time, so far as the record of the correspondence shows, the appellant raised the question that there was the matter of the clearing of the title to some property which the law firm should do before he was compelled to pay. Mr. McGee answered this letter, denying that there was any such qualification to the agreement on the part of appellant to pay the money. The court was authorized to take the first statement of appellant, as given upon his direct examination, as being true, which was in effect that he had agreed to pay the $650 as a compromise amount on the claim made against him by his attorneys, and that such promise was without the qualification later sought to be attached to it. On the direct examination the court's question was specific and the answer positive, when it was asked, "For items that were justly charged to you and for services they had rendered?" the answer being, "Yes, sir." The court, too, not without warrant, attached significance, as is shown by the judge's statement made at the trial, to the fact that, in response to the first letter written by Mr. McGee to appellant after the compromise settlement had been made, in which letter Mr. McGee demanded payment of the $650, appellant made no reply whatsoever. That a person from whom money was demanded in that manner, and who claimed that payment of the same rested upon conditions unperformed, should not immediately make denial of the debt or call attention to the alleged contingencies affecting the time of payment, was a circumstance to be given such weight as the court might attach to it in determining the facts in connection with appellant's testimony. The sole question here is as to whether there was substantial evidence to support the finding of the court which is attacked. There was substantial evidence, we think, and the duty of resolving any conflict was one which rested solely with the trial judge, with the decision of whom upon the facts we have not the right to interfere.

[4] A demand for a bill of particulars had been made prior to the trial, and, such bill not being furnished, objection was made to the introduction of any testimony; appellant insisting that such objection should have been sustained because of the provisions of section 454, Code of Civil Procedure. That section, in part, provides as follows:

"It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof."

Plaintiff here did not sue upon an account, but upon a settlement agreement arrived at after a consultation between the parties. Appellant by his own testimony admitted the amount agreed upon; hence an examination of the items which were considered in compromising the claim could not have been properly gone into at the trial. An examination of those items was foreclosed by the very fact that the parties agreed upon a sum total after reviewing the account, excluding certain items and determining a balance. The case of Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371, is in point against the contention of appellant. The whole controversy as submitted to the court was not as to the correctness of any charges made prior to the compromise settlement, but only as to whether the $650, admittedly agreed to be paid by appellant, was payable on demand or after some further services had been performed. We think that the evidence fully supports the findings and judgment, and that no error appears entitling appellant to a reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 391

PEOPLE ex rel. BRADFORD, Dist. Atty., v. BURCH et al. (Civ. 1987.)

(District Court of Appeal, Third District, California. March 2, 1920. Hearing Denied by Supreme Court April 29, 1920.)

1. Nuisance ⊂⊃83—Requisites of complaint under Red Light Abatement Law stated.

An action under the Red Light Abatement Law is not one for the abatement of prostitution, or of assignation, or of lewdness, but a civil action for the abatement of a public nuisance, permitted or maintained by the habitual practicing in a building, or in or on any premises, of acts of prostitution, assignation, or lewdness, and it is not necessary, in a complaint or information charging that lewdness was practiced on the premises, to describe the specific acts constituting the lewdness.

2. Nuisance ⊂⊃83—Evidence of sale of intoxicating liquor admissible in proceedings under Red Light Abatement Law.

In proceedings under the Red Light Abatement Law, directed against a theater and dance hall, it was not error to admit evidence of the sale of intoxicating liquors on the premises.

3. Nuisance ⊂⊃83—Finding that nuisance existed at time of commencement of abatement proceedings sustained.

In a proceeding under the Red Light Abatement Law, evidence *held* sufficient to show that

a nuisance existed on the premises at the time of the commencement of the action.

4. Witnesses ⟹372(2)—Cross-examination as to compensation of detectives held proper in proceedings under Red Light Abatement Law.

In a proceeding under the Red Light Abatement Law, it is proper to permit detectives employed by a law enforcement organization to testify on cross-examination that they were paid for their services and as to the precise amount of their compensation.

5. Appeal and error ⟹1048(6)—Refusal of cross-examination as to compensation of detectives in nuisance proceedings held not prejudicial.

In a proceeding under the Red Light Abatement Law, the refusal to permit cross-examination of detectives employed by a law enforcement organization as to the amount of their compensation *held* not prejudicial error.

6. Appeal and error ⟹1050(1)—Evidence by nonresidents as to general reputation held harmless error.

In a proceeding under the Red Light Abatement Law, admission of evidence by nonresidents as to the general reputation of the building as maintained by defendants, if error, *held* harmless.

7. Nuisance ⟹84 — Procedure under Red Light Abatement Law to accord with general and elementary rules of evidence.

Proceedings under the Red Light Abatement Law are to be conducted according to the general and elementary rules of evidence, by which disputed questions of fact are to be determined in courts of justice.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceeding by the People, on the relation of Hugh B. Bradford, District Attorney, against Charles T. Burch and another, to enjoin the use of certain premises under the Red Light Abatement Law. Decree for relator, and defendants appeal. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellants.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Deputy Dist. Atty., both of Sacramento, for respondent.

HART, J. The action was brought under the "Red Light Abatement Law" (St. 1913, p. 20); the property affected being a one-story brick building known as No. 119 K street, in the city of Sacramento. The property was owned by the estate of Mary Sweeney, deceased, and Charles T. Burch was the owner of the personal property situate in the premises, which was known as the Casino Theater and Dance Hall. The judgment enjoined the use of the premises "for the purpose of acts of lewdness," directed the sheriff to close the building and keep it closed for one year, and also directed him to remove and sell all of the furniture, fixtures, and musical instruments in said building. The appeal is by said Burch and Ella Ryan, as executrix, etc., named in the complaint as respondents, and who will hereinafter be referred to as the appellants.

The first point advanced by the appellants is that three separate and distinct causes of action are stated in the complaint, but not separately stated, and that for that reason said pleading was faulty, and the demurrer thereto should have been sustained. It is further contended, in this connection, that the acts constituting the "lewdness," the practicing of which the complaint charged and the court found constituted the nuisance maintained in and at the premises complained of, should have been specifically set forth. As to this proposition, counsel for the appellants say:

"The complaint, we believe, was sufficient so far as a general demurrer was concerned, for it contained the essential allegations to charge that the premises constituted a nuisance because of the alleged acts of prostitution and assignation; but it did not contain a sufficient statement of facts to establish a nuisance based on the ground of lewdness. Had the court sustained the special demurrer on the ground that the complaint contained three causes of action, which should have been separately stated, appellant would then have been entitled to interpose a general demurrer to each count, and a general demurrer to the count alleging lewdness would have been well taken, in the event respondent had seen fit to plead it in the same language made use of in the complaint now before the court. How different would the judgment have been in such event? Respondent would have been denied relief, because adequate proof was wanting on the counts charging prostitution and assignation, and the demurrer would have been sustained to the third count, alleging lewdness, because respondent could not have pleaded sufficient facts to make out a case on that ground. Judgment therefore, would have gone for appellant. This must be so, because the record discloses evidence of no single act which could be termed lewd, unless we include evidence of facts transpiring long after the pleadings were settled."

[1] The reply to both the above-stated propositions and the argument of counsel in support thereof is to be found in the case of People ex rel. Bradford v. Laine, 182 Pac. 986, a petition for a hearing of which by the Supreme Court was denied, and to which we refer for a full discussion of said points. We may say, however, that in the case named it was pointed out that an action under the "Red Light Abatement Act" is not one for the abatement of prostitution, or of assignation, or of lewdness, but one for the abatement of a public nuisance committed or maintained by the habitual practicing in a building, or in or on any premises, of acts of prostitution, or assignation, or lewdness, and that it is a civil, and not a criminal, action. We may add that, if it were a distinct crime to practice

lewdness in any manner in which acts of lewdness may be committed, then in a complaint, or an information, or indictment charging such offense it would be necessary to describe the specific acts constituting the lewdness. But, as stated, the situation in a case of this character is entirely different, the thing directly aimed at by the action being the nuisance. The cases cited in the Laine Case, supra, sustain this view. See, also, People v. Peterson et al., 187 Pac. 1079, and cases therein cited.

[2] Another point raised in the present appeal is that evidence of the sale of intoxicating liquors in the Casino Dance Hall was improperly admitted. Our decision in the Laine Case, supra, also disposed of this point adversely to the contention of appellants.

It is next urged that, as the complaint alleged and the answer denied that a nuisance existed at the commencement of the action, a determination of the issue thus raised was necessary, and that the court did not determine the question. The allegation of the complaint, which was filed September 24, 1917, in this particular, was:

"That on or for some time prior to the 15th day of September, 1917, and ever since that date, said premises were and now are used for the purposes of lewdness," etc.

[3] The court found that certain facts existed, among which were certain enumerated acts of lewdness practiced by the inmates of the building complained of, the dates of the commission of said acts being specifically given. One of the dates on which it was found that acts of lewdness were committed by female inmates of the place was September 15, 1917, before the date of the institution of the action. Other dates on which said acts were found to have been practiced by such female inmates were December 11, 1917, and December 22, 1917, which were subsequent to the filing of the petition in the action, said petition having been filed and the action thus commenced on September 24, 1917. Furthermore, the court finds generally that there "was conducted in said building and on said premises what is termed a dance hall, with two bars and many boxes; that intoxicating liquors were sold in said dance hall," etc.; and then proceeds to find that certain acts of lewdness were practiced therein by the women and the men frequenting the same. We think it is clear that the implication from the findings, when considered, as they must be, in their entirety and by the light of the averments of the complaint, is that a nuisance existed in and on the premises complained of at the time of the commencement of the action, and that thus the proposition was determined by the court.

Counsel for appellants cite the case of People v. Dillman, 37 Cal. App. 415, 174 Pac. 951, as supporting the obviously sound proposition that, if a nuisance has been suppressed or abated before action to abate it has been commenced, and does not exist at the time of the commencement of the action for its suppression, then in that case such action has no foundation for its support, inasmuch as there would be no nuisance in existence to abate. But in the Dillman Case it was also said:

"If there had been evidence sufficient to support a finding that the nuisance had been abated before this action was commenced, we doubt not that the court below would have dismissed the proceeding or found against the averments of the petition."

In the present case there is no evidence to which our attention has been called or which has, on reading the transcript, arrested our attention that the nuisance complained of had been abated at the time of the commencement of the action. To the contrary, there is some evidence in the record tending to show that there was no ellipsis in the maintenance of the nuisance at and on the premises from the time that acts of lewdness were shown to have been practiced there before the filing of the petition for the abatement of the nuisance to a day or two prior to the day on which the trial of the action was begun.

The legal propriety of certain rulings of the court interdicting the cross-examination of certain witnesses for the plaintiff with regard to the question of their interest in the case in behalf of the plaintiff, and allowing testimony as to the general reputation of the premises complained of, is challenged and said rulings denounced as having been prejudicial in their effect upon the rights of the appellants. Of these, the first called to our attention involve a refusal by the court to allow the appellants to ask several witnesses, on cross-examination, how much they were paid for their services by the organization known as the "State Enforcement and Protective League," by which they had previously testified that they were employed as detectives or agents to secure proof against places in which prostitution or assignation or lewdness, or all these acts, were habitually carried on, and that they were fully paid for their services in prosecuting that work. Each of said witnesses was asked that question, to which the court sustained the objection interposed in each instance by the district attorney.

It has been held that it is proper cross-examination, as affecting the credibility of the testimony of a witness who, as a detective, has procured evidence and testified against a person charged with crime, to ask such witness how much compensation he is paid for his services as such detective, even after he has testified that he has been fully paid for such services. People v. Loris, 131 App. Div. 127, 115 N. Y. Supp. 236; State v. Carroll,

85 Iowa, 1, 51 N. W. 1159; State v. Tosney, 26 Minn. 262, 3 N. W. 345. The reason of the rule is given in the first case above named and is that such a cross-examination might disclose an inordinate eagerness, motived by a desire to retain a highly paid employment, to show how successful the detective has been in working up a case against the accused, "and the time of payment might indicate that, despite the witness, the compensation was contingent upon some successful step in the prosecution of the crime."

We can readily perceive the importance of bringing out, on cross-examination, if thus it can be done, the fact, if it be a fact, that a detective employed to procure evidence in a case is to be paid for his services as such only upon the contingency that the result of the trial is favorable to the side by which he is so employed, but we cannot perceive how the amount of his compensation, where not contingent or to be paid only upon his success in procuring evidence sufficient to gain a victory of the issue for his side, can be of any special consequence as affecting his credibility as a witness, since it may well be assumed that, where he is not shown to be otherwise personally interested in the case, he is receiving or to receive compensation for his services. Indeed, in this case, the detectives who testified for the petitioner stated, as seen, that they were compensated for their services, and this consideration could just as effectually have been pressed upon the court as revealing an interest in the case as against the appellants which alone should be regarded as of a character to affect, according as the trier of the facts might view it, the credibility of the detectives as witnesses as if the precise amount of their compensation had been shown, which fact is all that the question disallowed as cross-examination called for.

[4, 5] But, while we think it would have been the proper course to allow that question to be answered, and further to permit the cross-examination to be extended to an inquiry as to whether the compensation of the detectives for their services in procuring evidence sufficient to establish a case against the appellants was contingent upon their success in that behalf, still we are not convinced that we would be justified in holding that the errors involved in the disallowance of the cross-examination referred to were prejudicial, or, in view of a consideration of the entire record, operated to produce a miscarriage of justice in the case. The judge who tried the case, for some reason—perhaps from a consideration of the overwhelming evidence directly showing that acts of lewdness were practiced in the building—was undoubtedly of the opinion, as we may assume from his rulings, that what precise compensation the detectives received, or whether their compensation was contingent upon the establishment of a case under the law, would be a matter of no consequence one way or the other in the determination of the ultimate issue in the case, and from all this we may well assume that, if the cross-examination had been allowed and it had thus been developed how much compensation each of the detectives received for his services or that his compensation to some extent was made to depend on whether the premises, as maintained, were sufficiently shown to be a nuisance to warrant an adjudication to that effect, the result would not have been affected thereby or have been any different from what it was as indicated by the decree. But, at all events, the evidence seems to show conclusively that acts of lewdness—such as the exposure of their nether limbs to males by the female inmates and the general use of obscene language and the solicitation, addressed by the women to the male frequenters of the place, and expressed in the most vulgar words conceivable, to indulge with them in sexual acts for money—were habitually practiced in the place. Therefore, as before stated, we think it is very clear that no miscarriage of justice resulted from the errors complained of in the rulings disallowing the cross-examination referred to. Const. art. 6, § 4½.

The next point urged is that witnesses who were nonresidents of the county of Sacramento were permitted by the court, over appellants' objections, to testify concerning the general reputation of the premises in question. It is provided in the statute that—

> "Evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance."

Among the witnesses who were permitted, against objection by the appellants, to testify to the general reputation of the premises, were Edwin E. Grant, executive officer of the State Law Enforcement and Protective League, an organization established for the special purpose of seeing that the Abatement Act is enforced, who once resided in Sacramento for a brief period, and who had since frequently visited said city; Harold F. Gray, state health officer of the Northern district of the state board of health, residing at Chico, but who had visited Sacramento several times during each of the several preceding years; S. J. Holsinger, secretary of the Church Federation of Sacramento, who testified that he had resided in Sacramento for the period of one month previously to the trial.

The objection here urged to the testimony of these witnesses is that "general reputation," being what people in a community commonly say about a thing existing or a person residing in such community, the witnesses named, since they were not residents of the city of Sacramento but made only sporadic visits thereto, were not competent to give testimony relative to the general reputation

of the premises in question. As supporting this objection, counsel for appellants cite the case of Tingley v. Times-Mirror Co., 151 Cal. 1, 27, 89 Pac. 1097, 1107, and certain cases referred to in the opinion therein. The testimony excluded by the trial court in that case was in the form of a deposition by a party who had gone to the city of Boston for the express purpose of investigating the character and standing in that city, where she once resided, of the plaintiff; the witness making the deposition having gone to Boston for the purpose stated "with a special bias," as the court said, against plaintiff. Upholding the action of the trial court in refusing to receive the deposition and permit it to be read in evidence in the case, the Supreme Court said:

"As general reputation consists of the estimation in which one is held in the community in which he resides, it can only properly and safely be testified to by a member of the community; it is the opinion of a member of a community as to the estimation in which another who moves in it is held generally by that community. Such member has the means of knowing what that general reputation is and can properly speak of it. It would be extremely dangerous to enlarge the rule so as to permit a stranger to a community, entering into it with special bias against another (as this Boston witness showed he was against plaintiff), to testify as to his opinion of the reputation of that other, based upon an interview with a limited number of persons in the community, possibly equally as prejudiced as himself. Under such circumstances it could not be said that he was testifying from his knowledge of the general reputation of the party, or that he was expressing his own opinion on the subject. He would be but stating his conclusion from the statements of others, derived from specific inquiry—a conclusion which would amount to but hearsay evidence at most. (State v. Forshner, 43 N. H. 89, 80 Am. Dec. 134; Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616.)"

[6] No just adverse criticism of the rule as it is above stated can be suggested; and, while we are not prepared now to say that what is said in the above extract from the case named applies with all its force to testimony of the general reputation of a building as a place where acts of lewdness are customarily practiced, we are prepared to say that the testimony as to that matter was wholly unnecessary in this case, if the court below, as we may assume that it did, attached full credit to the other testimony directly showing that such acts were, and had been for some time prior to and down to the time of the commencement of this action, customarily practiced in the building, for, as before declared, the direct testimony referred to is amply sufficient to support the findings and the decree. And it is for this reason that we are precluded from holding that the error, if it was error, in admitting the testimony of the general reputation of the building as maintained by the appellants was prejudicial in its effect upon the rights of appellants or resulted in a miscarriage of justice.

There are some other assignments involving the claim that prejudicial error was committed by certain rulings bearing upon certain evidence; but those, even if the assignments are well made, we regard as of such minor consequence as to justify us in concluding that they could not have affected or changed the result arrived at by the trial court upon the ample direct evidence showing or strongly tending to show that in the building involved herein acts of lewdness were habitually committed by both the female and male frequenters of the place.

[7] We may well conclude this opinion by calling attention to the fact that we have before taken occasion to say that it is no part of the duty of a prosecuting officer to establish a case, either criminal or one arising under the "Red Light Abatement Act," by means of improper testimony (People v. Dillman, supra), and that in a case of either kind there should be no desire to accomplish a victory for the people unless there is available to the prosecutor sufficient competent testimony to justify a conviction or a judgment. The purposes of the Abatement Act, laudable though they may be, have in no way changed the general and elementary rules of evidence by which disputed questions of fact are to be determined in courts of justice, and we can conceive of no reason why they should be departed from in the proof of a case under said act. Indeed, since the statute authorizes the court in a case of this character to deprive, by its decree, the owner of a building of which complaint is made under said statute of its use for any purpose for the period of one year from the date of the decree, and further likewise authorizes the confiscation of the personal property used in the building, it is eminently proper that the trial of such an action should, if anything, be prosecuted with greater care and consideration of the rights of such owner or owners than is the ordinary civil case.

The foregoing suggestions are prompted by the conviction, crystallized from an examination of records on appeal in many of the cases prosecuted under the Abatement Act which have come to this court on appeal, that there appears to be a disposition to sustain the complaints therein by means of incompetent as well as competent evidence, and we are constrained to say that the record before us justifies us in declaring that this case does not appear to be altogether free from this criticism.

However, for the reasons herein given, the judgment appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

(46 Cal. App. 578)

CUDDAHY v. GRAGG et al.
(Civ. 3166.)

(District Court of Appeal, Second District, Division 2, California. March 16, 1920.)

1. Appeal and error ⟸103—Order granting motion to strike demurrer from files not appealable.

An order granting a motion to strike a demurrer from the files on the ground that it was not filed within the time allowed by law, that it was not served within time, and was frivolous, is not appealable.

2. Judgment ⟸107—Default cannot be entered where pleading is on file though filed after time.

A default judgment cannot be entered where there is a pleading as demurrer on file, though it was filed after expiration of time.

3. Pleading ⟸352—Where a pleading is filed after expiration of time allowed, it may be stricken.

Where a demurrer is filed by defendant after expiration of the time for pleading, it may be stricken because filed out of time.

4. Appeal and error ⟸1042(1)—Striking demurrer from files harmless error, where defendant could have answered or again demurred.

Where the court would have been warranted in overruling defendant's demurrer filed after expiration of time without leave to answer, defendant cannot complain that his demurrer was stricken from the files where default was not entered until almost three months after the motion to strike was granted, and meanwhile defendant on proper showing could have moved for leave to file an answer or even another demurrer.

5. Appeal and error ⟸1031(1)—No presumption of injury from error.

Since the adoption of Const. art. 6, § 4½, injury is no longer presumed from error, but must affirmatively appear from an examination of the record or from the extrinsic nature of the error itself.

Appeal from Superior Court, Inyo County; Wm. H. Dehy, Judge.

Action by Martin P. Cuddahy against C. P. Gragg and others and Clyde L. Connor. From an order striking his demurrer from the files as well as a judgment of foreclosure, the last-named defendant appeals. Appeal dismissed, and judgment affirmed.

Harry Ellis Dean, V. J. Cobb, and W. L. Pollard, all of Los Angeles, for appellant.

L. C. Hall and Hogan & Carlson, all of Bishop, for respondent.

FINLAYSON, P. J. This is an action to foreclose a mortgage on real property in Inyo county. Defendant Connor appeals from the decree of foreclosure, given and made after the entry of his default.

[1] Plaintiff, the holder of the mortgage and the promissory notes secured thereby, filed an amended complaint, making parties defendant, besides the mortgagor and maker of the notes, the defendant Connor and others, who, the complaint alleges, claim to have some interest in or lien upon the mortgaged premises as subsequent purchasers or incumbrancers. The summons was served upon Connor in Inyo county on January 25, 1917. Return on the summons was not made until February 12, 1917. Meanwhile, on February 7, 1917, or three days after the expiration of the 10 days afforded him by the law within which to appear and answer or demur, Connor filed a demurrer to the amended complaint. Service of the demurrer was made on February 5, 1917, by mailing it at Los Angeles, addressed to plaintiff's attorney at Bishop. Thereafter, on notice duly served and filed, plaintiff moved to strike the demurrer from the files upon the grounds: (1) That it was not filed within the time allowed by law; (2) that it was not served within the time allowed by law; and (3) that it is sham and frivolous. At the time noticed, viz., April 10, 1917, the motion to strike was granted on the ground that the demurrer was not served or filed within the time allowed by law. On July 5, 1917, Connor's default was entered by the clerk, and on July 13, 1917, the foreclosure decree was entered. Appellant appeals both from the judgment and the order striking the demurrer from the files. The order is not appealable, and the appeal therefrom must therefore be dismissed.

It is contended that the court erred in striking appellant's demurrer from the files and in entering judgment against him on his default. As we think the order was warranted by the fact that the demurrer was not filed in time, we shall not consider whether it is justifiable on either of the two other grounds stated in the notice of motion.

[2, 3] Appellant has cited a number of cases wherein it is held that a default for failure to answer or demur cannot be entered if, at the time of the entry of default, an answer or demurrer be on file, even though it was filed out of time. That a court has no authority to enter the default of a defendant if, when it is entered, he has a pleading on file, even though it was filed out of time, is a proposition supported by an almost unbroken line of decisions. The pleading, though filed out of time, is not a nullity; and until it has been disposed of by motion, or in some appropriate manner, no judgment by default can be entered. Tregambo v. Comanche M. & M. Co., 57 Cal. 501; Reher v. Reed, 166 Cal. 525, 137 Pac. 263, Ann. Cas. 1915C, 737; Hestres v. Clements, 21 Cal. 425; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907; Bertagnolli Bros. v. Bertagnolli,

23 Wyo. 228, 148 Pac. 374; Kerney v. Hatfield, 30 Idaho, 90, 162 Pac. 1077; Ann. Cas. 1915C, p. 738, note to Reher v. Reed, supra. But while it is true that a defendant's default may not be entered until his demurrer or other pleading, though filed after the time permitted by law, has been disposed of, nevertheless it is a proper practice in such case to move to strike the pleading from the files. The plaintiff has no absolute right to have the pleading stricken from the files merely because it was not filed in time; and, on the other hand, the defendant has no absolute right to have his belated pleading remain in the files; for a defendant cannot, as of right, answer or demur after the expiration of the time prescribed by statute. It is a proper practice, therefore, for the plaintiff to move to strike the pleading from the files; and, in the exercise of a sound discretion, the court very properly may grant such motion to strike. Pett v. Clark, 5 Wis. 198; Bowers v. Dickerson, 18 Cal. 420; Acock v. Halsey, 90 Cal. 219, 220, 27 Pac. 193; Lunnun v. Morris, supra; Bertagnolli Bros. v. Bertagnolli, supra; Ann. Cas. 1915C, p. 738.

"If pleaded out of time, or if leave was not obtained, or if there was any reason why the defendant ought not to have been allowed to plead, the proper practice would have been to move to strike the plea from the files. Having done so, and the motion having been sustained, the default could be entered. * * *" Pett v. Clark, supra.

[4, 5] Moreover, even if striking the demurrer from the files could be regarded as an irregularity, at most it could be regarded as harmless error only—an irregularity not resulting in a "miscarriage of justice." The complaint does not appear to be demurrable on any of the grounds set forth in the demurrer. At any rate, appellant has not called to our attention any defect in the complaint; and we perceive none. The case seems to be one where the court would be warranted in treating the demurrer as frivolous, interposed to gain time, and in overruling it without leave to answer. Seale v. McLaughlin, 28 Cal. 669; Barron v. Deleval, 58 Cal. 95. The result to defendant would be the same whether his demurrer were overruled without leave to answer, or stricken fom the files. Nay, in the instant case, striking the demurrer from the files was less disadvantageous to defendant than if it had been overruled without leave to answer. His default was not entered until almost three months after plaintiff's motion to strike was granted. Meanwhile, on making a proper showing, by affidavit, of mistake, inadvertence, surprise, or excusable neglect, appellant had he been so advised, could have moved the court for leave to file an answer or even another demurrer. This he did not elect to do. Since the adoption, in its present form, of section 4½, art. 6, of the Constitution, injury no longer is presumed from error, but must appear affirmatively upon an examination of the record or from the intrinsic nature of the error itself. We fail to see how appellant could have been harmed by the course pursued by the lower court, even if we should concede, which we do not, that striking the demurrer from the files was not a proper disposition to make of it.

The appeal from the order is dismissed. The judgment is affirmed.

We concur: SLOANE, J.; THOMAS, J.

46 Cal. App. 587

FISK v. POPLIN. (Civ. 3262.)

(District Court of Appeal, First District, Division 2, California. March 16, 1920.)

1. Trial ⟸165 — Motion for nonsuit admits truth of plaintiff's evidence.

Conflicts in the evidence could not be considered on motion for nonsuit.

2. Municipal corporations ⟸706(5)—Findings of pedestrian's care and automobile driver's negligence as cause of accident supported.

In action for injuries when struck by defendant's automobile while crossing a street, plaintiff's testimony *held* sufficient to support findings that plaintiff exercised ordinary and proper care for her own safety, and that negligent acts of defendant were proximate cause of accident.

3. Negligence ⟸3—Law fixes no exact standard of care.

The law fixes no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances.

4. Damages ⟸43, 160—Medical expenses may be recovered; proof of incurring physician's bill inadmissible under allegation of payment.

One cannot prove that he has incurred a physician's bill under an allegation in his action for injuries that he has paid it, but under a proper pleading, where such fact is averred in the complaint, recovery may be had for medical services for which one has become liable.

5. Damages ⟸148—Allegation insufficient to cover liability for medical, hospital, and nursing expenses.

In action by woman for injuries when struck by defendant's automobile, allegation of complaint that plaintiff had been forced to expend $300 in doctor's bills, hospital bills, medicines, and X-ray pictures, no part of which had been paid, and would be compelled to expend a larger sum, *held* insufficient to cover any liability for medical, hospital, and nursing expenses.

6. Damages ⟸130(2)—$500 for injuries to kneejoint not excessive.

In action for injuries to woman when struck by plaintiff's automobile allowance of

$500 damages for pain and suffering and present and possible future disability from injury to a kneejoint required to be strapped to keep it from slipping *held* warranted.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Clara H. Fisk against John S. Poplin. From judgment for plaintiff, defendant appeals. Affirmed, subject to remittitur.

H. L. Poplin, of Los Angeles, for appellant.

E. E. Morris, Frank Karr, and Nat B. Browne, all of Los Angeles, for respondent.

LANGDON, J. [1] This is an appeal by the defendant from a judgment against him for $682.75, recovered by the plaintiff as damages for personal injuries alleged to have been caused by the negligent driving of defendant's automobile, which resulted in a collision between it and the plaintiff, causing her injury. The appellant assigns as error the ruling of the trial court in denying his motion for nonsuit, made at the end of plaintiff's case, and also assigns as error certain findings of the trial court, under the claim that such findings are not sustained by the evidence. Both contentions may be considered together, as both involve a discussion of the evidence appearing in the record, which is favorable to the contentions of the plaintiff. Conflicts in the evidence could not be considered upon a motion for nonsuit, and, in view of the findings of the trial court, which were favorable to the plaintiff, we are not concerned with the evidence which may appear in the record to support the defendant's contentions, as our examination of the evidence must end upon finding therein substantial support for the findings of the trial court.

At the time of the accident the plaintiff was crossing Hill street at its intersection with Sixth street, in Los Angeles. Hill street runs north and south and crosses Sixth street at right angles. There are double street car tracks on each street. The plaintiff was crossing Hill street from east to west on the north side of Sixth street. When she had reached a point on the north-bound tracks on Hill street, she was struck by defendant's automobile, which was going north on Hill street. The court found that the plaintiff exercised ordinary and proper care for her own safety, and that the negligent acts of the defendant were the direct and proximate cause of the accident.

[2] These findings are supported by plaintiff's testimony that, when near the curb on the east side of Hill street, she looked up and down the street and saw no vehicles whatever coming; that she looked ahead at the street car coming to a stop on the tracks on the west side of Hill street, "except I looked both ways as I stepped from the curb, and there were no vehicles whatever within my sight." It is contended by appellant that this testimony is contradicted by the physical facts. Appellant assumes, without any evidence in the record therefor, that defendant's automobile was on the south line of Sixth street at the instant that the plaintiff started to cross the street, and then he argues that if plaintiff had looked she must have seen it. He further argues, in this connection, that the finding of the court and the testimony of the several witnesses that the defendant was going at the rate of 15 miles an hour are contradicted by the physical facts. He points out that, if the machine had been going at the rate of 15 miles an hour and had left the south line of Sixth street at the instant plaintiff started across the street, it would have passed the point of collision before plaintiff reached it in view of the admitted measurements of the street, and the admitted speed at which plaintiff was walking. We may not, however, assume that the automobile left the south line of Sixth street at the instant plaintiff started across the street, in the absence of evidence upon this point, and in contradiction of the findings of other facts made by the trial court. The motorman on the south-bound car that had just stopped at the north line of Sixth street at the time of the accident testified that he saw the automobile first when it had about reached the center of Sixth street. The traffic policeman, who stood in the center of the street at the intersection of the two streets, testified that he saw the automobile when it passed in front of him; that plaintiff was almost at the east rail of the north-bound track when he first saw her, and the automobile was just then passing in front of him. There is other testimony to the same effect. There is no testimony establishing the basic fact of appellant's argument. Indeed, if we proceed along the chain of logic from the finding of the court that the defendant was going at the rate of 15 miles an hour, and take into consideration the admitted facts with regard to distances and the rate of speed at which plaintiff was walking, we arrive at the inevitable conclusion that the automobile was some distance south of the south line of Sixth street when plaintiff started to cross the street.

The trial court found that the defendant was traveling in his automobile north bound on Hill street and near the center of said street, and that the said defendant negligently failed to keep any proper lookout for pedestrians, and negligently failed to give any warning of his approach to the place of accident, and that at said time he was traveling at about 15 miles per hour, and that such rate of speed was negligent under the circumstances, that at said time and place

there were no other vehicles or other pedestrians to have prevented defendant from driving on the right-hand side of said street and near the curb thereof, and that he negligently drove near the center of said street. It is true the defendant testified that there was a wagon on the right-hand side of the street which made it necessary for him to drive in the center of the street in order to pass the same, but there is testimony of several other witnesses from which the court might conclude that this wagon was not in a position to interfere with defendant in driving to the right of the center of the street at that place and that time.

[3] It would serve no useful purpose to answer all the arguments made by the appellant to show that the defendant was in the exercise of proper care, and that the plaintiff was not. These are questions of fact for which there is no precise and unvarying measure. As was said in the case of Scott v. San Bernardino V., etc., Co., 152 Cal. 604, 93 Pac. 677, cited by both parties here:

"The law has fixed no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances. Hence in ordinary cases it is peculiarly a question for the jury or court trying the cause to decide as a matter of fact whether or not the person was culpably negligent."

[4, 5] The other objection of the appellant is made in regard to the damages allowed. It is contended that, as the proof shows that the doctor's bill of $100 has not yet been paid, and as the proof also shows that the bill for hospital and nurse was paid by plaintiff's son, with whom she lives, therefore it was improper to allow the same under the allegations of the complaint, as these sums were not expended by the plaintiff. It is true that the cases hold that one cannot prove that he has incurred a physician's bill under an allegation that he has paid it. Donnelly v. Hufschmidt, 79 Cal. p. 76, 21 Pac. 546. But it is also true that under a proper pleading, where that fact is averred in the complaint, recovery may be had for medical services for which one has become liable. Donnelly v. Hufschmidt, supra; McLaughlin v. Railway Co., 113 Cal. 592, 45 Pac. 839. It would appear, however, that in this case the allegations of the complaint are not sufficient to cover such liability. The allegation of the complaint is that plaintiff "has been forced to expend the sum of $300 in doctor's bills, hospital bills, and medicines and X-ray pictures, no part of which has been paid, and will be compelled to expend a larger sum in the future, the exact amount of which cannot at this time be determined."

[6] The court, in allowing damages in the sum of $682.75, evidently allowed $100 for the doctor's bill, which was at that time unpaid, and $82.75 for hospital bills, etc., which had been paid by the plaintiff's son, and $500 for damages for pain and suffering and present and possible future disability. The physician testified that it was hard to say whether or not the injury to the knee was permanent; that it had not improved much in four months, and that it might remain weak for an indefinite time, and that he thought it might be a permanent injury; that plaintiff had been in the hospital from October 16 to November 20, 1917; that she suffered considerably for a few days as a result of the injury; that he had examined her knee on May 14, 1918, and found inflammation of the bone where the bone had been fractured, and also found that there was too much play from side to side of the bones of the knee-joint when she would use her knee; and that he had made plaintiff a leather strap around the knee to keep it from slipping. The evidence of the plaintiff and her son was to the same effect, and plaintiff also testified that she was using the brace provided by her physician up to the time of the trial. Under such circumstances, it would seem that the allowance of $500 damages for pain and suffering and present and possible future disability was fully warranted. The $82.75 paid by the son as the hospital bill for his mother was a proper allowance. We may assume in favor of the findings of the court, that this amount was paid by the son as agent of his mother. The mother was an elderly woman, and when she was ill at a hospital her son, with whom she lived, would naturally pay her bills for her. Under the holding of the cases cited herein, it appears, however, that the introduction of evidence of the unpaid doctor's bill was improper under the pleadings. The objection of the defendant to this evidence that it was incompetent, irrelevant, and immaterial, and did not tend to prove any issue made by the pleadings, was sufficient objection.

In the case of McLaughlin v. Railway Co., 113 Cal. 592, 45 Pac. 839, where a similar situation arose, the court reversed the judgment and remanded the case with leave to plaintiff to amend his complaint to include therein an allegation covering expenses incurred, as well as expenses paid. This would have to be the order in the present case but for the suggestion and request of the plaintiff and respondent that, if this court should decide that the allowance of the amount of the doctor's bill was erroneous, it order the plaintiff to remit that amount of the judgment. Under the circumstances, we can see no reason for sending the case back for a new trial, resulting in delay and expense, for an error, the effect of which can be corrected upon appeal so as to protect the rights of the defendant and at the same time be satisfactory to the plaintiff.

The plaintiff and respondent is therefore ordered to remit $100 of the judgment ob-

tained, and, when said amount has been remitted, the judgment will stand affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

46 Cal. App. 677

CLARK et al. v. SHEPHERD et al. (Civ. 3306.)

(District Court of Appeal, Second District, Division 2, California. March 22, 1920.)

Courts ⇐476—Original application to appellate court to enforce private rights, denied.

Where a petition for mandamus is based on private rights only, and does not show any peculiar emergency or exigency justifying the issuance of the writ by the appellate court in the first instance, it shows no sufficient reason why it should not have been made to the superior court, and the application will be denied.

Original application for mandamus by S. N. Clark and another against L. E. Shepherd and others. Application denied.

Alfred H. McAdoo, of Los Angeles, for petitioners.

PER CURIAM. This is an application for a writ of mandamus. The application is based upon private rights only. The matters to be litigated are not publici juris. Nor does it appear that some peculiar emergency or exigency exists, such as would justify the issuance of the writ by this court in the first instance. The petition shows no sufficient reason why the application should not have been made to the superior court, and the application for the writ is therefore denied.

46 Cal. App. 599

LOUDON v. LOUDON. (Civ. 3301.)

(District Court of Appeal, First District, Division 1, California. March 18, 1920. Hearing Denied by Supreme Court May 17, 1920.)

1. Divorce ⇐91—Residence giving jurisdiction must be alleged and proved.

Under Civ. Code, § 128, it is the fact of residence which gives the court jurisdiction to grant divorce, and such fact must be alleged and proved.

2. Divorce ⇐152—Finding of jurisdictional fact of residence not necessary before court can deny decree.

Finding of the fact of residence giving the court, under Civ. Code, § 128, jurisdiction to grant divorce, is not required before the court can deny a decree, particularly when both allegation and proof thereof are amply sufficient to meet every demand.

3. Appeal and error ⇐1071(6)—Failure to find harmless in absence of evidence on which finding could have been made.

Failure to find on issue is not ground for reversal, where record discloses no evidence on which a finding favorable to the complaining party could properly have been made.

4. Divorce ⇐146—Order for submission of cause not erroneous as depriving plaintiff of fair trial.

Plaintiff in a divorce action *held* not deprived of fair trial by action of court in ordering cause submitted after hearing defendant's and plaintiff's testimony and receiving depositions.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action for divorce by James Arlington Loudon against Sarah Hancock Loudon. From judgment denying divorce, plaintiff appeals. Affirmed.

Tobias R. Archer, of Los Angeles, for appellant.

Frank C. Collier, John Schlegel, and Louis F. Laberere, all of Los Angeles, for respondent.

WASTE, P. J. This is an action for divorce brought by the plaintiff upon grounds of desertion and extreme cruelty. Defendant denied the allegation of the complaint, and by way of recrimination charged the plaintiff with many acts of alleged cruelty, inflicted upon her by the plaintiff, and with failing to properly support defendant and the two minor children of the marriage. She prayed for the custody of the children, for a division of the community property, and for counsel fees and expenses of maintaining the action. The trial court made full and explicit findings, the ultimate facts found being that the defendant left the plaintiff, by reason of the harsh and cruel treatment of the defendant, and said minor children, by the plaintiff, and that the plaintiff was guilty of extreme cruelty toward the defendant, in that he caused her grievous mental suffering.

The plaintiff was denied any relief, and judgment was entered in favor of the defendant that she recover, from the plaintiff, the sum of $200, as her reasonable attorney's fee, also her costs of court and all moneys necessarily expended by her in defense of the action, taxed at and allowed for the sum of $285.50. From this judgment the plaintiff appeals.

Appellant first attacks the finding of the trial court as to the residence of the parties. The original complaint was filed January 29, 1918, and the amended complaint was filed March 11, the same year. It is granted by appellant that in each of these pleadings the averment of residence was sufficient. The truth of the allegation was

admitted in the answer, and appellant further concedes, and the record discloses, that the fact of the jurisdictional residence of the parties was clearly established and amply corroborated by the testimony taken at the trial in the court below. The finding is:

"That the plaintiff and defendant have each been, and now are, residents of the county of Los Angeles, state of California, for more than one year last past."

The findings were filed August 8, 1918. Appellant contends that this is not a finding that the parties, or either of them, resided within the jurisdiction of the court for one year, next preceding the commencement of the action, but is "a finding of no jurisdiction for want of residence." He reasons, "Of course, plaintiff's divorce must be denied on such a finding, which is contrary to the evidence." On this ground he demands a reversal.

[1-3] It is the fact of the residence which gives the court jurisdiction to "grant" a divorce. Section 128, Civ. Code. That fact must be alleged and proved. While a finding, similar to the one above quoted, was held insufficient to support a decree of divorce, in Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, the Supreme Court has since pointed out that there is no statutory provision making express findings essential to the jurisdiction of a court to grant such relief. Flynn v. Flynn, 171 Cal. 746, 749, 154 Pac. 837. We know of none requiring such a finding, as that called for by appellant, to be made before the court may "deny" a decree, particularly when, as in the case at bar, both allegation and proof were amply sufficient to meet every demand. Furthermore, the failure to find on an issue is not ground for reversal where the record discloses no evidence on which a finding favorable to the complaining party could properly have been made. Maloof v. Maloof, 175 Cal. 571, 573, 166 Pac. 330.

Appellant specifies a number of particulars in which he claims the findings of fact are general, not warranted by the evidence, and not sufficient to support the judgment. A reading of the entire findings, however, and an examination of the voluminous record of the testimony, indicates that appellant, in making this contention, has only picked out isolated portions of the findings. He also fails to print in his appendix a large portion of the record which respondent has called our attention to, and which fully supports the findings attacked. As a whole the findings are complete and properly dispose of the issues presented by the pleadings and proof.

[4] Appellant contends that he was deprived of a fair trial by the action of the court in ordering the cause submitted, as it did. The record does not bear him out in this particular. In the opinion of the trial judge the plaintiff was failing to make out a case. He so stated, giving reasons which appear to be sound, and directed the attention of counsel to some of the testimony on which he based his opinion. In order to cover one feature of the alleged desertion of plaintiff by the defendant, the latter was called to the stand, by the court's permission, and with consent of counsel. She was being cross-examined by the attorney for the plaintiff, when the court suggested that immaterial matters were being gone into, and that owing to other court business the case would be closed at noon on that day. When the cross-examination was finished, counsel for the plaintiff offered, and there were received, in evidence five depositions in rebuttal; it being stipulated that the court, at its own convenience, might read the same. The plaintiff was then recalled as a witness in his own behalf, and testified in rebuttal at some length. The court thereupon stated that any further evidence would be merely cumulative; that with the permission of the parties he would take the case under submission, read the depositions, and decide the matter in the course of a few days. The record indicates that this course was agreeable to all the parties and that with that understanding the case was submitted. Plaintiff's affidavit, used on motion for a new trial, to the effect he was surprised by the action of the court, finds no support in the record, and presents no matter of such compelling force as to indicate he did not have ample opportunity to fully present every phase of this case.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

46 Cal. App. 641

KOEBERLE v. COIT. (Civ. 3174.)

(District Court of Appeal, Second District, Division 2, California. March 28, 1920.)

1. Appeal and error ⟸553(2)—Statutes authorizing appeal on typewritten transcript do not provide for presenting evidence by bill of exceptions.

Code Civ. Proc. §§ 953a, 953b, and 953c, providing for an appeal on typewritten transcript, make no provision for presenting the evidence by a bill of exceptions, and it is only where the proceedings on trial have been reported and can be reproduced in full by the reporter's transcript that this form of appeal can be resorted to.

2. Chattel mortgages ⟸72—Note and chattel mortgage given to avoid lawful levy of execution is valid.

A note and chattel mortgage given to avoid lawful levy of execution on property not shown to be exempt and to avoid annoyance and humiliation are valid and enforceable.

3. Chattel mortgages ⟸79—Evidence insufficient to show that note and mortgage were obtained by threats to make invalid levy.

In an action on a note and chattel mortgage given by a judgment debtor who asserted that they were obtained by duress and menace by means of threat to levy execution upon exempt household furniture, and to cause the judgment debtor humiliation, evidence *held* to warrant a finding that the property proposed to be levied on was not exempt, and that the note and mortgage were not procured through fraud or menace.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by William Koeberle against Kathryn Coit. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles Thompson and J. H. Creighton, both of Los Angeles, for appellant.

Horace S. Wilson and Frank Lillard, both of Los Angeles, for respondent.

SLOANE, J. This action was brought upon a promissory note and chattel mortgage securing the same. The note and security had been given in satisfaction of a judgment against defendant on a store account. The defense was that the note and mortgage had been obtained by duress and menace, by means of a threat to levy execution under the former judgment upon defendant's exempt household furniture, and to set the same out in the street in front of defendant's home so that the neighbors would see that defendant's household goods were being taken under process of law. The trial court found against defendant's contention, and gave judgment for plaintiff on the note and mortgage, from which judgment defendant has appealed. The ground relied on for a reversal is insufficiency of the evidence to sustain the findings and judgment.

[1] The record is brought up on what purports to be a typewritten transcript under the alternative method of appeal, and consists of the judgment-roll and what is denominated a "bill of exceptions," and comprises a list of exceptions and objections to the jurisdiction of the court, to the sufficiency of the evidence to support the findings, and a brief synopsis of the evidence, in narrative form, followed by a certificate of the trial judge that—

"Because the foregoing evidence does not appear of record, I, the undersigned, the judge who tried the said action, have, on due notice, settled this bill of exceptions, to the end and for the purpose that the same may be made a part of the record herein."

Sections 953a, 953b, and 953c, Code of Civil procedure, providing for an appeal upon the typewritten transcript, make no provision for presenting the evidence by a bill of exceptions. It is only where the proceedings on the trial have been reported and can be produced in full by a reporter's transcript that this form of appeal can be resorted to. Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609; Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730. Respondent has, however, interposed no objection to the sufficiency of the transcript. To what extent, if at all, this may constitute a waiver of the defects pointed out we will not stop to consider, since we are satisfied that the evidence as presented does not show such a failure of proof with respect to any of the material findings as to justify a reversal.

[2, 3] The only material issue of fact in controversy is whether plaintiff procured the execution of this note and chattel mortgage by fraud, duress, or menace.

Defendant, in her testimony, avers that plaintiff and an associate representing himself as a constable appeared at her home demanding payment of the amount due on the original judgment against defendant, and, upon her expressing her inability to pay at that time, threatened then and there to take her household goods on an execution unless she gave a note and chattel mortgage for the amount due and owing, stating that in case of her refusal they would set the goods out on the street where her neighbors would be informed that defendant's goods were being seized for debt; and that to prevent such levy she consented to execute the securities demanded. Plaintiff and his witness, the constable, testify that they went to defendant's home with an execution, demanded payment of the judgment, and, on defendant's failure to pay, were about to levy upon some pictures that

were in defendant's house, but offered to give defendant further time if she would give a note for the amount, secured by mortgage upon certain articles of furniture, which defendant claimed to be her separate property; that defendant consented; and that it was under this state of facts that the note and mortgage were given.

There is no evidence in the record offered that the pictures referred to were "hanging pictures," "oil paintings or drawings painted or drawn by any member of the family," or "family portraits," or otherwise exempt from execution under section 690 of the Code of Civil Procedure. The court seems to have accepted plaintiff's version of the transaction. There was nothing unlawful in threatening to take on execution any property of defendant not exempt from execution. And if the note and mortgage were given to avoid a lawful levy, and any annoyance or humiliation attending such enforcement of collection of a valid debt, the defense offered in this case cannot be maintained.

We cannot say that the court was not justified in accepting the plaintiff's evidence.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

46 Cal. App. 561

NUSSBAUM v. TRAUNG LABEL & LITHOGRAPH CO. et al. (Civ. 2114.)

(District Court of Appeal, Third District, California. March 15, 1920.)

1. Municipal corporations ⟸706(5)—Evidence justifying finding automobile driver was negligent.

In action against two corporations and employé of one of them, selling agent for the other, for injuries to plaintiff when struck by automobile driven by the employé, evidence *held* to justify finding employé was negligent, and that it was his negligence which directly caused plaintiff's injury.

2. Master and servant ⟸300—Master responsible for damage to third persons by torts of servant.

Master is responsible to third persons for damage caused by wrongful acts or omissions of his servant in course of employment.

3. Master and servant ⟸302(1)—Liability for negligence of servant depends on authority.

Test of master's liability for negligence of servant in all cases depends on question whether injury was committed by authority of master, expressly conferred or fairly implied from nature of employment and duties incident, having regard to object, purpose, and end of employment.

4. Master and servant ⟸302(6)—Master not responsible for act of servant in his own behalf.

When servant acts without reference to services for which he is employed, and not to perform his employer's work, but for an independent purpose of his own, the employer is not responsible for his acts or omissions.

5. Master and servant ⟸330(1)—Burden on injured party to show servant acted within master's "business."

To establish liability of corporation for consequences of negligence of employé, burden rests on plaintiff, the injured party, to show that, when accident occurred, employé driving company's automobile was about its "business"; that is, engaged in doing some act within sphere of his duties as salesman for the company, or incident thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

6. Master and servant ⟸330(3) — Evidence held not to warrant finding salesman driving automobile was within scope of duties.

In action against corporation for injuries to plaintiff struck by company's automobile driven by its salesman, evidence *held* not to warrant finding that at time of accident salesman was acting within scope of his duties as such, or that act of returning automobile to place where he was to report in the morning was incident to his duties.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Carl F. Nussbaum against the Traung Label & Lithograph Company, a corporation, the Union Lithograph Company, a corporation, and R. W. Hornbeck. From judgment for plaintiff against defendants Union Lithograph Company and R. W. Hornbeck, they appeal. Judgment against defendant Hornbeck affirmed; judgment against defendant Union Lithograph Company reversed.

Duke Stone, of Los Angeles, for appellants.

Ray E. Nimmo, of Los Angeles, for respondent.

HART, J. This is an action for personal injuries. The case was tried by the court, sitting without a jury, and judgment was awarded the plaintiff for the sum of $439.25 against the defendants the Union Label & Lithograph Company and R. W. Hornbeck. The defendant Traung Label & Lithograph Company was acquitted by the court of any culpability in connection with the cause of the injuries complained of by plaintiff, and was accordingly awarded judgment for its costs. The appeal here is by the other defendants, the Union Label & Lithograph Company and Hornbeck, from the judgment against them.

The Union Label & Lithograph Company

was, at the time the injuries complained of by plaintiff were received by him, the agent in Southern California of the Traung Label & Lithograph Company for the purpose of selling the latter's labels in that part of California. The defendant Hornbeck was in the employment of the Union Company (as for the sake of brevity we will hereafter refer to said corporation the Union Label & Lithograph Company) as a salesman. For the purpose of facilitating the discharge of Hornbeck's duties as a salesman of said articles, the Union Company furnished him with an automobile. It appears that the automobile so furnished was the property of the Traung Company, but had been let or turned over by said company to the Union Company for the latter's use.

The general facts of the accident resulting in the injuries to the plaintiff are substantially as they are given in the following findings of the court:

"That on or about the 6th day of October, 1917, at the hour of about 8:55 o'clock in the forenoon of said date, while plaintiff was walking across Broadway at the north side of the intersection of Eighth street, in a westerly direction, in the city of Los Angeles, the defendant R. W. Hornbeck, who was then and there an agent and employé of the defendant corporation the Union Lithograph Company, and who was then and there operating and driving an automobile * * * for the use and benefit of said defendant corporation the Union Lithograph Company, did then and there willfully, negligently, wantonly, carelessly, and with wanton and reckless indifference to the safety of said plaintiff, drive and propel said automobile against said plaintiff and knocked him down, and in order to save himself from severe injury and while in the act of falling said plaintiff grabbed the left fender of said automobile, and was then and there dragged by said automobile for a distance of upwards of 10 feet before said automobile came to a stop, and thereby sustained the following injuries: [Describing them.]

"That plaintiff, upon entering the crossing of said intersection, did look in both directions to see whether or not there were any approaching motor vehicles, and did observe the said automobile driven by said defendant R. W. Hornbeck approaching from a southerly direction and about 200 feet away and proceeded to cross said intersection until he was obliged to stop by reason of the fact that there was on the westerly street car tracks a street car which was slowly proceeding in a southerly direction on such street car tracks, but, while plaintiff did not use ordinary care in that he failed to look both ways after proceeding across said intersection, yet the negligence of the said defendant R. W. Hornbeck was the proximate cause of the injuries so sustained by said plaintiff, in that he did not attempt, after discovering the location of said plaintiff in the middle of said street, to avoid the collision by stopping the said automobile; that he had control of said machine; that he saw plaintiff when at a distance of not less than 25 feet away from him; and that he could have stopped said automobile had he not been entirely indifferent to the safety of said plaintiff, and could have avoided striking plaintiff."

The general contentions of the appellants are that the findings are not supported by the evidence, and that the evidence without conflict shows that the plaintiff himself was guilty of negligence proximately contributing to the injuries he sustained.

The court, it will be observed, found that, while the plaintiff, in attempting to make the street crossing, failed to exercise that degree of care which is required of a pedestrian when in the act of passing over or across streets or highways, the evidence nevertheless disclosed that Hornbeck saw the plaintiff in the act of crossing the street at a sufficient distance from the automobile he (Hornbeck) was driving in ample time to have enabled him, by the exercise of ordinary care, to avoid a collision of the machine with the plaintiff, and that it was the want of such care that was the proximate cause of the accident and its consequences; in other words the court held that the facts developed a case to which the doctrine known as the last clear chance or opportunity applied.

[1] We are satisfied, from an examination of the evidence, that the court was therefrom clearly justified or warranted in finding that Hornbeck was negligent, and that it was his negligence which was responsible for and directly caused the injuries to plaintiff. Hornbeck admitted that he saw the plaintiff in the act of crossing the street, and that, although as he approached him he slackened the speed at which he had previously been traveling, he did not stop the machine until it struck the plaintiff. And from the testimony of other witnesses who saw the accident it is clear that Hornbeck saw the plaintiff in the street in time to have stopped his machine before reaching him, and therefore knew that plaintiff was in a position of peril.

The plaintiff testified that, as he started across the street, a street car was going in the direction of where he was in the street, and that he took a position between the two car tracks and stood there until the car had passed, and that before he had time to move from that position he was hit by Hornbeck's machine. One Marshall, who witnessed the accident, testified that he observed Hornbeck as he approached the spot where the plaintiff was standing when struck, and that he was driving at approximately the rate of 20 miles an hour. He said he saw another automobile going south (Hornbeck was traveling north), and Hornbeck swerved his car to the left to avoid the other automobile, and then proceeded on at a pretty lively rate of speed until his machine struck plaintiff. Marshall, addressing Hornbeck immediately after the accident occurred said, "Young man, I drive a car myself, and you was driving entirely

too fast past this corner." Hornbeck replied: "Yes; I know I was, and I tried to pass that car."

But it is not necessary to proceed further in a review herein of the testimony so far as it relates to the conduct of Hornbeck in the matter. As above declared, the findings that, notwithstanding the negligence of the plaintiff in not looking to see whether an automobile or other vehicle was approaching the spot where he was standing, Hornbeck saw plaintiff in a position of more or less peril in the street in ample time to have avoided the accident, if he had exercised ordinary care, and that his negligence in failing to exercise such care was the proximate cause of the injuries received by the plaintiff, are sufficiently supported. It follows that the judgment, as to Hornbeck, must be sustained.

But a more serious question, and one the decision of which has not been altogether free from difficulty, is whether Hornbeck was, at the time the injuries were received by plaintiff through the former's culpable negligence, acting within the scope of his duties as an employé of the appellant, the Union Company.

[2-4] It is, of course, an old, and indeed an elementary, doctrine:

"That, where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants, in the course of their employment." Shearman & Redfield on the Law of Negligence (6th Ed.) § 141.

But, while the scope of the rule as thus abstractly given is clear and easily understood, it is often difficult to determine whether it does or does not have application to a certain given state of facts; that is to say, whether the evidence does or does not show that the servant, when he committed or omitted to do the thing which caused the damage, was acting in the course of his employment. And, as is said by Judge Cooley, in his work on Torts, vol. 2 (3d Ed.) p. 1030:

"The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment and the duties incident to it; and, in determining the question of authority, we are to regard the object, purpose, and end of the employment."

Again, the learned author, at pages 1032 and 1033 of the same work, states the obvious proposition that—

"When a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either act or omission of the servant."

The question here, then, is: Was Hornbeck at the time he committed the tort complained of by the plaintiff about the business of his employer; that is, was he engaged in some act or the execution of some purpose which, while not of the actual duties of his employment, was an incident to his duties as an employé of the Union Company? After a painstaking examination and analysis of the evidence, we have not been able to persuade ourselves that an affirmative answer to that question can justly be returned.

Before proceeding to a presentation and examination herein of the evidence bearing upon the proposition now in hand, we call attention to the fact that there is absolutely no evidence in the record justifying the finding that the accident and resultant damage occurred at 8:55 of the forenoon of October 6, 1917. The plaintiff testified that the accident occurred between a quarter to and 8 o'clock. The witness Marshall fixed the same hour as the time of the accident. The witness Bush, for the defendants, said he thought it occurred near or about 8 o'clock. The official report of the accident made by Hornbeck to the police department of Los Angeles states the time as 7:55, and we will assume that that hour, instead of 8:55, was approximately the time of the occurrence, and that the finding that it occurred at the time last stated was due to an inadvertence.

Recurring now to the question whether Hornbeck was about the business of the appellant the Union Company or acting within the scope of his duties under his contract of employment with said company at the time the plaintiff was injured as a result of his negligence, we here present the testimony upon a consideration of which that question must be determined. We may add that the only testimony received at the trial disclosing the nature or terms of the contract of employment between the appellant corporation and Hornbeck was that of the latter. He testified, giving his testimony in part by question and answer:

"Q. Mr. Hornbeck, you are one of the defendants in this action? A. Yes, sir. Q. And you remember the accident on October 6, 1917? A. Yes. Q. You were driving the machine at that time? A. I was. Q. Whose machine was that? A. Traung Label & Lithograph Company. Q. One of the defendants in this action? A. Yes. Q. And by whom were you employed at that time? A. Union Lithograph Company. Q. What were your duties? A. Salesman. Q. Salesman? A. Yes, sir. * * * Q. How long have you used this machine? A. Since the first of the year 1917. Q. You have used it daily? A. Yes, sir; except Sundays. Q. In what line of work? A. Selling lithograph labels. * * * Q. You were in lawful possession of the car that morning? A. I was; yes. Q. And you were performing your duties at that time as an employé of the Union Lithograph Company? A. I was going to the office at that time. Q. What was your habit in getting the machine mornings? A. When I got up at the hotel I usually went down to the Tenth street garage, where I kept my car, and drove down to the

cafeteria and got breakfast, and went over to my office. Q. That was a part of your duty and employment? A. No; it wasn't a part of my duty and employment, but I always used the car to do it, though."

Hornbeck further testified that his hours of work for the appellant corporation were from 8 o'clock in the morning until 5 o'clock in the evening. He also testified, in reply to questions by the attorney for the plaintiff:

"Q. What were your instructions with reference to getting that car? What were your hours of work? A. 8 o'clock in the morning until 5 at night. Q. Was it a part of your duty to get the machine from the garage and take it down to work? A. Yes; I couldn't use the car unless I got it. Q. That was a part of your employment? A. Yes. Q. That is one of your instructions? A. I never was instructed. The car was given to me to use in my selling, and I kept it in the garage, as any one would."

It was further made to appear that the appellant corporation paid the expense of keeping the automobile in the garage.

We have now presented all the testimony disclosed by the record bearing upon the terms of Hornbeck's contract of employment with the Union Company and the nature of his duties under said contract.

[5] To establish the liability of the defendant the Union Company for the consequences of Hornbeck's negligence, the burden rested upon the plaintiff to show that, when the accident the consequences of which to plaintiff are complained of here occurred, Hornbeck was about this employer's business, that is, engaged in doing some act within the sphere of his duties as a salesman for said corporation or which was an incident thereto. In our opinion, the evidence addressed to that issue, when imparting to it its full face value or credit, shows that the plaintiff failed to maintain that burden.

It is not disputed that the duties incumbent upon Hornbeck under his contract of employment were those of a salesman. It is not disputed that the hours during which he was required under his contract to discharge those duties were from 8 a. m. until 5 p. m. of each working day. It is also clear from the testimony, the finding of the court to the contrary, notwithstanding, that the injuries to the plaintiff were received prior to 8 o'clock a. m., and before the time at which Hornbeck was required to report for duty at the appellant corporation's place of business. Hornbeck testified that the act of taking the automobile to the garage in the evening after his hours of employment had expired and the act of returning it to the appellant corporation's place of business the following morning were no part of the duties of his employment. From all this testimony (all that there is in the record bearing upon that question) it is clear that, when in the act of taking the machine to the place of business of his master on the morning of the accident, he was not engaged in discharging his duties as as salesman of his employer; in other words, the evidence fails to show that the injuries complained of by the plaintiff were "committed by the authority of Hornbeck's master, expressly conferred." Cooley on Torts, supra.

The question now to be considered, then, is: May it be said that it is fairly implied from the nature of Hornbeck's employment and the duties incident to it that the injuries to plaintiff were inflicted while Hornbeck was about the business of the appellant corporation? In other words, may it be fairly implied from the nature of his employment and the duties incident to it that the purpose for which Hornbeck was using the machine at the time of the accident was within the scope of his contract of employment or any part of his duties under said contract? It seems to us that none but negative replies may, consistently with the evidence, be returned to these questions. In considering these questions, we will first direct our attention to what clearly appears to our minds from the evidence to have been the particular mission Hornbeck was on from the time he got the car out of the garage to the time of the accident, although, as will later appear, we are convinced, upon the general proposition, that the act of taking the machine from the Union Company's place of business to the garage and thence to the former place between Hornbeck's working hours as a salesman was not an act incident to his duties as a salesman within the contemplation of the contract of employment as shown by the evidence.

Hornbeck testified, it will be remembered, that it was his habit or custom, after leaving the room at the hotel at which he was residing, to go to the garage, procure the automobile, and then go to breakfast at a cafeteria, thence to his office. It will not be disputed that when going to his breakfast before the time at which he was to report for duty in the mornings he was not thus engaged in the performance of an act having any connection, either directly or indirectly, with the duties required of him under his contract of employment. Such act cannot, upon any possible course of just reasoning, be regarded as of the essence of the object, purpose, and end of his employment; and, as declared, the burden was upon the plaintiff to show that, when the accident happened, Hornbeck was then engaged in executing some act or purpose connected either directly or indirectly with the duties he was under contract to perform for his employer; and, he having testified that it was his habit each morning, before the hours of his employment began, to use the automobile for the purpose of going to a cafeteria to get his breakfast, it became

incumbent upon the plaintiff to show that on the morning in question and at the time of the accident he was not going to his breakfast, or using the machine for that purpose, assuming, of course, that Hornbeck's custom of taking the machine to the garage and back to the place of business of his employer after and before his working hours each day involved acts coming (impliedly) within the scope of his duties. Now, the only testimony in the record upon that subject is that of Hornbeck himself, who testified that, when the accident occurred, he had not had breakfast. It is true that he did not say in so many words that he was then on his way to breakfast, but there is not a word of testimony in the record that he was not then on his way to his morning repast. Therefore it is clear that, when his statement that he had not had breakfast at the time of the accident is considered in connection with his uncontradicted statement that it was his habit to procure the car in the mornings, go to his breakfast in it, and then go to the office—that is, the place of business of his employer—the only fair and reasonable inference from the testimony is that when the accident occurred he was on his way to his breakfast. But, conceding that it was alone with the trial court to determine that question, the proposition remains that the custom of Hornbeck to go to his breakfast in the machine before the hour in the morning at which he was to report for duty as a salesman, for which specific services he was employed, was established by his own testimony, and that the plaintiff failed to show that he was not in the act of following that custom when the accident happened. But, as before stated, upon the general proposition we do not think the evidence fixes liability for the accident against the appellant corporation.

Counsel for respondent, as in support of their theory that the acts of Hornbeck in taking the machine after and before the commencement of his working hours to and from the garage were in the line of his employment, lay much stress upon the following testimony given by Hornbeck in reply to questions by them:

"Q. Was it a part of your duty to get the machine from the garage? A. Yes; I couldn't use the car unless I got it. Q. That was a part of your employment? A. Yes."

We perceive no special significance in the answers thus made by Hornbeck to the questions asked, so far as they may be regarded as throwing any light on the question whether the taking of the car to and from the garage was among the duties for which Hornbeck was employed by the appellant corporation. The situation, as it is clearly disclosed by the testimony of Hornbeck, was simply this: The car had been turned over to Hornbeck by his employer to be used by the former in discharging his duties as a salesman during the hours of the day that he was required under his contract to perform those duties, to wit, between the hours of 8 a. m. and 5 p. m. of each day; that between the hours of 5 p. m. of any day and 8 a. m. of the following day he was not required to perform, nor did he perform, said duties, and, while it is true that he maintained control or in a measure physical possession of the car after his day's work as a salesman was completed, there is no evidence showing or tending to show that he used the car at any time between the hours of 5 o'clock p. m. and 8 o'clock a. m. for the purpose of carrying out or executing the requirements of his contract of employment with his employer. Of course, as he said, it was his duty to return the car from the garage to the place of business of his employer or "his office," as he called it, in order that he might use it in discharging his duties as a salesman. Indeed, it was necessary for him to do so for that purpose.

[6] Thus we think it is very clear that there is no just warrant in the evidence for the finding that, when the accident occurred, Hornbeck was acting within the scope of his duties as a salesman for the appellant corporation, or that the act of returning the automobile to the place where he was to report for the discharge of the duties for which he was employed was an incident to his duties as a salesman. As counsel for the appellant corporation well say, so far as the circumstances of this case are concerned:

"If the rule be extended to hold the master liable for the negligent acts of a servant while on his way to report for duty in the morning, the master would also be liable for the negligent acts of the servant while preparing his dinner pail before leaving his home, because he is then preparing, or, in a sense, on his way, to report for duty; and also the master, under such a rule, would be liable for the negligent act of a servant from the time he arose from his bed in the morning in preparation to report for his day's duties. The statement of such a rule reduces it to an absurdity."

The case of Mauchle v. Panama-Pacific International Exposition Co. and L. I. Fulcher, 37 Cal. App. 715, 174 Pac. 400, cited by appellants and elaborately considered in the briefs of counsel on both sides of this controversy, seems to us to be exactly in point here. In that case the defendant Fulcher, who was superintendent of grounds of the exposition company, having finished his day's work, started to his residence in an automobile which was the property of the exposition company and kept on the grounds of said company. He was himself driving the machine, and when he reached a certain point on one of the streets in the city of San Francisco his machine struck the plaintiff in the back, and with great violence forced the latter over a handcart which he at the time was pushing over and along the street. The plain-

tiff obtained a judgment for damages against both defendants. On appeal it was contended in behalf of the exposition company:

"That there was no showing that the defendant Fulcher at the time of the accident was performing any duty which he owed to the exposition company."

The appellate court of the First district reversed the case as to the exposition company upon the facts, and the facts were, as shown by the testimony of Fulcher: That the automobile used by him on the occasion of the accident was owned by the exposition company and used by him for the purposes of his employment on the grounds, that it was also his custom to use the machine as a means of conveying himself to his home after his day's work was done, and that he kept it in front of his house until about 10 o'clock, when it would be called for by his night foreman and by him taken back to the exposition grounds, where the machine was used for the purposes of the company all night. On some occasions, Fulcher said, he would himself take the machine back to the grounds. He had at his home no garage in which to keep an automobile. The court said:

"The foregoing testimony [referring to the testimony of Fulcher as synoptically stated above], being the only evidence quoted in the attempt to show responsibility on the part of the exposition company, seems to us to fall far short of so doing."

Then the court refers to and distinguishes from that case the cases of Chamberlain v. California Edison Co., 167 Cal. 500, 140 Pac. 25, and Jessen v. Peterson, Nelson & Co., 18 Cal. App. 350, 123 Pac. 219; thereupon further saying:

"The evidence above quoted does not show that Fulcher was in any way serving the exposition company at the time of the accident in this case; nor does it present any evidence tending to so show."

It will be noted that in the Mauchle Case against the exposition company and Fulcher the automobile was in use either by Fulcher or his night foreman at the exposition grounds for the purposes of the exposition company at all times, day and night. In the present case the use of the automobile for the purposes of the appellant corporation was at an end after 5 o'clock in the evening of each day, and that situation as to the machine continued until the defendant Hornbeck returned it to the appellant corporation's place of business the following morning when he reported for the performance of those duties for the discharge of which he was employed. Therefore, if there be a difference between the general facts of the two cases, the facts in the case of Mauchle v. Exposition Co. and Fulcher are stronger against the exposition company than are the facts of the present case against the appellant corporation. But, be that as it may, the fact is that, with the exception that Fulcher was going home when the accident in his case occurred and that he did not himself always return the machine to the exposition grounds, there is as to the facts no line of demarcation between the two cases. They are, in other words, substantially the same. Most assuredly, it would not be contended, upon reading the opinion in the Mauchle Case, that, if the defendant Fulcher had, like Hornbeck in this case, been in the habit of leaving the car overnight in a garage near his home and returning with it to the grounds each morning as he reported for the performance of his daily duties as superintendent of the grounds, the conclusion in that case would have been different from what it was and is.

Our conclusion is, as is evident from the foregoing discussion, that the evidence in this record fails to attach liability for the injuries here complained of to the appellant corporation.

Accordingly the judgment against the defendant Hornbeck is affirmed, and the judgment against the defendant the Union Lithograph Company is reversed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 688

HEARTE v. GLASSELL DEVELOPMENT CO. (Civ. 3261.)

(District Court of Appeal, First District, Division 2, California. March 23, 1920.)

1. Contracts ⊂=332(2)—Complaint for breach held insufficient.

Where a complaint for breach of contract contained several causes of action, a statement of one cause which was in form of common-law assumpsit, but which referred to the first cause of action in which the contract was set out, seeks recovery on the contract and is insufficient if it fails to allege performance or partial performance by plaintiff, or facts showing that performance was excused, prevented, or delayed by defendant, the breach by defendant, or the latter's corporate capacity.

2. Contracts ⊂=337(1)—Complaint for money under contract must show money not paid.

A complaint for breach of contract to pay a specified sum of money and to convey land in payment for the balance of the work done which claimed recovery of money must allege that the money specified had not been paid.

3. Contracts ⊂=337(1)—Complaint claiming amount to be due under contract is insufficient.

A complaint, stating a cause of action for breach of contract, which merely alleged that plaintiff claimed a certain amount to be due

under the contract on information and belief, without an allegation that defendant was liable to pay that amount, is insufficient.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Oliver K. Hearte against the Glassell Development Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. E. Hannon, of Los Angeles, for appellant.

William P. Redmond, of Los Angeles, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of plaintiff following the verdict of a jury in an action brought to recover damages for breach of contract. Generally the facts material to the opinion are: That plaintiff and defendant entered into a written contract whereby plaintiff agreed to grade certain streets in the city of Los Angeles in accordance with plans and specifications which were made a part of the contract, and defendant agreed to pay plaintiff therefor, on the 1st and 15th of each month, 80 per cent. of the engineer's estimate of the work done, the balance of 20 per cent. to be reserved until 30 days after the completion of the contract. The total contract price was not named; but, when the sum of $3,741.30 had been paid in cash, the balance was made payable in land; seven distinct lots being described for that purpose. It is claimed on behalf of plaintiff that defendant in various ways delayed plaintiff in the performance of his contract and had failed to make the progressive payments when due; but it is not alleged in any of the first eight causes of action whether the contract was wholly or partially performed, or whether the contract was breached or abandoned by reason of the acts complained of. The amended complaint contains nine separate causes of action, some sounding in tort, others in assumpsit.

The first and fifth causes of action are based upon allegations of negligence upon the part of the defendant in cutting a ditch across the streets where the work was to be performed and permitting water from an artesian well to so flow across the line of work as to add to the burden of plaintiff's contract. The second and third causes of action are based upon allegations of failure upon the part of defendant's engineer to furnish the necessary grade stakes and negligence on his part in placing grade stakes so carelessly that plaintiff was delayed and was required to regrade a portion of the work. Upon the fourth and sixth causes of action the jury found for the defendant. The seventh cause of action is based upon allegations that the sum of $263.90 was due plaintiff as a progressive payment in accordance with the terms of the contract on the 15th day of August, 1917, and that the same, after demand, remained unpaid. As to the eighth cause of action, the amended complaint, after incorporating certain preceding paragraphs of the amended complaint, alleges as follows:

"That pursuant to the said contract alleged in paragraph II of plaintiff's first cause of action, the defendant corporation withheld twenty (20%) per cent. of all money earned by virtue of the work and service rendered by the plaintiff pursuant to the contract, and that upon information and belief plaintiff claims the sum of one thousand and two dollars ($1,002.00) in cash or real property in the value of one thousand and two dollars ($1,002.00) as such twenty (20%) per cent. due the plaintiff under the terms of the said contract, to the further damage of the plaintiff in the sum of one thousand and two dollars ($1,002.00)."

As to the ninth cause of action, the amended complaint alleges that plaintiff was compelled to abandon the continuance of the work by reason of the wrongful acts of the defendant as theretofore alleged, and that by reason thereof he lost the sum of $1,154.50, the profits which he anticipated he would have earned upon completion of the contract. These allegations were not incorporated in any of the first eight causes of action. The jury found for the defendant upon this cause of action, and to it no consideration need be given herein.

[1, 2] Within time the defendant filed its demurrer to the amended complaint, setting up both general and special grounds; but this demurrer was overruled. Upon the opening of the trial the defendant objected to the introduction of any evidence in support of the amended complaint or in support of any of the separate causes of action therein stated on the ground that none of the alleged causes of action stated facts sufficient to constitute a cause of action. This objection, however, was overruled and the parties proceeded to trial, resulting in a verdict in favor of plaintiff as above stated on all but the fourth, sixth, and ninth causes of action.

As the soundness of this objection, in so far as it relates to the seventh and eighth causes of action, is so patent, this opinion might properly be confined to those two causes. In the seventh cause of action plaintiff seeks to recover damages under a pleading which approaches the common-law count of assumpsit. But having by reference to the first cause of action incorporated the contract in hæc verba in this cause of action, his pleading is in fact an action upon the contract for payment claimed to be due in accordance with its terms. A complaint for such purpose on a contract of this nature should allege performance or partial performance, or facts tending to show that performance was excused, prevented, or delayed by the defendant, the breach of the defendant, the corporate capacity of the defendant, and the fact

that the engineer's estimate of the work done had been made as required by the contract (or legal cause for the nonproduction of such estimate). Loup v. Cal. S. R. R. Co., 63 Cal. 97, 103. Then the contract called for payments in cash up to the sum of $3,741.30 and in land thereafter. To support an action for money alone it was essential to allege that the amount claimed was due in money. None of these essential allegations appear in this cause of action.

[3] The eighth cause of action is subject to the same objections and to the further objection that it fails to allege any indebtedness or any facts supporting a claim for damages. Plaintiff alleges on information and belief that he "claims the sum of one thousand and two dollars ($1,002.00) in cash or real property in the value of one thousand and two dollars ($1,002.00) as such twenty (20 %) per cent. due the plaintiff under the terms of the said contract, to the further damage of the plaintiff in the sum of one thousand and two dollars ($1,002.00)." Here, also, it was essential to allege whether the cash payments under the contract had been made. The mere allegation that plaintiff "claims" a certain sum in cash or real property due under the contract does not state a cause of action for either money or land. If land alone is due, the remedy is by specific performance to compel a conveyance; if money alone is due, that fact must be alleged. An alternative judgment for money could be had only in the event that specific performance was impossible. On the trial it was proved without conflict that no money was due as claimed under this cause of action; but, notwithstanding this undisputed evidence, the jury awarded plaintiff a money judgment for the full sum claimed.

It is not necessary to discuss the objections which are made to the introduction of evidence in support of the various causes of action further than to say that some of them alone would require a reversal of the judgment. But it is not likely that the same errors will occur on a new trial.

For the reasons given, the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 542

FARMER v. LEAF. (Civ. 2727.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1920. Hearing Denied by Supreme Court May 10, 1920.)

1. Sales ⟸199—When title to personalty not in existence or capable of segregation passes.

Question when title to personalty not in existence or capable of being segregated passes to buyer usually depends on intention of parties, to be determined from agreement, which controls if it contains express provisions covering matter; but, where intention cannot be ascertained from agreement, title does not pass until thing is identified, ready for delivery, and perhaps tendered, rule expressed by Civ. Code, § 1141.

2. Sales ⟸218½—Evidence showing segregation for buyer of trees sold.

In action on a promissory note incidental to and a part of a further agreement made respecting sale of prune trees by plaintiff to defendant, evidence *held* to show that trees of required number, size, and condition had been segregated and set apart for defendant when he was unable to take delivery and gave note, so that he was liable thereon though payment was contingent on delivery of trees.

3. Appeal and error ⟸927(3)—In reviewing nonsuit truth of plaintiff's testimony is admitted.

In reviewing judgment of nonsuit, the appellate court is required to give strongest effect to testimony of plaintiff in sustaining cause of action alleged.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by George A. H. Farmer against Erle M. Leaf. From judgment of nonsuit, plaintiff appeals. Reversed.

William H. Fuller, of Los Angeles, and F. J. Schuhl, of Porterville, for appellant.

James E. Shelton and H. G. Bockius, both of Los Angeles, for respondent.

JAMES, J. Plaintiff was nonsuited in this action, the trial court holding that the evidence introduced in support of the cause of action set out in the complaint was insufficient. The appeal is from the judgment which followed.

The action was upon a promissory note given incidental to and as a part of a further agreement made between the parties respecting the sale of a certain lot of prune trees. The note and agreement, signed by both parties to the action, were in the following terms:

"$510.00. Porterville, Cal., April 1, 1915.

"On or before April 1, 1916, for value received, I promise to pay to the order of George A. H. Farmer at the First National Bank of Porterville, in U. S. gold coin, the sum of five hundred ten dollars ($510), with interest thereon in like coin, at the rate of seven per cent. per annum from date until paid. Interest payable semiannually. In case of collection by law, I agree to pay reasonable counsel fees. The payment of this note is contingent upon the delivery to the undersigned by said George A. H. Farmer of certain Tragedy prune trees, in accordance with the provisions of an agreement of even date herewith, executed by the undersigned and approved by said George A. H.

Farmer, to which agreement reference is hereby made for full particulars.

"[Signed] Erle M. Leaf."

"This is to certify that the undersigned, Erle M. Leaf, did on the sixth day of January, 1915, order from George A. H. Farmer of Porterville, California, three thousand (3,000) Tragedy prune trees, four to six feet in height; two thousand (2,000) of said trees at the rate of eighteen cents ($.18) per tree and one thousand (1,000) of said trees at the rate of twenty cents ($.20) per tree, making a total of five hundred sixty dollars ($560). That I have paid said George A. H. Farmer the sum of fifty dollars ($50) leaving a balance unpaid of five hundred ten dollars ($510).

"That said trees were to be delivered to me on or before April 1, 1915, at Porterville in the county of Tulare, state of California, but owing to circumstances I could not accept said trees at said time and will not be able to accept said trees until on or before April 1, 1916.

"I herewith deliver to said George A. H. Farmer my promissory note bearing date April 1, 1915, in the sum of five hundred ten dollars ($510), with interest on same at seven per cent. per annum and the said George A. H. Farmer is to hold and keep said trees and take care of the same in a husbandrylike manner until on or before the 1st day of April, 1916, the time of delivery, with no expense to me.

"The said promissory note is to be paid as therein stated on or before April, 1916.

"It is understood and agreed, that the consideration of the execution and delivery to said George A. H. Farmer of said promissory note mentioned above is the delivery to the undersigned on or before April 1, 1916, of said three thousand (3,000) Tragedy prune trees at least ninety-two and one-half (92½) per cent. of said trees to be alive and in perfect condition and all of said trees to be guaranteed by said George A. H. Farmer to be true to name. Said trees are to be delivered on the order of the undersigned on April 1, 1916, or at any time prior thereto, at the option of the undersigned.

"Dated, Los Angeles, California, May 1, 1915."

The evidence showed that about April 1, 1915, as recited in the contract just quoted, defendant placed his order with the plaintiff for 3,000 prune trees of the kind and size specified. Plaintiff had not so many trees in stock, but immediately (about April 1, 1915) proceeded to fill the order by securing from persons in the business the trees required, placing an order for some in the state of Oregon and for some in California. As to whether he had gathered together the requisite number of trees by May 1, 1915, the date of the making of the supplemental agreement, is not clear; but it is made entirely clear by the evidence that the trees were secured and placed in two separate yards and tied in bunches ready to be delivered prior to April 1, 1916. We have said that they were placed in a condition to be delivered, although it is the contention of the respondent, with whom evidently the trial judge agreed, that the trees never were so segregated and made ready for delivery as to cause the title to pass to the vendee. Practically the only contention made here in support of the judgment of nonsuit is that the plaintiff has mistaken his remedy; that the title did not pass to the vendée; and that therefore the plaintiff could not sue for the purchase price, but should have declared for damages under provisions of section 3311 of the Civil Code. It is admitted by respondent that, if title had vested in the vendee, then this action in the form as determined by the complaint was properly brought. We will make particular reference, therefore, first to the evidence showing the manner in which the trees plaintiff had secured for the purpose of filling the order of the defendant were handled. Plaintiff testified that he had collected in the manner hereinbefore indicated about 4,000 prune trees in his yards for the purpose of securing for defendant the 3,000 of the proper height and the requisite percentage of live trees; that the entire lot of trees was procured for the purpose of filling this order only. He testified on the subject, in part, as follows:

"A. I mean that the trees that I had set aside of the 3,300 to 3,800 were for Mr. Leaf and no one else. The Court: Then in addition to that you added about 200? A. Another 200 trees. Q. Making between 3,500 and 4,000? A. Possibly. Q. So that you were going to select and deliver to him 3,000 out of the 3,500 to 4,000 that you could make selection from? A. Yes, sir. If I might explain, the trees were bunched together in lots of 25, and I guarantee 92½ per cent. of these to be alive; without taking them out of the ground I couldn't tell exactly how many were dead in each bunch, so I estimated and thought possibly, to be safe, I had bought another 200 trees. I guaranteed the 92½ per cent. to be alive at that time."

He further testified that the total number of prune trees out of which the order of Leaf was to be filled were kept separate from other stock; that he had no other prune trees in stock; that he continued to keep the entire lot of trees separate, ready for delivery; and that they were in his yards in such condition, properly cared for, on the 1st day of April, 1916, and for six months thereafter. However, in February of 1916, defendant having sold the land upon which he had intended to plant the trees, wrote to the plaintiff a letter containing the following phrase:

"It is my desire to dispose of the trees without incurring any loss, and I shall expect to do this. If you are able to sell them for money on this basis, I will be glad to have you do so."

On March 7th of the same year, defendant wrote the plaintiff again, stating:

"In regard to the Tragedy prune trees, I beg to again advise you that I wish to secure such a price for them as will net a sufficient amount to cover the cost to me. You are hereby authorized to sell any of this lot of trees

on the above terms. * * * I have sold all the land which I owned in Tulare county on which I originally intended to plant the trees, and accordingly, as you see, have no possible use for them."

Having thus been apprised of the position of the defendant, the plaintiff on March 15, 1916, wrote to the defendant as follows:

"You are hereby notified that I hold, subject to your order and in accordance with the terms of our agreement dated the first day of May, 1915, three thousand Tragedy prune trees; that of said three thousand Tragedy prune trees so wanted by you, over ninety-two and one-half per cent. are alive and in perfect condition, and furthermore, that I hereby guarantee the said trees to be in perfect condition and true to name. That said above-described trees are now ready for delivery to you and subject to your order of disposition. The trees are in may care, and I shall be pleased to hear from you and learn your wishes."

A letter from the defendant, under date of March 17, 1916, followed. This letter was as follows:

"In connection with the Tragedy prune trees, I beg to again suggest that, looking at the matter purely from your standpoint, that it will be to your interest to make an effort to dispose of these trees. Owing to the hard times which have prevailed during the last two years, I was compelled to dispose of the land at a considerable sacrifice, and consequently will be compelled to ask for a considerable extension of time on my obligation to you in case the trees are not disposed of. I trust that you will still be able to dispose of the trees to our mutual advantage."

Plaintiff continued to hold the trees and cared for them for six months subsequent to April 1, 1916. Defendant gave no further direction regarding the trees, and they subsequently died in the hands of the plaintiff.

[1-3] The question as to when title to personal property not in existence or capable of being segregated at the time of the making of the contract of purchase passes to the vendee depends many times upon the intention of the parties to be determined from their agreement. If the agreement of purchase expressly contains provisions covering the matter, the agreement, of course, controls, and title may pass to a thing not prepared by the vendor in condition for delivery, perhaps only partially manufactured by him. On the other hand, where the intention of the parties regarding the matter cannot be ascertained from the agreement, the courts have enforced the general rule that title will not pass to the vendee until the thing is identified and ready for delivery and perhaps tendered. Benjamin on Sales, (7th Ed.) § 308 et seq. Section 1141 of the Civil Code expresses the general rule on this subject:

"Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance."

We think here that the evidence showed that prune trees of the required number, size, and condition had been segregated and set apart for the defendant; that the mere fact that there was an excess of other trees of the same kind, but of insufficient size, or perhaps lacking in vitality, accompanying the lot, did not establish a condition showing such lack of segregation as would reserve in the plaintiff the title to the property. Further than that we think that the terms of the supplemental agreement accompanying the promissory note were evidence of the intent of the parties to acknowledge a completed sale, and especially is this intent emphasized by the letters written by defendant to the plaintiff wherein he requested the plaintiff to sell the property for his benefit. In reviewing the judgment of nonsuit, we are required to give the strongest effect to the testimony of the plaintiff in sustaining the cause of action alleged. There is nothing in that evidence to show that the plaintiff failed to perform all of his obligations, and the evidence does show that the defendant refused to accept the trees according to the agreement made by him. Our conclusion is that the plaintiff was entitled to maintain the action.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 747

KELLY v. GREAT WESTERN ACC. INS. CO. (Civ. 3279.)

(District Court of Appeal, First District, Division 2, California. March 31, 1920. Hearing Denied by Supreme Court May 27, 1920.)

1. Insurance ⟸151(1)—Note and policy constituted single accident contract.

A parenthetical clause printed under assured's signature to a note, "This obligation is not a part of the policy of insurance, but is a separate contract," etc., may be disregarded; the note and policy each referring to the other, concerning the same subject-matter, constituting but a single contract under Civ. Code, § 1642, and such parenthetical clause contradicting the express terms of the note as signed.

2. Insurance ⟸146(1)—Contract to be construed in the sense in which insurer believed assured understood it.

If there is a doubt as to the meaning of a contract of insurance, it is to be construed in the sense in which the insurer believed, at the time of making it, that the assured understood it, under Civ. Code, § 1649.

3. Insurance ⟸146(3) — Uncertainty to be construed against insurer.

If a contract of insurance prepared by insurer has any uncertainty, it must be construed against the insurer, under Civ. Code, § 1654.

4. Insurance ⟸146(1)—Inconsistent words to be rejected and repugnancies reconciled.

In view of Civ. Code, §§ 1652, 1653, inconsistent words in an insurance contract are to be rejected, and repugnancies must be reconciled by such an interpretation as will give some effect to the repugnant clauses subordinate to the general intent and purpose of the whole contract.

5. Damages ⟸78(5)—Nonforfeiting provision in accident policy a penalty.

A nonforfeiting provision in a contract of accident insurance under which assured signed a note for five annual premiums, but when installments were overdue could not recover for certain accidents then incurred, *held* to provide a penalty in contravention of the provisions of the Code relating to liquidated damages.

6. Insurance ⟸392(10)—Forfeiture of accident policy for nonpayment of premium waived by attempt to collect note.

Insurer under a contract of accident insurance, where assured gave a note for five annual premiums, waived any rights under a forfeiture clause providing that certain accidents would not be compensated when occurring after maturity of an installment for annual premium, where it sent letters to assured indicating an intention to collect the full amount of the installment due for which the assured was entitled to insurance for the year.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Mabel Hillman Kelly against the Great Western Accident Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert Brennan, of Los Angeles, and Carr, Carr & Evans, of Des Moines, Iowa, for appellant.

James S. Bennett and Rives & Rives, all of Los Angeles, for respondent.

BRITTAIN, J. The insurance company appeals from a judgment for $7,440, with interest, amounting in all to $8,020, against it under an accident insurance policy providing for death benefits in favor of the widow of Luke Kelly, the assured. The form of the policy is unusual. It is described as a "five-year term" policy. It was accompanied by a collateral agreement, in effect a nonnegotiable note, by which the assured obligated himself to pay a premium of $300 for five years' insurance, in five annual installments of $60 each, the first installment being payable at the time of the application for the insurance, and each of the other installments annually in advance of the last four successive years of the term. It provided for interest on past-due installments at the rate of six per cent. per annum and for a reasonable attorney fee in the event of suit. The first installment of $60 was paid, and the second installment became due October 4, 1916. The assured died December 17, 1916, as a result of accidental injuries within the meaning of the policy. At that time the second installment of the note had not been paid. The insurance was for $7,500, and the judgment was on a complaint in which the prayer was for $7,440, that being the amount of the insurance less the $60 unpaid under the note.

The insurance company maintains that, under the terms of the policy, the insurance in favor of the widow of the assured on his death had lapsed by default in the payment of the second installment of the premium, and that there was no waiver of the provisions of the policy for forfeiture. The respondent contends that the policy is not a unilateral contract, but a promise of the company to pay the insurance in consideration of a promise on the part of the assured to pay the five years' premium; that the law does not permit the insurer to declare a forfeiture as against the assured while retaining and asserting the right to collect the premium under the note; that the right to rely upon the forfeiture provisions, if it ever existed, was waived by the insurer; and that the provisions for forfeiture are void under section 1670 of the Civil Code, in that the forfeiture clause of the contract is one by which compensation to be paid for a breach of the obligation to pay the second installment promptly was determined in advance of the breach. It appears, at least from the briefs, that the normal rate of such insurance for a one-year term is $72, which

amount includes, of course, the cost of insurance, plus the overhead and agency expense in handling such insurance for one-year periods. The contract fixes the rate for one year at $60 in consideration of the assured guaranteeing the payment of the full premium for five years; in other words, it appears that, where the company is compelled to renew its business only once in five years, the overhead cost is reduced at the rate of at least $12 a year, that being the amount of the saving to the assured.

The policy is a lengthy one, with a large number of provisions couched in technical language, with frequent cross-references from one set of conditions to others in such a manner that any man of ordinary education and intelligence after reading it might well remain in doubt as to exactly what the company promised to do. On the other hand, the policy and the collateral agreement are both very clear in regard to what the assured was to do. He was required to tell the truth in the statements contained in his application, to pay $60 in advance at the time of his application and to pay $300 in all in the $60 installments, with interest at 6 per cent. if they were not paid when due, and to pay reasonable attorneys' fees if the money was collected by suit. Despite the fact that the assured was obliged to pay the premium of $300 for the five years' insurance, the insuring clause purports to insure him for a period of one year. In section II of the policy, there is a statement of specific benefits in clear language by which the company undertook to pay within ninety days from the date of accident $7,500 in the event of the death of the assured by accident. In section III there is a long and involved statement headed "Benefits for Loss of Time," purporting to cover "Weekly Accident Payments," "Weekly Sick Benefits," "Continuous Sickness," "Extra Hospital Benefit," and sickness resulting from a large number of specific causes. In section IV there is a tabulated list of optional benefits for specific injuries which the assured might claim in lieu of other benefits, ranging from $300 for fracture of the skull, to $30 for the dislocation of the great toe. There is a provision for double benefits for injuries while the assured was a passenger on a railway or street railway passenger car or of a steam vessel. There are additional benefits for surgical operations, with a lengthy schedule defining specific operations. Then follows a series of special provisions under what is designated section VII of the contract. Subdivision 1, relating to accidents common to all men, refers specially to disability caused by assaults of burglars, highway robbers, and other unprovoked assaults; subdivision 2 relates to payment for quarantine; subdivision 3, for surgeons' fees paid; subdivision 4, for identification benefits to which reference will later be made; subdivision 5, for limited liability in case the assured changed his occupation; subdivision 6, limited liability for injuries occurring through drunkenness, chronic diseases, etc.; subdivision 7 provides for prorating with the insurer other concurrent insurance; subdivision 8 provides for notice and proofs of loss; subdivision 9, for arbitration of claims denied by the insurance company; and subdivision 10 is headed in capital letters "Nonforfeiting Provision." Further reference will also be made to this provision. Under the next clause, headed "General Agreements," there are numerous subdivisions relating to cancellation, premium payments, maturity of indemnities, change of beneficiary, age limits, modification to comply with state laws, the right of examination of the assured by the representatives of the company, providing against duplication of benefits, and requiring strict compliance with the conditions of the policy.

Subdivision 10 of section VII, being the so-called "Nonforfeiting Provision," is as follows:

"10. *Nonforfeiting Provision.*—In case the assured has entered into a written obligation to guarantee the payment of the premium named in the insuring clause hereof for a term of five years (unless this policy shall have been previously canceled), the company will be liable during a period of thirty months after suspension hereof for nonpayment of any of the installments named in said obligation to the assured or his beneficiary, for the benefits specified in paragraph 4 of section VII hereof, and to the extent of one-half of the several benefits for accidental injury as provided in section II, III, and IV hereof, if such accidental injury is received while the assured is (1) a passenger within any railway or street railway passenger car, or (2) while a passenger on board a steam vessel licensed for the regular transportation of passengers and such injury is due to the wrecking of such car or vessel."

Paragraph 4 of section VII, thus referred to, is the one in regard to identification benefits, which reads as follows:

"4. *Identification Benefits.*—In all cases where the assured enters into a written obligation to keep his policy in force for a term of five years, if during said term he shall become unconscious on account of injury or illness while absent from home or acquaintances and while carrying upon his person the means of identification furnished by the company, the company will, when immediately notified by telegram or other message giving this policy number, pay such additional benefit in a sum not to exceed one thousand dollars ($1,000) as may be necessary temporarily to care for the person or body of the assured during the period of such unconsciousness or until such time as his beneficiary or other friends can be notified of his condition."

[1] The application, which is headed "Five-Year Term Plan," was made a part of the contract of insurance. So much of it as is

necessary for the present purpose is as follows:

"I hereby apply for insurane * * * for a term of five years. * * * I also understand and agree that the contract between me and the company is entirely in writing; that it is limited to this application, the obligation which I have this day executed for the payment of the premiums for this insurance and the policy of insurance (including any riders that may be attached thereto), except as it may be affected by the table of rates or classification of risks filed by the company with the insurance department. * * * I also agree that there shall be retained from any indemnity which may become due the unpaid balance of any premium then due, or of any current premium covered by written note or order."

The substance of the collateral note has already been stated. Under the signature is printed in parenthesis the following:

"This obligation is not a part of the policy of insurance, but is a separate contract between the assured and the company given for the purpose of securing a lowered rate of premium and other special benefits named in the policy."

This parenthetical clause may be disregarded. The note and the policy, each referring to the other, concerning the same subject-matter, constitute but a single contract. Civ. Code, § 1642. The parenthetical clause contradicts the express terms of the note as signed.

[2-4] If there is a doubt as to the meaning of the contract, one of the rules of interpretation requires it to be construed in the sense in which the insurer believed, at the time of making it, that the assured understood it. Civ. Code, § 1649. In view of the fact that the application was for insurance for a five-year term, and that the collateral note obligated the assured to pay the premium of $300 for a five-year term, it cannot be contended that the company did not believe the assured understood its promise to be for the insurance for which he applied and for which he was bound to pay, notwithstanding the fact that the insuring clause purports to limit the insurance to a period of one year. The contract was prepared by the insurer. If, under other rules, any uncertainty in the contract was not removed, it must be construed against the insurer. Civ. Code, § 1654. Inconsistent words are to be rejected (Civ. Code, § 1653), and repugnancies must be reconciled by such an interpretation as will give some effect to the repugnant clauses subordinate to the general intent and purpose of the whole contract (Civ. Code, § 1652).

Considered as an entirety, by the acceptance of the application of the assured the insurer undertook, subject to lawful conditions of the policy, to give five years' insurance in consideration of the payment of $300, of which $60 was paid at the time of the application, and for the remaining $240, payable in annual installments of $60 each, the company took the note of the assured.

[5] One of the conditions of the contract was that, if any installment of the note should not be paid promptly when due, except as to very limited liability for very remote risks, the insurer provided for its release from liability during the period between the maturity of the installment and its subsequent payment, which the insurer retained the right to enforce. This forfeiture clause was contained in that provision of the policy headed "Nonforfeiting Provision." Under the rules to which reference has been made, if the contract was ambiguous in this respect, it must be construed most strongly in favor of the assured and his beneficiary. The respondent maintains that this forfeiture clause, designated by the insurance company as a nonforfeiting provision, was, in fact, a penalty in contravention of the provisions of the Code relating to liquidated damages in fixing compensation to be made for the breach of an obligation to pay a sum on a certain day, while the insurance company retained the right to collect the sum at a later date with interest and attorney's fees. Under the terms of the contract a $60 payment furnished compensation for complete insurance for one year of the five-year term, and, further, under the terms of the contract, if the assured had lived, and if he had waited until the last day of the second year for the payment of the $60 with interest, as he had a right to do under the contract, he would have been charged the full amount of $60 for one day's complete insurance, instead of one year's complete insurance. The reservation of the so-called nonforfeiting and trivial provisions did not militate against a claimed forfeiture of the principal object of the contract. The word "forfeiture" is equivalent to the word "penalty." Van Buren v. Digges, 1 How. 461, 13 L. Ed. 771; Stearns v. Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Salters v. Ralph, 15 Abb. Prac. (N. Y.) 273; Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417; Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707.

[6] After the second installment became due the insurance company in several letters requested payment of the past-due installment. In each of them the insurer relied upon the five-year contract. On November 4, 1916, it wrote:

"Since you are under obligation to make these payments continuously during the time covered by your five-year contract, it is in every way to your advantage to make payment promptly and thus secure the full benefits of your insurance."

On November 22, 1916, it wrote:

"The check you intended to send us for the payment due October 4, 1916, on your five-year contract has not arrived, no doubt forgotten. Why not send it now while you are thinking about it?"

On December 14, 1916, the company wrote:

"If it is necessary for us to spend an amount equal to the premium in time and expense collecting this bill, it is unprofitable for us, and if there is an additional expense added on to you, it will really be making a hardship upon you. Therefore we will ask you to send us today your check, draft or money order for $60.00."

The trial court determined that these letters indicated an intention on the part of the insurance company to collect the full amount of the second installment of the premium for which the assured was entitled to the insurance for the second period of the five-year term. This determination on the part of the trial court seems to be entirely justified by the decision of the District Court of Appeal of the Third Appellate District in the recent case of Faris v. American National Assurance Co., 185 Pac. 1035, and the cases therein cited, particular reference being made to the cases of Noem v. Equitable Life Ins. Co., 37 S. D. 176, 157 N. W. 308, and Murray v. Home Benefit Life Assurance Co., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

The appellant relies chiefly on the case of Cayford v. Metropolitan Life Ins. Co., 144 Cal. 763, 78 Pac. 258, and similar cases, in which the particular policy under consideration provided clearly for forfeiture for nonpayment of premiums in advance. Those cases appear to have been determined in view of the fact that the insurance which had been paid for had been furnished. In this case the insurer was relying upon its right to collect the note given for the entire five years' premium. It could not take advantage of the contract for payment made for its benefit and relieve itself of the obligation to furnish the insurance for which that benefit, when collected, ought to have paid. Such a construction of its contract would leave the insurer in a position where it might enforce payment of the note, with interest and authority's fees, if no loss was suffered by the assured, and to deny all liability for loss if it was suffered.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

46 Cal. App. 637

LEO G. McLAUGHLIN CO. v. PHILLIPS et al. (Civ. 2737.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1920.)

1. Appeal and error ⟸757(3)—Without definite specifications court may refuse to review evidence.

Where appellants asserted the findings were not supported by the evidence, but there were no definite specifications either in the record presented by means of the reporter's typewritten transcript or the briefs showing the particulars wherein the evidence was claimed to be insufficient, the appellate court might be well justified in declining to frame for appellant definite specifications of insufficiency of evidence which should have been submitted.

2. Evidence ⟸431—Parol evidence admissible to show want of effective delivery of writing.

Where defendants signed a written agreement for exchange of property, which incidentally provided for payment of $1,000 commission to plaintiff, parol evidence is admissible to show that one of the defendants at that time stated that the whole transaction was contingent upon the willingness of his sister, who owned an interest in the property, to trade, and this is so despite the parol evidence rule, for it goes to the extent of showing that there was no effective delivery of the agreement.

3. Deeds ⟸194(2) — Deed deposited with grantee for particular purpose not deemed delivered.

While possession of a deed by the grantee is prima facie evidence that it was delivered, yet such possession is not conclusive, and it may be shown by parol that a deed was not delivered, but was deposited by the grantee for another purpose, in which case it is not effective.

4. Brokers ⟸86(1)—Evidence held to show that agreement for exchange of property was not delivered.

In an action by brokers for commission for effecting exchange of property, evidence *held* to warrant finding that the writing containing an alleged agreement for exchange and promise to pay commission was not delivered.

5. Brokers ⟸57(2)—Brokers not entitled to commission on exchange effected by principal on different terms.

Where an exchange of property which brokers sought to bring about was not consummated, and it was not established that at the time the corporation which the brokers had interested, and later effected an exchange with defendants had authorized its president to agree to the then proposed exchange, the brokers are not, where exchange later made was on entirely different terms, entitled to the commission reserved.

6. Corporations ⟸404(2) — President not ex officio authorized to make binding agreement for exchange of lands.

The president of a corporation is not, by virtue of his office, authorized to bind the corporation to an agreement for exchange of lands.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Leo G. McLaughlin Company against A. L. Phillips and another. From a judgment for defendants, plaintiff appeals. Affirmed.

A. G. Allen, of Pasadena, for appellant.

Clifford H. Phillips, David E. Bergman, and Alfred H. McAdoo, both of Los Angeles, for respondents.

CONREY, P. J. Action to recover on a contract to pay a commission of $1,000 for services rendered in procuring an exchange of real property of defendants for other real property. Judgment for the defendants, from which the plaintiff appeals.

[1] Appellant contends that the findings "are not supported or justified by the evidence." The record being presented by means of a reporter's typewritten transcript, and there being no definite specifications therein nor in the briefs, showing the particulars wherein the evidence is claimed to be insufficient, the court might be well justified in declining to frame for appellant the definite specifications of insufficiency of the evidence which should have been presented. However, to the extent that we are able to do so, we have endeavored to ascertain the merits of the case.

[2-4] The last paragraph of finding 2 reads as follows:

"That it is not true that on or about June 1, 1917, or at any other time, said defendants promised and agreed in writing to pay to plaintiff the sum of $1,000, or any other sum, as commission for its services, providing the plaintiff could find and produce the owner of certain other property secondly described in said agreement made a part of plaintiff's complaint as Exhibit A, ready, willing, and able to exchange the property last described in said agreement for the property first described in said agreement, but it is true that defendants signed and delivered to plaintiff the agreement, a copy of which is attached to plaintiff's complaint and marked Exhibit A, but with the express statement and understanding that said agreement in its operation and effect was conditional and contingent upon the sister of the defendant Pierce consenting to the exchange of said property in which she had an interest."

The evidence, without contradiction, proves that Mrs. Smith, a sister of defendant Pierce, was the owner of a one-fourth interest in one of the parcels of land first described in Exhibit A. Defendant Pierce testified that when he signed the document, Exhibit A, he stated to plaintiff's representative that his sister owned the interest above mentioned. "I told him that it would not go without she —that is that I would reserve the right to have her consent to the signing of this instrument." On account of some informalities in Exhibit A a correctional document was signed; and that also proving to be incorrect, a third instrument was prepared and signed, wherein, for the first time, the L. C. Reed Company, a corporation, the true owner of the property for which defendants were to trade, was named. Defendant Phillips testified that at the time of signing the last-named document by the defendants, defendant Pierce stated to Mr. Turner, who represented plaintiff in the matter, "Now I am signing this with the understanding I will go right down and see my sister, to see if she is willing to let this property go through; if she is not, we can't trade." Pierce confirmed this testimony. It further appears that the proposed exchange of properties as then contemplated failed to proceed further at that time by reason of the nonconsent of Mrs. Smith. Some months later an exchange was made between the defendants and the L. C. Reed Company of a part of the property of defendants omitting that in which Mrs. Smith was interested for a part of the property of the L. C. Reed Company. The exchange as finally made not only included less property on both sides but was made upon different terms with reference to incumbrances on the respective properties exchanged.

Appellant contends that the court erred in receiving the testimony above mentioned, and insists that in so doing the court violated the rule that oral evidence may not be received to alter the terms of a valid written instrument. The argument is that the document, Exhibit A, which is the instrument relied upon in the complaint, and the two subsequent documents referred to in the evidence, asserted that defendants were the owners of the property, and that the court could not properly receive evidence to contradict such recital. Exhibit A did not in terms assert ownership, but did contain an offer to exchange the property therein described. The subsequent documents did refer to the defendants as the owners of the property described. Nevertheless, we are of the opinion that the evidence was receivable for the purpose of determining whether or not the documents, when signed and left in the possession of the plaintiff, were in legal effect delivered. "While it is true that the possession of a deed by the grantee is prima facie evidence that such deed was delivered by the grantor with intent that it should take effect according to its terms yet such possession is not conclusive evidence of a valid delivery; and 'it may be shown by parol evidence that a deed in the possession of the grantee was not delivered.' Devlin on Deeds, §§ 294, 295, and authorities there cited. 'And even if the deed is deposited with the grantee but for a purpose other than delivery it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered. While therefore it is not competent to control a deed by parol evidence where it has taken effect by delivery it is always competent by such evidence to show that the deed, though in the grantee's hands, has never been delivered.' Washburn on Real Property, 311." Black v. Sharkey, 104 Cal. 279, 37 Pac. 939. The evidence tended to show, and therefore was sufficient to authorize the

court to find, that the writings in question, which incidentally contained a promise to pay the sum of $1,000 commission, were not effectively delivered. In finding 3 it is stated:

"That it is not true that plaintiff found and produced and introduced, or found or produced or introduced, to the defendants, the owners of the property secondly described in said agreement made Exhibit A to plaintiff's complaint, and that said owners were ready, willing, and able, or ready, willing, or able to exchange their said property for defendants' said property. It is not true that subsequent to said introduction the defendants did effect an exchange of all or part of their property for a consideration satisfactory to said defendants, with the parties to whom plaintiff introduced them and brought them into relationship, and that said exchange was brought about and occasioned solely by and on account of plaintiff's efforts."

[5, 6] Concerning the first sentence above quoted from finding 3, the controversy is concluded by the conclusion hereinbefore announced. We may say, however, that the record fails to show that the L. C. Reed Company, acting by any competent authority thereof, was ready or willing to make the exchange as originally contemplated in the writings signed by the defendants. It does appear that L. C. Reed, the president of that corporation, took part in the negotiations, and was willing to proceed with the transaction; but there is no evidence that the corporation had authorized him to bind it in such transaction. He did not have such authority merely as president of the corporation. It does appear that negotiations were later resumed, and that the defendants conveyed to the L. C. Reed Company a part of the property referred to in Exhibit A, and received from that company in exchange therefor 60 acres less than the 182.36 acres originally suggested as the property to be conveyed by that company to the defendants. Not only did the defendants receive so much less land, but they took it subject to a larger incumbrance than that specified in Exhibit A. It is not to be presumed, nor is the evidence sufficient to raise the inference, that the defendants, under the writings to which we have referred, obligated themselves to pay the plaintiff the full sum of $1,000 on a later and substantially different transaction consummated by the parties themselves. This action is not upon a quantum meruit for services rendered by an authorized agent; nor is there any evidence of the value of the services rendered by the plaintiff, if any there were, having relation to such subsequent transaction.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

BEEMAN v. RICHARDSON et al.*
(Civ. 3008.)

(District Court of Appeal, Second District, Division 2, California. March 18, 1920. On Rehearing, July 30, 1920.)

1. Fraud ⟸11(1)—Representations as to condition of company matters of opinion.

Representations of defendant that company in which he and others desired plaintiff to invest was a large, prosperous, and rapidly growing concern, that additional capital was necessary, that plaintiff's investment would be used to strengthen business and establish branch offices and agencies, and that corporation would employ him as a salesman at $100 a month salary, *held* in legal contemplation mere expressions of opinion, so that defendant, under Civ. Code, § 1572, was not liable unless he did not honestly hold such opinions, or was not justified by his information, or deliberately made representations to deceive.

2. Fraud ⟸12—Misrepresentations must be of facts and not conjectures.

As a general rule, representations on which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere expressions or conjectures as to future acts or events, though subsequently unfulfilled.

3. Fraud ⟸12 — Making of promise unless without intention not to perform not fraud.

Under Civ. Code, § 1572, subd. 4, where a promise was not made without intention of performing it, its making did not constitute fraud.

4. Fraud ⟸25—Damage essential.

Fraud without damage calls for no redress from any court, however censurable in morals.

5. Fraud ⟸12—Promise to employ "permanently" fulfilled by employment until dissolution of company.

Plaintiff, induced by defendants to invest in their company on promise he would be employed permanently as a salesman, was employed "permanently" where he continued in the employment of the company until it was dissolved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permanently.]

6. Appeal and error ⟸1011(1)—Finding on conflicting evidence not disturbed.

Where there is a conflict in the evidence, finding of trial court cannot be legally interfered with by appellate court.

7. Fraud ⟸58(2)—Evidence held not to show fraud in inducing plaintiff to invest.

In action for defendants' fraud inducing plaintiff to invest in their company, evidence *held* insufficient to support findings of fraud by defendants, showing rather that their representations were matters of opinion, and, furthermore, were true, and that the business was unfortunate owing only to market conditions.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Superseded by opinion of Supreme Court. See 196 Pac. 774.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by George H. Beeman against J. C. Richardson and others. From judgment for plaintiff, defendants appeal. Reversed.

Oliver O. Clark and George M. Pierson, both of Los Angeles, for appellants.

Parker & Moote and Moote & Patterson, all of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover $5,500, and interest thereon, claimed to have been paid by plaintiff for 50 shares of stock in a corporation known as Richardson, Holmes & Lamb Company, and for general relief.

It is alleged that defendants were, and at all times herein mentioned have been, directors of the said corporation; that they "entered into a conspiracy to cheat and defraud plaintiff" out of said sum of money by knowingly making certain fraudulent representations which were relied upon by plaintiff, to wit, that said corporation "was a large, prosperous and rapidly growing concern, having assets in excess of $40,000 over and above all liabilities; that the business of said corporation was growing so rapidly that additional capital was necessary, and that if plaintiff would invest $5,000 or thereabouts, in the business of said corporation, the amount so invested would be used for the purpose of strengthening the business of said corporation and establishing branch offices and agencies thereof"; and, further, that if he, plaintiff, made such investment, the corporation would employ him as salesman at a salary of $100 per month. The complaint then sets forth that all said representations, so alleged to have been made, were false and untrue, etc.; that said corporation "was not a prosperous and rapidly growing concern, but that its affairs were in a shaky and precarious condition," and that it did not possess net assets of said value, but was, in fact, at the time such representations were made, and ever since has been, insolvent; that said shares of stock were of no value whatever, although represented to have been of the value of $110 per share; and that all such statements were known by said defendants to be false and untrue at the time they were so made. It is further alleged that the money paid by plaintiff, as aforesaid, was not used for the strengthening of the corporation, but that the greater portion thereof was withdrawn from the corporation by defendants and used for the purpose of paying their own personal debts; that no branch offices or agencies were established by said corporation after plaintiff made the investment in question; and that the position of salesman was not a permanent position, "but was offered merely as an inducement to plaintiff to purchase said stock." Following these allegations is an elaborate statement as to how the money so paid was disposed of by defendants, and their subsequent acts in carrying out the alleged nefarious deal. The answer denies all the material allegations of the complaint. Upon the issues thus presented the case was tried without a jury, at the conclusion of which the court found against the defendant Boqua in the sum of $700, and against each of the other three defendants in the sum of $5,500, with interest. Judgment was entered accordingly, from which this appeal is taken.

The record is voluminous. No brief, except appellants' opening brief, has been filed. The ground upon which the appeal is taken is insufficiency of the evidence to support the findings.

It must be observed that plaintiff is not seeking in this action a rescission of the contract, but, rather, to recover the damage which he claims to have sustained by reason of the alleged false representations, having, by so doing, elected to affirm the contract. We have read the entire record, and it contains no evidence that any one, other than defendant Richardson, ever made any of the alleged representations to plaintiff. There is no evidence that any of the other defendants ever knew of the representations alleged to have been made by Richardson; nor is there anything, in our judgment, from which knowledge of the alleged representations by defendants, other than Richardson, may be inferred. Indeed, we might disregard all the testimony offered in behalf of defendants on this point and accept the testimony offered by plaintiff as wholly correct, and still our conclusion would have to be the same. The same statement is true as to the alleged conspiracy. Webster defines a conspiracy as follows:

> "A combination of men for an evil purpose; * * * an agreement for the purpose of wrongfully prejudicing another; * * * a concurrence or general tendency, as of causes or circumstances, to one event."

Certainly no argument need be advanced to prove that the actions of one man, however reprehensible they may be, can bring him within the scope of this definition. "An actionable conspiracy exists only where there is an unwarrantable combination of two or more persons to do an unlawful thing." Menner v. Slater, 148 Cal. 284, 83 Pac. 35; Schwenn v. Schwenn, 166 Wis. 420, 166 N. W. 171, 2 A. L. R. 287, and cases there cited.

[1] In the case at bar the evidence shows that defendant Richardson did represent to plaintiff that said corporation "was a large, prosperous, and rapidly growing concern, having assets in excess of $40,000 over and above all liabilities; that additional capital was necessary"; that if plaintiff would so invest that such investment would be used to strengthen the business of the corporation

and to establish branch offices and agencies; and that the corporation would also employ plaintiff as salesman at a salary of $100 per month, which position was to be permanent. In support of the foregoing representations the evidence further shows: (1) That the corporation was a large concern, transacting a total business during 1913 amounting to $915,074.69; (2) that it was rapidly growing during all the years from its organization, in 1905, to and including 1913, its total business transactions during the first-mentioned year having been in the sum of $184,417.44; (3) and that, by the statements received in evidence, as well as the testimony of the defendant Richardson, it was prosperous. All the foregoing representations were, in legal contemplation, but expressions of opinions. There is no evidence in this case, however, showing that such opinions were not honestly held by Richardson, or that he was not justified by the information which he had in making them. Nor is there evidence to show that they were deliberately made for the purpose of deceiving plaintiff. These are essential, if Richardson is to be held liable. Civ. Code, § 1572; Estate of Johnson, 134 Cal. 662, 66 Pac. 847; Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804.

[2, 3] As to the representations that the corporation had assets in excess of $40,000 over and above all liabilities, the record shows, by the statements offered and received in evidence—in view of the fact that there is no impeachment or contradiction of such showing—the same to be true. This may also be said as to the representation "that additional capital was necessary." As to the representation that "if plaintiff would invest $5,000, or thereabouts," the money would be used for the purpose of strengthening the business of the corporation and for the establishment of branch offices and agencies thereof, we are confronted at the outset with two propositions: (1) That at most it was a promise made to do something in the future; and (2) the record fails to disclose that plaintiff was damaged in any sum, or at all, by defendants' failure to comply therewith. "As a general rule, false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such promises may be subsequently broken." 20 Cyc. 20; Ayers v. Sou. Pac. Ry. Co., 173 Cal. 74, 159 Pac. 144, L. R. A. 1917F, 949. It is not alleged, nor is there any evidence in this record indicating, that such promise was made without any intention of performing it. In such case "the making of a promise does not constitute fraud. * * *" Civ. Code, § 1572, subd. 4; Ayers v. Sou. Pac. Ry. Co., supra. "The mere failure to perform the covenant does not relate back to and render the same fraudulent." Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29.

[4] As to the second proposition presented above, we think it must now be apparent that no such action can find support here. "Fraud without damage calls for no redress from any court. However in morals such conduct may be censurable, it is not regarded by the law as of sufficient consequence to put in operation the machinery of courts." Reay v. Butler, 69 Cal. 572, 11 Pac. 463; London, etc., Co. v. Liebes, 105 Cal. 203, 38 Pac. 691; Stouffer v. Eymann, 183 Pac. 210.

[5] As to the representation that the corporation would employ plaintiff permanently, little time or space, we think, need be devoted to the consideration thereof. The fact is that the evidence shows, without conflict, that plaintiff was employed, and that he continued in the employment of the corporation, until the latter died. Such was a permanent employment, so far as it was legally and physically possible. It certainly cannot successfully be maintained that an agreement to employ one "permanently" is intended to extend the time beyond the grave.

In this case a series of unfortunate circumstances, apparently such as could not, with ordinary prudence and foresight, be guarded against—unusual market conditions, etc.—affected in a very material way the business of the corporation involved, resulting very disastrously for all the defendants, each of whom lost everything invested therein. The defendants, Richardson and Lamb, it appears, had each invested $25,000, the defendant Holmes had in the venture $26,400, while the investment of the defendant Boqua therein amounted to $30,000. Under these circumstances, and in view of the state of the record before us, we think that the rule and guide repeatedly prescribed for trial courts in this state in actions such as this must govern here:

> "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing." Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753.

[6, 7] We are not unmindful of the fact that there was conflict in some of the evidence, and that the finding of the trial court in such case cannot be legally interfered with by this court. Still, in the instant case, on all the material issues, as we have seen—if we disregard all the evidence offered by and on behalf of defendants and rely wholly on the evidence offered by and on behalf of plaintiff, as interpreted and applied under the laws of this state—we think the trial court should have found in favor of defendants, for the reason that the record contains no legal evidence which supports a judgment against them, or any of them.

This disposes of all the points raised by appellants.

As we have seen, the judgment entered against the defendant Boqua is for $700, the amount which he is supposed to have received from the proceeds of the $5,500 paid in by plaintiff; while a judgment for the full amount of $5,500 is entered against each of the other three defendants, notwithstanding the fact that each of them received only what the shares of stock sold by him at $110 each would amount to, and notwithstanding the further fact that a portion of plaintiff's alleged "investment" was actually turned into the corporation for "corporation" stock. We fail to understand the reason for what appears to us a discrimination by the plaintiff between the defendant Boqua and the remaining defendants.

If it be contended that the evidence shows that these defendants represented to plaintiff that they were selling him treasury stock, or that the money paid by him for the stock would go into the treasury of the corporation, or into its business, the answer to this is that the complaint contains no allegation which would permit the legal reception of any such testimony. We, of course, do not so hold, but it has occurred to us, after a careful reading of the whole record here, that in any event the sales of stock made by these defendants were individual sales, and, there being no conspiracy to defraud, the liability, if any there be, would be only individually to the amount received for the individual shares. However, these points are not raised by appellants, and we cite them simply as further reasons for the conclusion we have reached.

We do not think the evidence supports the findings.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

On Rehearing.

PER CURIAM. This case was before us on our term calendar for January last, at which time, by stipulation entered into between the parties hereto—there being no briefs on file, with the exception of appellants' opening brief—respondent was given 20 days to file his answering brief, and appellant 10 days thereafter, if so advised, within which to reply to respondent, the cause then to stand submitted. The time so given expired, without any briefs being filed, and in due time, by proper order, the cause was submitted, the case considered, and opinion filed as the court's judgment therein. Such decision was rendered on March 18th last, and may be found above (189 Pac. 790). On March 24th, by stipulation of the parties, the decision so entered was, by order of this court, set aside, and respondent again given 30 days to prepare, serve, and file his brief, and again on April 21st that stipulation was renewed for 30 days "after April 23d." Respondent finally, and on May 19th last, filed his brief herein, the cause was set for hearing at the July term of this court, and upon the calling thereof was submitted without argument.

We have considered respondent's said brief fully, and find nothing therein which causes us to view the case from any different angle than that taken by us when the opinion above referred to was handed down. We therefore readopt the opinion previously filed herein, and for the reasons there stated the judgment is reversed.

46 Cal. App. 682

MYERS v. LOWERY et al. (Civ. 3295.)

(District Court of Appeal, First District, Division 1, California. March 23, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Fraud ⇐11(1)—Representations of nurses operating hospital as to accredited character of hospital held to be of fact and not opinion.

In action by nurses in hospital organization against the operators thereof, themselves accredited and registered nurses, for damages for fraud inducing rendition of services under representation and belief hospital was accredited institution meeting requirements of state board under St. 1913, p. 613, court must hold defendant nurses' representations, in view of their knowledge of requirements of their profession, to have been made strictly with respect to specific facts.

2. Fraud ⇐11(1) — Affirmation as existing fact of matter which might be only opinion may be fraudulent.

Wherever a party states a matter which might otherwise be only an opinion, and does not state it as expression of opinion, but affirms it as an existing fact material to transaction, so that other party may reasonably treat it as a fact and rely and act upon it as such, statement becomes an affirmation, and may be a fraudulent representation.

3. Fraud ⇐18—Affirmation to nurses of existing fact as to status of hospital actionable.

The misstatement of registered nurses operating a hospital to other nurses employed by them that the hospital was accredited to the state board of health (under St. 1913, p. 613) was an affirmation of an existing fact material to the transaction to induce other nurses to rely on it, and was therefore actionable.

4. Fraud ⇐25—Possibility that nurse deceived by hospital operators could take examination required by state board not a defense.

In action for damages for fraud by a nurse employed by other nurses who operated a hospital under representation that it was duly accredited to state board of health (under St. 1913, p. 613), it was not a defense to hospital operators that whether or not misrepresentations were made and course of training at hospital was insufficient, nevertheless plaintiff nurse could take examination required by state board and become accredited.

5. Trial ⇐256(1)—Further instructions desired should have been prepared and submitted.

If defendants desire further instructions on the matter as to which party had the burden of proof by a preponderance of evidence, they should have properly prepared and submitted them to the court.

6. Trial ⟸260(1)—Instruction need not be repeated on request.

A requested instruction fully and properly covered by other instructions given by the court was properly refused.

7. Fraud ⟸62 — $12 a week for services of nurses fraudulently procured not excessive.

Damages of less than $12 a week awarded nurses deceived into working for defendants, other nurses who were operating a hospital, by misrepresentations that it was duly accredited to the state board, as required by St. 1913, p. 613, *held* not excessive in view of evidence that the value of the services rendered was $15 a week.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Alta Myers against Catherine T. Lowery and others, copartners doing business under the name and style of St. Catherine's Hospital. From judgment for plaintiff, defendants appeal. Affirmed.

Fredericks & Hanna and Chas. W. Lyon, all of Los Angeles, for appellants.

Bernard Potter and Lynden Bowring, both of Los Angeles, for respondent.

WASTE, P. J. Plaintiff for herself, and on behalf of her assignors, brought this action against the defendants, copartners conducting the St. Catherine's Hospital, in the city of Santa Monica. The action is one for damages, the amount of which is alleged to be the value of services during the time plaintiff and her assignors were employed at said hospital, at the rate of $15 per week. The trial was had before a jury. A verdict was rendered for plaintiff upon three counts. Judgment was entered accordingly, and defendants appeal.

In substance, the allegations of the complaint are that plaintiff and her assignors were induced by the defendants to enter the hospital, and take up training there, upon the representations of the defendants that the said hospital was an accredited training school for nurses, which had met the requirements of the state board of health of the state of California, and that the graduates of said school were eligible for examination by, and registration with, the board; that, relying upon these representations, plaintiff, and her assignors, entered the hospital, and for varying periods of time were employed in caring for patients under treatment, without compensation; that they subsequently learned that the St. Catherine's Hospital was not a training school for nurses, did not meet the requirements of the state board of health, was not an accredited training school, and its graduates were not eligible for examination or registration as nurses; that the training and instruction, given the plaintiff and her assignors at the hospital, were not such as would qualify them to take such examinations, and no record of any kind or nature was kept, as required by law, showing the qualifications of the nurses in training, or their efficiency in their work, nor was said hospital properly equipped in other respects for a training school for nurses; that plaintiff, and her assignors, have endeavored to procure entrance to various other hospitals conducting training schools for nurses that are properly accredited, but have been refused admission for the reason that no credit could, or would, be given for the time expended by them in said St. Catherine's Hospital.

There was evidence in support of these allegations. It is admitted by appellants that the representations, as alleged, were made, and it is further conceded by them that the course of training at the hospital was insufficient to meet the requirements of the state board. They contend, however, that the representations were not material, were but the statements of matters of opinion, honestly believed and expressed by the defendants, and that there was no evidence to the contrary. This position of appellants finds no support in the record. The act to promote the better education of nurses, and the better care of the sick in the state, providing for, and regulating the examination and registration of, graduate nurses, and defining "accredited schools" under the act, was passed by the Legislature some three years before the plaintiff and her assignors made application to be enrolled as student nurses at St. Catherine's Hospital. St. 1913, p. 613. That statute defines an "accredited training school for nurses," within the meaning of the act, to be "a school for the training of nurses attached to or operated in connection with a hospital, or hospitals, giving a general training, and a systematic theoretical and practical course of instruction covering a period of at least three years."

[1, 2] The defendants were, themselves, accredited, and registered, nurses familiar with the requirements of their profession, and its preliminary training. We must assume that as owners they well knew St. Catherine's Hospital was not an accredited school, and was not upon the list of such institutions, as required by the law. It is equally certain that they knew that the admittedly "insufficient course" did not measure up to the legal standard required for the training of nurses. Under such circumstances, we must hold the representations to have been made strictly with respect to specific facts. Even though there might have been some contrary belief on the part of the defendants, or some of them, the evidence clearly brings the statements within the rule laid down by Mr. Pomeroy, and so many times approved in this state and elsewhere, that—

"Wherever a party states a matter which might otherwise be only an opinion and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction so that the other party

may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation within the meaning of the general rule and may be a fraudulent representation." Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 Pac. 351, 42 L. R. A. (N. S.) 125; Crandall v. Parks, 152 Cal. 772, 776, 93 Pac. 1018; Cowley v. Smyth, 46 N. J. Law, 380, 388, 50 Am. Rep. 432.

[3] In support of their contention that the representations made to the plaintiff and her assignors were not material, appellants argue that—

"To entitle a graduate of a nurses' training school to take the examination to become a registered nurse, it is not necessary that the school should have been an accredited training school during the entire time that the student was in attendance at the school. It is only necessary that the school be an accredited school at the time the student graduated."

The representation was not to the effect that the hospital would be upon the list when plaintiff and her assignors were ready to graduate, after three years of service, but that it was actually already accredited by the state board of health. The statement was the affirmation of "an existing fact material to the transaction," made to the end that the plaintiff and her assignors might, and the evidence shows did, rely and act upon it.

One of the theories of the defense is that, admitting the representations to have been made, and that the course of training of St. Catherine's Hospital was insufficient at the time the plaintiff and her assignors applied for the course in training, it would still be a defense to the action, if the plaintiff and her assignors would be in position to take the examination required by the state board of health and become graduate nurses upon completion of the course. We think this is a false quantity in the case.

[4] Consequently, the court was correct in sustaining the objection of the plaintiff to certain questions propounded to her upon cross-examination, the purpose of which was to get this erroneous theory before the jury. The defendants do not appear to have been unduly limited upon their cross-examination of the plaintiff, in regard to matters under proper inquiry.

The court instructed the jury as follows:

"In civil cases a preponderance of evidence is all that is required, and by 'a preponderance of evidence' is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."

[5] Appellants contend that the effect of the instruction was to tell the jury that the party upon whom the burden rested must prove his case, by a preponderance of the evidence, without informing the jury who the party was. An instruction on the point suggested was included by appellants in another, otherwise bad, which was properly rejected. If appellants desired any further instructions on the matter, they should have properly prepared and submitted them to the court.

[6] The appellants requested the following instruction, which the court properly denied:

"You are instructed that if you find that the defendants, or any of them, stated or represented to the plaintiff, or the plaintiff's assignors, that the training school for nurses operated by the St. Catherine Hospital was an accredited training school, such statement was a representation of an opinion as distinguished from a representation of fact, and you must not return a verdict for the plaintiff based upon such representation unless you are convinced by a preponderance of the evidence that such representation was untrue and was made by the defendant or defendants with knowledge of the fact that it was untrue.

"If you find that such representation was made and that such representation was an honest expression of opinion on the part of defendant or defendants, you must not return a verdict for the plaintiff based upon such representation."

The matter was fully, and properly, covered by other instructions, given by the court, which were based upon the rule laid down by Mr. Pomeroy, already quoted. Furthermore, the requested instruction was erroneous, in part, in informing the jury that the representations were matters of opinion, and was for that reason properly refused. Marriner v. Dennison, 78 Cal. 202, 215, 20 Pac. 386.

Appellants are in error in stating that facts sufficient to constitute a cause of action are not pleaded, in that there is no allegation that the defendants knew the representations made by them to be false at the time they were made. The amended complaint contains such averment.

[7] The contention that damages are excessive is not borne out by the evidence, which was that the value of the services rendered was $15 per week, while the amount of the verdict is at the rate of less than $12 per week.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

46 Cal. App. 704

JARVIS et al. v. FREY et al. (Civ. 3313.)

(District Court of Appeal, First District, Division 1, California. March 26, 1920.)

1. Appeal and error ⊜1212(3)—On reversal and remand, simply, new trial is on all issues.

The effect of a judgment that judgment be "reversed and the cause remanded" is that the cause is remanded to the lower court for a trial of all the issues made by the pleadings.

2. Principal and surety ⟹112—Surety not released by partial satisfaction of judgment.

Mere satisfaction of judgment, to the extent of a payment on account thereof, is not a release of the surety of the judgment debtor.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by W. H. Jarvis and another against A. Frey and others. From a judgment for cross-complainant, Universal Lumber & Mill Company against cross-defendant, Pacific Surety Company, said cross-defendant appeals. Reversed.

Patterson Sprigg, of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondent.

WASTE, P. J. The respondent, Universal Lumber & Mill Company, was a party to, and a cross-complainant in, a consolidated action to enforce the payment of certain mechanic's liens. Defendant Frey was the owner, defendant Campbell was the original contractor and cross-defendant, and the cross-defendant and appellant, Pacific Surety Company, was the surety upon the contractor's undertaking, conditioned on the faithful performance by him of his contract, and binding the surety, if Campbell failed to do so, to pay for any materials or supplies, furnished for and in performance of his contract. The trial court denied the lumber company relief by reason of certain infirmities in its claim of lien which, it held, rendered it invalid. It likewise denied it judgment against the surety company, based upon the same ground, to wit, the invalidity of the lien. On appeal the Supreme Court held that "the trial court ruled all too rigidly in holding this lien claim to be invalid." The judgment appealed from was therefore "reversed, and the cause remanded." Jarvis v. Frey, 175 Cal. 687, 690, 166 Pac. 997.

When the case came on for trial the second time the respondent lumber company introduced evidence, both oral and documentary, as to the existence of its lien, the amount and value of the material furnished by it to Campbell, and in support of the amount remaining unpaid. After allowing the introduction of this testimony, the trial court, over the objection of this appellant, held the issue as to the validity of the lien and as to the amount and value, if any, of the materials furnished by the lumber company conclusively established, and foreclosed as to all parties, and the surety company estopped to offer any evidence thereon, by reason of the findings of fact made in the first trial, which findings the court held to be conclusive as to the facts therein stated.

In keeping with this ruling, the court permitted the cross-defendant surety company to introduce testimony in an endeavor to establish a special defense it alleged, by way of a subsequent release of the lien, but denied it the right to dispute the claim of the lumber company against its principal, Campbell, the contractor, and its own liability under the lien. New findings were thereupon made "that all the allegations in the cross-complaint of the cross-complainant Universal Lumber Company are true," and that there had been no release of the lien. Judgment was entered against the surety company for the sum established by the former findings, as the amount of the claim due from the contractor to the lumber company.

[1] From this judgment the surety company has appealed, urging, as the principal ground for a reversal, the action of the trial court in refusing it a trial de novo upon all the issues presented by the pleadings to which it was a party.

The court was in error in so ruling. While the appellate court may, and often does, remand a cause with directions to the trial court to find upon a single issue, leaving the other findings to remain as part of the record (Duff v. Duff, 101 Cal. 1, 4, 35 Pac. 437), in this instance that was not done. The judgment of the Supreme Court was that judgment be "reversed, and the cause remanded," the effect of which was that the cause was remanded to the lower court for a trial of all the issues made by the pleadings. Rossi v. Caire, 180 Pac. 58; Stein v. Leeman, 161 Cal. 502, 119 Pac. 663; Davis v. Le Mesnager, 155 Cal. 520, 101 Pac. 910; Glassell v. Hansen, 149 Cal. 514, 87 Pac. 200; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

[2] Appellant complains that the court erred in holding the evidence sufficient to justify its finding to the effect that no release or satisfaction, of any kind or character, was ever given to the appellant, Pacific Surety Company, by the respondent, Universal Lumber & Mill Company, for any part of the claim sued upon in this action. There is no merit in this contention. At the former trial of this case the trial court gave judgment in favor of various lienholders, including the respondent, and against W. F. Campbell, the contractor. It ordered that the balance of the funds remaining in the hands of Frey, the owner, after the payment of the claims of all the other lien claimants, which balance amounted to the sum of $1,716.83, be paid to the lumber company on account of its judgment. It is conceded that the lumber company accepted this sum and satisfied the judgment to that extent. The entry in the judgment book, introduced by the appellant, amounts to no more than a satisfaction of the judgment in that amount.

The judgment appealed from is reversed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

46 Cal. App. 700

GLOBE INDEMNITY CO. v. HOOK et al.
(Civ. 3277.)

(District Court of Appeal, First District, Division 2, California. March 26, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Master and servant ⇐389—Employé stepping into elevator well in darkness held negligent precluding recovery over by compensation insurer.

Employé who in darkness stepped into elevator well without attempting to ascertain whether elevator was at floor, but looking behind him with his companion, was negligent precluding recovery over against owners and lessees of building by workmen's compensation insurer.

2. Negligence ⇐136(26)—Contributory negligence is for court only where facts undisputed.

Ordinarily contributory negligence is of fact for the jury, but becomes a question of law for the court where facts are undisputed and reasonable minds can draw but one conclusion.

3. Master and servant ⇐405(1) — Evidence held conclusively to show contributory negligence of deceased employé.

In action by workmen's compensation insurer of employers of one who stepped in darkness into elevator shaft of building owned by some and leased by them to other defendants, evidence *held* to show conclusively that deceased employé was guilty of contributory negligence in stepping into shaft without endeavoring to ascertain whether elevator was at floor.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Globe Indemnity Company against W. S. Hook, Jr., and wife, and Geo. Rice & Sons, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for appellant.

R. P. Jennings and Jefferson P. Chandler, both of Los Angeles, for respondents W. S. Hook, Jr., and Myrtle Wood Hook.

Hollzer & Greenberg and Joe Crider, Jr., all of Los Angeles, for respondent George Rice & Sons.

NOURSE, J. This is an appeal from a judgment in favor in defendants following an order granting their motion for nonsuit. Plaintiff sued as surety in subrogation under the provisions of the "Workmen's Compensation, Insurance and Safety Act" (St. 1917, p. 831), to recover damages for negligence on the part of the defendants resulting in the death of one Eugene P. Nolan. The decedent was an employé of the Pacific Knitting Mills, with which the plaintiff had made a contract of compensation insurance. Plaintiff had paid the award made by the Industrial Accident Commission to the dependents of decedent.

The facts of the case are: That the Pacific Knitting Mills maintained and operated an establishment on the fourth floor of a building situate in the city of Los Angeles and owned by the defendants Hook and leased by the defendant Geo. Rice & Sons. Means of ingress and egress to the said fourth floor was by way of a passenger elevator and a stairway in the front part of the building and a freight elevator in the rear of the building. The stairway was always open. The passenger elevator in the front of the building was operated between the hours of 7 a. m. and 5 o'clock p. m., and the freight elevator was used by employés of the company at their convenience. Decedent and one Stewart on the day of the injury entered the rear of the building at about 5:30 p. m. on a dark night on their way to the fourth floor for the purpose of attending to their duties. They approached the elevator shaft, which was without light of any kind, and Stewart raised the gate which guarded the elevator shaft, stuck his foot into the shaft to feel the elevator, and continued on down to the bottom of the well, receiving slight injuries. Decedent, who was by his side, followed him immediately into the well and struck the bottom in such a way as to receive injuries which resulted in his death. Neither party made any effort to ascertain whether the elevator was at the ground floor other than as just stated. Both were looking back at the time they stepped into the well, and both were thoroughly familiar with the danger which they assumed. Stewart, who was the only eyewitness to what occurred, testified in part as follows:

That his automobile was standing in the street directly in front of the freight elevator, and he went to the automobile and turned the dimmers down; that he and decedent reached the elevator at the same time, and he reached down and raised the gate of the elevator; that at that time there were no lights in the elevator nor street lights in the vicinity to light up the elevator shaft. "I reached down and pulled the gate up and stuck my foot in to feel if the elevator was there, and just as I did that he (decedent) spoke to me and said, 'Your lights are not on.' * * * And instinctively as he said that, although I knew the lights were on, I turned around to look; and then just a subconscious thought, whatever it was, I had in my mind to step in there, and I stepped in. All I thought was, all the way down, 'This elevator is a long way below the floor,' because it never stopped right at the floor. * * * The elevator was above instead of below. * * * We both stepped in together into the shaft."

The same witness testified that they could have entered the front door and walked up the front stairs; that, though the elevator in

the rear was for freight, it had been used by employés of the knitting mills as a passenger elevator for about three years prior to the accident; that, though the freight elevator was frequently at or near the ground floor, it was often either in the basement or at one of the upper floors; and that both he and decedent had frequently been required to pull the cable in order to bring the elevator up or down to the ground floor, but in the nighttime "generally from an upper floor down; in fact, always. I don't know of a case where I raised the elevator from the basement after dark."

The testimony of the witness Stewart was the only evidence offered by plaintiff showing the circumstances under which the accident occurred. There is therefore no conflict in the evidence in this particular. The only point urged upon appeal requiring consideration is whether this evidence presented such a case of contributory negligence on the part of decedent as to justify the trial court in taking the case from the jury, it being conceded that the same principles of law as to contributory negligence are applicable to a surety suing in a case of this nature as are applicable in a case brought directly by the one injured or his legal representatives.

[1] From the evidence it appears that decedent knew of the danger and assumed the risk without taking any precautions or care to avoid injury. No exlanation is given to account for his conduct. Reasonable prudence would require any one approaching a place of known danger to use some care, at least, for his own safety. But the evidence here is not only that decedent stepped into the elevator well without attempting to ascertain whether the elevator was at the floor, but that at the very time he and his companion entered the well they were both looking behind them into the street. One may not thus heedlessly disregard the ordinary precautions which prudence would require to be taken for his own safety.

[2] From this statement of the evidence the propriety of the nonsuit is apparent. As the Supreme Court said in Loftus v. Pac. Elec. Ry. Co., 166 Cal. 464, 467, 137 Pac. 34, 35:

"Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence."

And again, in Kauffman v. Machin Shirt Co., 167 Cal. 506, 511, 140 Pac. 15, 17:

"It is true that ordinarily the question of contributory negligence is one largely of fact for the consideration of the jury, but where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law." McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 579, 52 Pac. 1004.

[3] The evidence here is of such a nature that no deduction or inference other than that the decedent was guilty of contributory negligence could be drawn, and reasonable minds could not have honestly reached a different conclusion.

For these reasons the order of the trial judge granting the motion to nonsuit plaintiff was proper, and the judgment is accordingly affirmed.

I concur: LANGDON, P. J.

Mr. Justice BRITTAIN, deeming himself disqualified to act in this case, does not participate in its determination.

46 Cal. App. 653

LINDLEY v. KNOWLTON. (Civ. 3294.)

(District Court of Appeal, First District, Division 1, California. March 19, 1920.)

1. Damages ⟸130(3)—Award of $1,500 for boy's nervousness brought on by chimpanzee's attack sustained by evidence.

In action against owner of chimpanzee for injuries to boy of nine, attacked in his home by the animal negligently permitted to be at large, evidence *held* to sustain finding boy had been damaged in sum of $1,500, in that he was rendered sick and thereafter subjected to nightmares, inability to sleep, night frights, nervous attacks, etc.

2. Costs ⟸260(4)—Penalty will be imposed for frivolous appeal taken for delay.

Where appeal is taken from judgment awarding damages for injuries to a child by a chimpanzee negligently permitted to run at large, and the evidence clearly sustains the judgment, the appeal will be deemed frivolous, and judgment will be affirmed, with an added penalty of $100 imposed on appellant.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Milton Lindley, a minor, by his guardian ad litem, Oliver P. Lindley, against E. W. Knowlton. From judgment for plaintiff, defendant appeals. Affirmed.

Ticknor & Carter, of Pasadena, for appellant.

A. L. Abrahams and Claude B. Morton, both of Los Angeles, and P. B. D'Orr, of Atlanta, Ga., for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant for the sum of $1,500, damages for injuries received by the plaintiff, a minor child of the age of nine years at the time of his said injuries, in consequence of an attack made upon him by a chimpanzee

which was owned by the defendant and which was negligently allowed to go at large, and which, entering the home of the parents of the plaintiff, made there the attack upon him from which the injuries resulted which led to this action.

The facts of the case are set forth at length in the case of Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440, to which reference is hereby made. The cause was tried before the court, and the only error complained of by the defendant in this case is that there was not sufficient evidence to justify the finding of the court "that said minor Milton Lindley has been damaged in the sum of $1,500."

Without reviewing all of the evidence upon which this finding is based, it will be sufficient to state that there was evidence offered on behalf of the plaintiff showing that about the hour of 9 o'clock in the morning of March 17, 1914, while the plaintiff was in the home of his parents and was in the act of dressing, the defendant's chimpanzee, which it is conceded he had negligently permitted to be at large, entered the room where the boy was, and seized him, knocking him down, striking his head against a post and stepping upon his body; that his mother and a faithful dog fought the animal off; that the child was picked up by his mother in a fainting condition suffering from bruises that were superficial; that he continued until about 4 o'clock in the afternoon to be extremely nervous, sick at his stomach and dizzy, when he was taken to a physician and treated for his superficial injuries; that although prior to the attack he had been wont to sleep peacefully during the night, after the attack and during months following he screamed in the night, had nightmares, and thought he was being pursued by something, and that he had sick spells with fever and headaches and jerky and twitching nerves; that after his injuries he would wander off and be gone all day without breakfast, dinner, or supper, and that often when spoken to he seemed dazed, and it was found difficult to attract his attention; that upon one occasion three weeks after the attack he was thrown into such a state of terror at seeing a dog that he ran into the house screaming, locked the doors and windows, and remained in a state of fear all the rest of the day; that during the four years which elapsed between the date of his injuries and the trial of the case he was irritable and hard to control, and even at the trial was neurotic and subject to high fever upon exertion.

[1, 2] From testimony of this character and from the personal observation which the judge of the trial court had of the child he made the finding complained of on this appeal; and that said evidence amply sustains such finding is too plain for argument; and that this is a case which should never have been appealed does not admit of serious discussion. We are of the opinion that the appeal is frivolous, and that it was taken for delay. This being so, the judgment is affirmed, with the added penalty of $100 hereby imposed upon the appellant for the taking and prosecution of a frivolous appeal.

We concur: WASTE, P. J.; KNIGHT, J., pro tem.

46 Cal. App. 556

HAGENAH v. BIDWELL et ux. (Civ. 3251.)

(District Court of Appeal, First District, Division 2, California. March 13, 1920.)

1. Appeal and error ⊂=1011(1) — Finding on conflicting evidence conclusive.

Where the evidence as to contributory negligence was conflicting, the Court of Appeal is bound by the trial court's finding.

2. Highways ⊂=184(2)—Finding that allegations of complaint in action for injuries from collision were true held not sustained by evidence.

Where the complaint alleged that plaintiff was riding "along" the highway on the northerly side of the road and defendants were riding "along" the highway on the same side, being their left-hand side, a finding that the allegations of the complaint were true was not sustained by evidence showing that both parties were on the south side of the road, and, in an attempt to avoid a collision, turned diagonally across the road, colliding at the extreme north edge.

3. Highways ⊂=184(3)—Driving on left-hand side not negligence as matter of law.

That defendants were on the left-hand side of the highway was not negligence as a matter of law, as there are circumstances under which the law permits one to use that portion of the highway.

4. Highways ⊂=184(2)—Party injured in collision must show accident occurred through defendant's negligence.

Plaintiff, suing for injuries in a collision with defendant's automobile, must show, not only that an accident occurred and he was injured, but also that it occurred by reason of the negligence of the defendants or of the defendant driving the machine.

5. Highways ⊂=175(1)—Driver must seek to avoid collision through another's negligence.

The driver of a vehicle suddenly confronted with danger, though arising from the fault of another, must seek to avoid a collision, but whether he has taken the proper course depends upon all the circumstances of the case.

6. Trial ⊂=391—Where negligence question of fact, court should find facts in issue.

In an action for injuries sustained in a highway collision, where the question of negli-

gence was one of fact, defendant was entitled to a finding on the facts put in issue in order that the court might, on appeal, determine whether the trial court drew the proper conclusions of law from the facts so found.

7. Highways ⟸175(1)—If proximate cause of collision was negligence of plaintiff's driver, he cannot recover.

Though the negligence of the driver of the motorcycle on which plaintiff was riding might not be imputed to him under a plea of contributory negligence, yet, if the proximate cause of the collision with defendant's automobile was the negligence of such driver, plaintiff could not recover.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Alfred Hagenah against W. E. Bidwell and wife. From a judgment for plaintiff, defendants appeal. Reversed.

C. B. Sessions, of San Francisco (David K. Watkins, of San Francisco, of counsel), for appellants.

John D. Willard, of San Francisco, for respondent.

NOURSE, J. The defendants appeal from a judgment for personal injuries sustained by the plaintiff while riding on a motorcycle which, while being driven by one Reed, came into collision with an automobile driven by the defendant, Maude A. Bidwell.

The plaintiff alleged that at the time of the accident he was riding along a public highway "in a westerly direction, and was on the extreme northerly side of said road within a foot from the northerly edge of said highway; that while riding as aforesaid plaintiff was on his right-hand side of the road;" and that "the defendants were riding in their aforesaid automobile along said public highway in an easterly direction * * * and were going in the opposite direction to that in which the plaintiff was proceeding; * * * that said defendants were driving said automobile on the northern side of said public highway, being their left-hand side of said highway, and being the side on which the plaintiff was riding." The defendants, in addition to denying these allegations, affirmatively pleaded that, as they were proceeding easterly on the highway in question and on the right-hand or southern side thereof, the motorcycle driven by Reed was proceeding westerly towards them on the same side of the highway, being on Reed's left-hand side thereof; that Reed in driving the motorcycle approached so close to the automobile that a head-on collision appeared to be imminent; that confronted by this danger produced by Reed's negligence, the defendant, Maude A. Bidwell turned the automobile to the left in a direction which caused it to move diagonally across the road to the north side; that at approximately the same instant Reed turned his motorcycle so that it headed diagonally across the road to his right; and that the collision occurred at the extreme north edge of the road. The evidence, without conflict in these essential particulars, shows that the accident occurred exactly as described in the answer. Notwithstanding these facts, judgment was rendered for the plaintiff, the only findings on these matters being that the allegations set forth in the complaint were true and were facts established by the evidence, except in an immaterial particular, and that the denials and allegations in the answer and cross-complaints of the respective defendants were not true and not facts, except in immaterial particulars.

[1] The defendants also pleaded contributory negligence on the part of the plaintiff in riding with Reed in the manner in which he was riding and under the conditions claimed by the defendants to have existed. It was contended at the trial that since Reed was not a party to this suit, the defendants' cross-complaints could not be sustained as against the plaintiff Hagenah. The arguments on behalf of the appellants on the subject of Hagenah's claimed contributory negligence may be disregarded, because on that subject the evidence was conflicting, and this court is bound by the finding of the trial court.

[2] Under a narrow and extremely technical interpretation of the allegations in the complaint, the finding that they were true is sought to be sustained by the suggestion that at the very moment of the collision the defendants' automobile was on the left-hand side of the road, and at that moment the motorcycle was on the right-hand side. It is not true, however, that the respective machines were at that moment proceeding either westerly or easterly along that side of the road. The driver of each machine was trying to avoid collision with the other, and each machine at the moment of the accident was proceeding diagonally across and not along the road. There was no conflict in regard to this important matter, and the finding that the allegations of the complaint to the effect that at the time of the accident the plaintiff was proceeding westerly along his right-hand side of the road and the defendants were proceeding easterly along their left-hand side of the road is not sustained by the evidence.

[3-6] It is argued that at the moment of the collision the defendants were on their left-hand side of the road. This cannot be controverted, but it does not follow as a matter of law that the defendants were negligent

in being where they were at that time. It is not sufficient in a suit of this nature for the plaintiff to show that an accident occurred, and that he was injured, but he must also show that the accident occurred by reason of the negligence of the defendants, or, in this case, of the wife who was driving the machine. Cary v. Los Angeles Ry. Co., 157 Cal. 599, 604, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329; Marsiglia v. Dozier, 161 Cal. 403, 405, 119 Pac. 505. The allegations of the complaint that defendants were traveling along their left-hand side of the highway do not make a case of negligence per se because there are certain circumstances under which the law permits one to use that portion of the highway. It is the duty of the driver of a vehicle who is suddenly confronted with danger, though arising from the fault of another, to seek to avoid a collision. Skene v. Graham, 114 Me. 229, 95 Atl. 950; Hartley v. Lasater, 96 Wash. 407, 165 Pac. 106. Whether he has taken the proper course depends upon all the circumstances of the case. Hartley v. Lasater, supra; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; County of Alameda v. Tieslau, 186 Pac. 398. Accordingly, when the question of negligence is one of fact and not one of law, the defendant is entitled to a finding on the facts put in issue in order that the court may on appeal determine whether the trial court drew the proper conclusions of law from the facts so found. Here the circumstances under which the collision occurred were definitely put in issue by the answer, and were proved substantially without conflict at the trial. The finding that all the allegations of the answers were untrue was not sustained by the evidence.

[7] If the court had found in accordance with the evidence it would then have been called upon to determine who had the last clear chance of avoiding the collision, and also whether the proximate cause of the collision was the negligence of defendants or the negligence of Reed. For it is true that, though the negligence of the driver of the motorcycle may not be imputed to respondent under a plea of contributory negligence, nevertheless if the proximate cause of the collision was the negligence of the driver of the motorcycle upon which respondent was riding, he cannot recover. These questions, however, cannot be determined here because the findings which were made negative the essential facts upon which these legal questions must be based.

For these reasons the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 644

CASSRIEL v. McINTYRE. (Civ. 3258.)

(District Court of Appeal, First District, Division 2, California. March 18, 1920.)

1. Sales ⊂⊃417—Evidence held not to show agreement as to invoice conditional to completion of deal.

In an action for breach of agreement for the sale of personal property consisting of the fixtures of a jewelry store and a stock of merchandise, whereby a balance of the purchase price was to be paid when the invoice had been completed and footed, evidence *held* not to show that such invoice had been agreed upon so as to justify demand for possession.

2. Sales ⊂⊃406—Tender of price accompanied by unauthorized condition held invalid.

In an action for breach of contract to sell certain fixtures and a stock of merchandise of a jewelry store, where plaintiff had refused to allow defendant to remove from the store articles not included in the sale, a tender by plaintiff of the purchase price, conditioned upon possession of the premises containing the property not sold, was insufficient; the condition being one which the tenderer had no right to make.

3. Sales ⊂⊃406—Tender of insufficient amount is invalid.

In an action for breach of contract to sell store fixtures and a stock of merchandise where the agreement fixed the price of the fixtures at a certain figure and provided that the merchandise should be paid for at the invoice cost price, less a 15 per cent. discount, a tender by the purchaser of the amount due for the fixtures only was insufficient as a tender of the purchase price for the whole contract.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Henry Cassriel against J. M. McIntyre. Judgment for plaintiff and defendant appeals. Reversed.

A. M. Drew, of Fresno, for appellant.

Alva E. Snow, of Fresno, and W. J. Minville, of Coalinga, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of plaintiff, awarding him damages for breach of an agreement dated October 15, 1918, to sell personal property. The agreement, which was in writing, read as follows:

"Received of E. A. Webb, the sum of $50.00, as first payment on the purchase price of all fixtures, furnishings, safe, show cases, stationery, merchandise and other articles in or belonging to the Coalinga Jewelry store, as owned and operated by me at 237 N. 5th street, Coalinga, California. I agree to sell to the said E. A. Webb, or his assigns the fixtures consisting of 1 safe, 1 cash register, counter, 8 show cases, 1 fountain pen case, 2 show windows, a small silver show case, 2 oak wall cases, 2 pine wall cases, 3 tables, scales, &c for the consideration of $1,000.00 to be paid

with and in conjunction with the balance of the purchase price as stated below: I agree to sell him or assigns, all the stock of merchandise, consisting of stationery, stationer's supplies, jewelry and all other stock in said business &c. at its invoice cost price, less a discount of 15% from said invoice price, upon the following terms, to wit: The above sum of $50.00 as credited on all the purchase price herein, the receipt of which is hereby acknowledged, the further sum of $950.00 upon completion of and footing of said invoice cost and the balance of purchase price within 48 hours after delivery of bill of sale to the First National Bank of Coalinga, Coalinga, California, for said purchaser or his assigns, it being agreed that the usual and legal notice of intended sale shall have been given and that all claims against said business shall have been paid and satisfied so that no obligations shall remain against said business, the said bank being authorized to withhold sufficient of said funds to pay all presented claims, until same are satisfied. It is also agreed that said sale shall include the good will of said business as well as all right to the use and occupation of the premises at 237 N. 5th street under lease from A. P. May."

The sign "&c." following the word "scales" was lined out by the parties executing the contract and initialed by them in the margin thereof at the time of its execution for the purpose of eliminating from the sale any articles other than those expressly enumerated.

On October 24, 1918, Webb assigned his interest in the agreement to Cassriel, the plaintiff in this action. Webb and an employé of defendant prepared an invoice of the stock of merchandise, which showed a cost price of $5,133.15. At the time of the taking of the invoice defendant's employé presented to Webb a supplemental invoice of fixtures and furnishings located within the store and not enumerated in the list of fixtures agreed to be sold for $1,000, the value of which was $407.50. Webb refused to indorse such invoice, claiming at the time that he had purchased all the articles listed therein for $1,000 under his agreement, and that if any dispute arose regarding said items between defendant and plaintiff, to whom at that time the agreement had been assigned, such dispute would have to be adjusted by them. These facts having come to the attention of defendant, he sought the plaintiff, and urged him to come into the store to see just what was included in the contract of sale and invoice so that he (defendant) might retain and subsequently remove from the store the articles which he claimed were not included in the sale. Plaintiff, however, refused to enter the store for any purpose, and insisted upon defendant accompanying him to the office of his attorney for the purpose of closing the deal. The parties there continued their controversy over the disputed articles, and plaintiff tendered defendant payment of $950 and demanded possession of the premises, but defendant refused to accept payment or to deliver possession because plaintiff would not permit him to first remove the disputed articles from the premises. There is some evidence to the effect that at the time of this purported tender the plaintiff had sufficient money in the First National Bank of Coalinga to make full payment for the stock of merchandise, and that defendant was told, either by plaintiff or by Webb, that this money was available, but there is no evidence that it was tendered to defendant, or that any demand was made upon him for a bill of sale, or that the notice to creditors of intended sale had been made as called for by the contract. The trial court found that the plaintiff tendered to the defendant the sum of $950, but that defendant refused to accept the same, and defendant thereupon notified plaintiff that he would not carry out the terms of his contract. Judgment was rendered in favor of plaintiff in the sum of $3,079 as damages for defendant's breach.

[1] On the trial it was urged, among other things, that the tender was insufficient. The necessity of a tender is apparent. The contract calls for the payment of the sum of $950 in conjunction with the balance of the purchase price on completion of and footing of the invoice cost of the merchandise. No other time for payment on the part of the buyer or delivery on the part of the seller is fixed in the contract. No method being specified as to the manner in which the invoice was to be completed and footed, it is fair to assume that the preparation of this invoice was to be made by the parties to the contract, and was to be approved by them before delivery or payment was to be made. The trial court merely found that some time in the month of October, and after the 15th of that month, an inventory was taken for the purpose of ascertaining the invoice cost price of the merchandise, and that the footing of said invoice was completed. The evidence is that the inventory was taken by an employé of appellant and by respondent's assignor. It is not claimed that respondent's assignor was acting as the agent of respondent, and it is not claimed that appellant's employé was authorized to do more than the mere clerical work of taking the inventory. There is no evidence that this inventory was ever presented to or approved by either appellant or respondent. On the contrary, it is alleged in the complaint and found true by the trial court that the "defendant has at all times since the taking of said invoice refused to, and does now refuse to, apprise plaintiff thereof, or the footings thereof." It is uncontradicted that appellant's employé insisted that the disputed articles should be included within this invoice, and that Webb refused to do so, and claimed that all the disputed articles were included in the pur-

chase of fixtures for the consideration of $1,000. It was on account of this dispute that appellant insisted upon the respondent coming to his store to check up the invoice so that he might see what he was getting. This respondent refused to do. Whether the disputed articles should have been included in the invoice as claimed by appellant's employé, or whether they were included in the sale of fixtures, as claimed by Webb, is immaterial. The evidence fails to show that the invoice had been agreed to by the parties, and there is no conflict in the evidence that appellant's refusal to make delivery was conditional upon the adjustment of the dispute as to these articles.

Appellant argues that inasmuch as upon uncontradicted evidence the tender of $950 was accompanied by a demand of either immediate possession or of the key to the premises for the purpose of acquiring immediate possession (which also included possession of the disputed articles), and that inasmuch as respondent was not entitled to possession until the full purchase price was paid, the tender was defective, both because it was accompanied by a condition which respondent had no right to exact and because it was insufficient in amount.

[2] Respondent now disclaims any interest in the articles valued at something over $400, but the evidence is without conflict that there was some dispute as to the ownership of these articles immediately prior to the time that the purported tender was made. The agreement expressly provided that the sale should include the right to the use and occupation of the premises where the personal property was located. But that appellant was not obliged to deliver to respondent possession of property which was not included within the terms of the sale cannot be questioned. His demand that he be permitted to remove these articles before possession of the store was given to respondent was reasonable. But respondent refused this request, and demanded possession of the premises and all the property upon tender of payment for a portion of the fixtures alone. When a tender of payment is made, accompanied by a condition which the tenderer has no right to make, the tender is invalid.

[3] Furthermore, the purported tender was insufficient in amount. The contract specifically provided that payment for the fixtures was to be made with and in conjunction with the balance of the purchase price of the merchandise. Concededly no tender or the purchase price of the merchandise was ever made or attempted. Respondent was not entitled to possession of the premises, nor of the property to be purchased, until full payment had been made, the contract not having provided for an earlier transfer of possession. The purported tender of the $950 was apparently made under advice of counsel to protect the legal rights of respondent. But a tender which is short of something which the creditor is entitled to receive is insufficient, and nothing short of an unconditional tender of the purchase price in addition to the sum of $950 would constitute a valid tender under the circumstances.

For these reasons the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 735

INTERNATIONAL INDEMNITY CO. v. BUCHER et ux. (Civ. 3264.)

(District Court of Appeal, First District, Division 2, California. March 30, 1920.)

1. Mortgages ⊂⊃581(6)—Evidence insufficient to show that plaintiff's attorney was paid so as not to justify allowance of attorney's fees.

In a mortgage foreclosure suit, evidence *held* insufficient to sustain defendant's special defense against an allowance of attorney's fees based on an agreement by plaintiff corporation with its counsel for a fixed compensation.

2. Mortgages ⊂⊃581(6)—Employment of attorney need not be proved to justify allowance of attorney's fees in foreclosure.

Appearance of attorney for plaintiff in a foreclosure suit is sufficient to warrant allowance of compensation for attorney's fees, and plaintiff need not allege or prove that attorney had been employed, or that an agreement had been made to pay him for his services.

3. Trusts ⊂⊃315(1)—Trustee entitled to compensation for services rendered.

A trustee is entitled to compensation for services rendered in connection with the trust.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the International Indemnity Company, a corporation, against Joseph Bucher and wife, to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank F. Oster, Jos. L. Lewinsohn, and Jerry H. Powell, all of Los Angeles, for appellants.

N. Blackstock, of Los Angeles, for respondent.

NOURSE, J. Plaintiff corporation instituted this action to foreclose a mortgage on real estate of the defendants. The complaint contained the usual allegations in a suit of this nature, including the mortgage in full, wherein it was provided that in the

event of foreclosure a reasonable attorney's fee, to be fixed by the court, was to be paid by the mortgagor. The essential allegations of the complaint were admitted by the defendants in their answer, but as to the payment of the attorney's fee they set up the defense that the only attorney engaged by plaintiff in this action was one who was regularly employed by it as its counsel at a fixed salary and other compensation for all services rendered by the attorney, including his legal services in this action. After trial the court found that it was not true that said attorney was employed on a salary for all services as alleged in the answer, but that his salary was paid to him as president of the corporation, and that said corporation was obligated to its attorney to pay him what his services in this action might be reasonably worth. Upon these findings the court awarded judgment in favor of plaintiff for $8,425.28 as principal and the additional sum of $365 as attorney's fees. The only objection to the judgment on behalf of defendants goes to the correctness of the findings as to the allowance of attorney's fees.

[1] In support of their special defense the defendants proffered evidence of a written contract executed by the plaintiff corporation and its counsel in this action on the 26th day of January, 1912, whereby said counsel was employed for the period of five years at a fixed compensation to be paid for all legal services rendered by him on behalf of the corporation. The same agreement provided that as president of the corporation he should receive no compensation. This agreement, by its terms, expired on January 26, 1917, and no evidence was offered tending to prove that it had either been extended or that a new agreement for the payment of compensation for legal services had been made. This action was commenced January 22, 1918, and the only effort of proof of an agreement on the part of the corporation to pay compensation to its counsel in this case was the introduction of the resolution of its board of directors passed on May 1, 1918, wherein the corporation fixed the salary of its president, the same party who appeared as its counsel in this case, at $250 a month. If this evidence proves anything material to the issues in this case, it is that the directors of the corporation, by fixing the salary of its president, deemed as no longer in force the contract of January 26, 1912, which provided that the president should receive no compensation as such. There is not the slightest evidence to support the special defense raised by defendants, and nothing from which even an inference might be drawn to bring the case within Bank of Woodland v. Treadwell, 55 Cal. 379.

[2] It was not necessary for plaintiff to allege or prove that an attorney had been employed by it or that an agreement had been made to pay him for his services rendered in connection with this case. The fact that an attorney appeared for plaintiff in the action was sufficient to warrant the court in allowing plaintiff compensation for attorney's fees as having been incurred by it in this action. Conner v. Blodget, 18 Cal. App. 787, 789, 124 Pac. 733.

[3] It is also argued that, because plaintiff's counsel was an officer and hence a trustee of the plaintiff corporation, he was not entitled to compensation for his services in connection with this action in the absence of a resolution or by-law of the corporation authorizing such compensation to be paid. In this connection it is argued that, inasmuch as plaintiff's counsel occupied a position of trust as president of the corporation, the services rendered by him must be deemed to have been gratuitous unless a specific contract was made for that purpose. To this point cases from the Illinois courts are cited. It is sufficient to say that appellant has selected authorities from one of the few states which recognize the common-law doctrine that a trustee is not entitled to compensation for services rendered in connection with the trust. Such is not the rule in California, and the cases cited are not applicable.

It is not necessary to consider the objections raised to the introduction of evidence, because the admission of such evidence, if error, was not prejudicial to defendants. Full opportunity was given to them to prove the allegations of their special defense, and this they failed to do.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

46 Cal. App. 755

Ex parte TAHBEL. (Cr. 713.)

(District Court of Appeal, Second District, Division 2, California. April 1, 1920.)

1. Witnesses ⟸292—Every one may be compelled to give testimony.

Every person is subject to the power of the Legislature to compel him in any judicial proceeding to give testimony of any fact within his knowledge and material to the issue, except in so far as the Constitution restrains the exercise of this power, or protects the individual from compulsory compliance with its attempted exercise.

2. Witnesses ⟸297—Rule against self-incrimination stated.

According to one of the oldest maxims of the common law, "Nemo tenetur seipsum accusare," any person, whether a party or stranger to the litigation, either in a civil action or a criminal prosecution, may, if he sees fit, refuse

to answer any question the answer to which, if true, will render him punishable for crime, or which, in any degree, may tend to establish a public offense with which he might be charged.

3. Witnesses ⊂297—Immunity from self-incrimination exists, although no criminal prosecution pending; "criminal case."

The words "criminal case," as used in Const. art. 1, § 13, are broader than "criminal prosecution," and, to bring a person within the immunity of this provision, it is not necessary that his examination as witness be had in a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending, but it is sufficient if there is a law creating the offense under which the witness may be prosecuted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Criminal Case or Cause.]

4. Witnesses ⊂304(1)—Rule against self-incrimination applies to any offense examination may disclose.

If there is a law creating the offense under which the witness may be prosecuted, and if the witness may be indicted or otherwise prosecuted for the public offense arising out of the acts to which his examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless absolutely secured against any use in a criminal prosecution of the evidence he may give, which can be done only by a statutory provision that if he submits to the examination in answers he shall be exempt from criminal prosecution for any offense that may be disclosed as a consequence of his examination.

5. Witnesses ⊂21—Juvenile court law held not to warrant commitment of minor for refusing to answer incriminating questions.

Juvenile court law *held* not to justify commitment to juvenile detention home of a minor solely because of his refusal to answer incriminating questions.

Application of Bodo Tahbel for writ of habeas corpus, prayed to be directed to the Juvenile Court of Los Angeles County to secure his release from juvenile detention home. Ordered that petitioner be discharged from detention.

Paul Schenck, of Los Angeles, for petitioner.

J. W. Joos, Deputy Dist. Atty., of Los Angeles, for respondent.

FINLAYSON, P. J. By his petition for a writ of habeas corpus, the petitioner, Henry Tahbel, father of Bodo Tahbel, a boy 15 years of age, seeks his son's release from "Juvenile Hall," a detention home, in the city of Los Angeles, established under the juvenile court law as a place for the confinement of delinquent minors, and to which the boy was committed for refusing to answer certain questions when a witness in the juvenile court. The boy's refusals to answer were made upon the ground that by his answers he might incriminate himself.

On February 19, 1920, there was filed in the juvenile court for Los Angeles county a petition wherein it is charged that the minor, Bodo Tahbel, is a person defined in subdivisions 2, 4, 11, and 13 of section 1 of the "juvenile court law" (Stats. 1915, p. 1225 et seq.) and that he comes within the purview of section 1 of that act in that he has no parent or guardian willing to exercise proper parental control; that, by reason of the depravity of his parents, his home is an unfit place for him; that, by reason of the association of his parents with lewd and lascivious characters and the influence of his parents and of such characters, he is in danger of leading a lewd and immoral life; and, further, that he has violated the criminal law of this state, in that he did commit perjury, as defined in section 118 of the Penal Code, and did violate section 134 of the Penal Code by preparing a false paper and instrument in writing with intent to produce it in the superior court of Los Angeles county in the trial of the case of People v. Otoman-Adusht-Zar-Ha'Nish. The petition so filed in the juvenile court against the minor sets forth in detail the acts charged against him as an alleged violator of the two above-mentioned sections of the Penal Code, and prays that he be adjudged to be a ward of the juvenile court, and be dealt with as provided in the juvenile court law.

Some time prior to the presentation of this petition of January 19, 1920, to the juvenile court, another petition had been filed therein against the minor, similar in all respects to that filed January 19, 1920, except that it did not charge the minor with the commission of any crime. The proceeding so initiated by the prior petition is still pending, though it seems that no formal judgment has as yet been entered therein adjudging the minor to be a ward of the juvenile court; the only order made in that proceeding being an order that the minor be allowed to remain in the custody of his father. He remained in his father's custody until the court, because of his refusal to answer the questions, ordered his detention in Juvenile Hall.

The second petition, that wherein the minor is charged with the commission of felonies—violations of sections 118 and 134 of the Penal Code—was referred to a duly appointed referee of the juvenile court to take testimony concerning the charges therein made against the minor, and to make report to the juvenile court. During the course of the proceedings before the referee, the minor was sworn as a witness and asked certain questions, which, on the advice of counsel representing him, he refused to answer upon the ground that his answers would tend to incriminate him. At the hearing before us on

this habeas corpus proceeding it was agreed by counsel on both sides that the questions which the witness refused to answer were such that answers thereto would tend to incriminate him. The referee reported to the juvenile court that the minor, when a witness before her, had refused to answer the questions so propounded to him, and set forth in her report facts tending to show the materiality of the evidence sought to be elicited from the minor by the questions that he refused to answer. Upon the hearing of the referee's report, the judge of the juvenile court instructed the minor to answer the questions. The minor continuing his refusal, upon the ground that his answers might incriminate him, the juvenile court made the following order:

"It is the order of this court that said witness, Bodo Tahbel, be committed to the custody of the superintendent of Juvenile Hall until he does answer said questions."

[1] Every person is subject to the power of the Legislature to compel him in any judicial proceeding to give testimony of any fact within his knowledge and material to the issue, except in so far as the Constitution restrains the exercise of this power, or protects the individual from compulsory compliance with its attempted exercise. The Constitution of this state has limited the extent to which the Legislature may exercise this power, and has given the individual protection against its exercise by providing, in article 1, section 13, that no person "shall be compelled in any criminal case to be a witness against himself."

[2] According to one of the oldest maxims of the common law, "Nemo tenetur seipsum accusare," any person, whether a party or stranger to the litigation, either in a civil action or a criminal prosecution, may, if he sees fit, refuse to answer any question the answer to which, if true, will render him punishable for crime, or which, in any degree, may tend to establish a public offense with which he might be charged. Rapalje on Witnesses, § 261. This principle of the common law doubtless had its birth in the abhorrence with which confessions coerced by inquisitorial torture were regarded alike in England and America. 8 R. C. L. p. 78. Its soundness has seldom been questioned. And today it stands among the guaranties of personal liberty and security in all the Constitutions, both of England and America.

[3, 4] The words "criminal case," as used in section 13 of article 1 of the Constitution, are broader than "criminal prosecution." To bring a person within the immunity of this provision, it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a statutory provision that, if he submits to the examination and answers the questions, he shall be exempt from criminal prosecution for any offense that may be disclosed as a consequence of his examination. Ex parte Clarke, 103 Cal. 352, 37 Pac. 230; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Karel v. Conlan, 155 Wis. 221, 144 N. W. 266, 49 L. R. A. (N. S.) 826. There has been no immunity law in this state since the repeal of section 1324 of the Penal Code that will justify a court in compelling a witness to give self-incriminatory evidence.

[5] The commitment of the witness to Juvenile Hall was therefore unlawful, unless, as suggested by counsel appearing here in opposition to the writ, justification for the detention can be found in the juvenile court law itself. After heedful consideration of all the points urged by counsel, we fail to see how the juvenile court law has attempted to, or, for that matter, could justify the commitment to Juvenile Hall solely because of the boy's refusal to answer incriminating questions.

It is suggested that a proceeding against a minor to have him adjudged a ward of the juvenile court is not a criminal proceeding, even though the violation of a penal law of the state be one of the grounds set forth in the petition therefor; that the law expressly declares that an order adjudging a minor to be a ward of the court shall in no wise be deemed to be a conviction of crime (section 5 of the act); that the proceeding is no more than one whereby it is sought to have the state, as parens patriæ, supplant the natural parent as the child's custodian; and that therefore the minor is not being prosecuted for any crime, and is in no danger of conviction of a public offense. The statute itself answers this contention. It does not follow, simply because the minor's alleged violation of a state law defining a public offense is charged against him in a petition to have him adjudged a ward of the juvenile court, that he is not also liable to criminal prosecution and to punishment as for the commission of a crime. The juvenile court law expressly declares that, if a petition be filed in the juvenile court seeking to have it adjudged that a minor be made a ward of the court because he has violated a penal law of the state, that court, at the hearing of the petition, or at any time thereafter, if it shall determine that such minor is not a fit and

proper subject to be dealt with under the provisions of the act, "may dismiss the petition therein, and direct that said person be prosecuted under the general law." Section 4c, Stats. 1915, p. 1228. And section 10 of the act reads:

"When any ward of the juvenile court under subdivision thirteen of section one of this act shall have been accused of a felony and no indictment or information shall have been filed, and said ward shall have been committed to either of said schools [the Whittier State School, the Preston School of Industry or the California School for Girls] and shall there prove to be incorrigible or not amenable to the discipline of the said school, and shall be returned to the custody of the juvenile court, * * * it shall be the duty of the judge of said court to sit as a committing magistrate and hold the preliminary examination of such person, and if upon said hearing he shall determine that there is probable cause to believe that the said person has committed the offense charged in the petition theretofore filed in said court, he shall hold such person to answer to the superior court, and thereupon the usual proceedings shall be had for the trial of said case in the superior court after the filing of the information in pursuance to said order of said judge sitting as a committing magistrate, and said person shall be tried by court and jury in the usual manner for the trial of a felony." Stats. 1915, pp. 1233, 1234.

But it is claimed, if we rightly understand the position of counsel appearing here in opposition to the writ, that if a minor refuse to answer a question upon the ground that he might incriminate himself, that fact alone warrants an order adjudging him to be a ward of the juvenile court, and as such amenable to an order of that court committing him to a detention home, or other suitable public institution. We have looked in vain for a provision in the juvenile court law that, by any possible stretch of the imagination might justify such contention. It would have been strange indeed if the Legislature had sought to visit a minor with the loss of his natural parents' society, guidance, and governance merely because, forsooth, he had the temerity to invoke the protection of a constitutional guaranty incorporated into the state's organic law for the very purpose of safeguarding his personal liberty against the methods that obtained when confessions were extorted by inquisitorial abuses.

It next is suggested that, if a minor has been duly adjudged to be a ward of the juvenile court, that tribunal, representing the state as parens patriæ, may, like the natural parent, compel obedience to any order, and punish for disobedience. We understand that, as yet, the minor has not been formally adjudged to be a ward of the juvenile court by a judgment wherein findings upon the jurisdictional prerequisites have been made, as contemplated by section 2 of the act. But even had such judgment been made, and the minor had become a ward of the court in the full sense of the term, the court would not, for that reason, have the power to commit the ward to a detention home merely because the boy might see fit to exercise one of his constitutional prerogatives.

It is true, the right of liberty, secured by the guaranties of state and federal Constitutions, is not that of entire unrestrainedness of action. For civil government itself implies an abridgement of natural liberty. And there are restrictions imposed upon personal liberty that spring from the helpless or dependent condition of individuals in various relations of life, among them being those of parent and child, guardian and ward, teacher and pupil. There are well-recognized powers of control in each of these relations over the actions of the child, ward, or pupil, which may be exercised. These are legal and just restraints upon personal liberty, which the welfare of society demands, and which, where there is no abuse, are entirely consistent with the constitutional guaranty of liberty. Where the restraints imposed by statute upon this class of dependents are such as are essential to the welfare of society and to the comfort and well-being of the unfortunates who come within the purview of the statute, there is no infringement of personal liberty. As we read it, the juvenile court law has not attempted to impose any unlawful restraint upon personal liberty. It is not its purpose to impose unnecessary restraint upon the unfortunates whose care it commits to the juvenile court. Much less is it is purpose to impose upon any of them a degree of restraint amounting to imprisonment in a detention home merely because the ward may have sought the protection of a constitutional guaranty. The purpose of the act is to afford a protecting hand to unfortunate boys and girls who, by reason of their own conduct, evil tendencies, or improper environment, have proven that the best interests of society, the welfare of the state, and their own good demand that the guardianship of the state be substituted for that of the natural parents. To accomplish that purpose the statute should be given a broad and liberal construction. But no construction of the act should be adopted that will cause it to clash with any of those constitutional safeguards that have been incorporated into the state's organic law for the purpose of securing to all protection against possible abuses, inquisitorial or otherwise. We are firmly convinced that the liberty of a ward of the juvenile court, restricted to a great extent, as it necessarily must be, cannot be further restrained, as, for example, by confinement in a public institution, solely and simply because the ward chooses to stand steadfastly by a right guaranteed to him by the fundamental law of the state. An order committing him to a detention home for that

cause, and that cause only, is an abuse of discretion. The exercise of such a power, if sanctioned, would, in its practical effects, be tantamount to the coercion of a confession of crime. True, the design of the act is salutary, and every effort should be made to further its legitimate purposes. But never should it be made an instrument for the denial of a constitutional right, even though the person seeking refuge in the asylum afforded him by the invocation of that right be but a poor, unfortunate minor, who, by reason of his evil tendencies or improper environment, must be taken from the sole care and custody of his own natural parents and placed under the control of the court as its ward.

Finally, it is suggested that the order under which the minor is detained in Juvenile Hall is not an order adjudging him guilty of contempt. Whether the order whereby Bodo Tahbel was taken from his father's custody and deprived of his liberty by being placed in a detention home be regarded as a contempt order, or whether it be characterized by some other designation, the fact remains that this boy was taken from the custody of his parent and committed to Juvenile Hall, there to remain until he should surrender his constitutional right to refuse to give self-incriminatory evidence. Without doubt, the juvenile court, where the welfare of the minor requires it, has the power to commit a ward of the court to a detention home. But such a power, unquestionably lawful when the welfare of the child necessitates it and when its exercise is governed by a wise and sound discretion, cannot be made the pretext for the punishment of the child merely because he elects to stand upon a constitutional right. Section 9b of the act reads:

"No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury; or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

The welfare of a ward does not require that his custody be taken from his natural parent or guardian simply because he has invoked the protecting Ægis of the Constitution.

The commitment to the juvenile hall was illegal; and the minor should be discharged from detention therein.

It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

(46 Cal. App. 87)

RIVERSIDE PORTLAND CEMENT CO. v. MARYLAND CASUALTY CO.
(Civ. 3191.)

(District Court of Appeal, First District, Division 1, California. Feb. 11, 1919. Opinion of Supreme Court, in Bank, Denying Hearing, April 7, 1920.)

1. Notaries ⟸11—No damages for default of notary unless proximate cause of loss.

No recovery can be had upon the bond of a notary public unless the default of the notary was the proximate cause of loss, under Pol. Code, § 801, and wrongful act of the notary in certifying to a justification to a contractor's bond, which was blank when signed by sureties, could not have been the proximate cause of loss to third persons furnishing material to the contractor on the faith of the bond.

2. Alteration of Instruments ⟸12—Principal and surety ⟸46—Implied authorization to fill blanks; noncompliance with law as to justification did not release sureties.

If sureties signed a bond and justified without the amounts being filled in, they consented by implication that the blanks might be filled; and, if the blanks were later filled in, they were estopped as against those who, in good faith, supplied materials to the contractors, to object to the sufficiency of the bond because of their failure to comply with the law regarding justification.

On Hearing in Supreme Court.

3. Notaries ⟸11—Finding that furnishers of material relied on notarial certificate to bond not sustained.

Where the evidence showed that furnishers of material inspected the record for information as to who the sureties were upon the contractor's bond, and relied upon the bond only in connection with an independent investigation of their worth and financial standing, a finding that such materialmen relied upon the notary's certificate attached to the justification in extending credit was not supported, and wrongful act of the notary in making such certificate to the justification of the sureties, sureties having signed in blank without knowledge of the amount involved, could not have been the proximate cause of loss to the materialmen.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Riverside Portland Cement Company against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed.

John Murray Marshall and James S. Bennett, both of Los Angeles, for appellant.

G. C. De Garmo, O'Melveny, Stevens & Millikin, and Alex. Macdonald, all of Los Angeles, for respondent.

WASTE, P. J. This is an appeal by the defendant, Maryland Casualty Company, a

corporation, from a judgment against it as surety upon, and in the full amount of, the official bond of C. B. Davis, a notary public.

E. P. Hunziker and E. C. A. Berger, as contractors, were about to erect a seven-story, reinforced concrete hotel building for C. W. Howard, the ostensible owner. Before the contract for the work had been signed, Hunziker took Davis, the notary, to his home, where he asked his wife, Josephine Hunziker, and his mother-in-law, Mary W. Crutsinger, to sign the printed form of bond to laborers and materialmen, attached to the contract. At the instance of Hunziker the women affixed their signatures to the purported bond, and to the affidavit attached, in the presence of Davis. He did not swear the signers to the truth of the contents of the affidavit, but, according to the findings, at his direction they "did raise their right hands and swear to their signatures, said bond being then blank as to amount." Hunziker then took the blank form away with him and delivered it to a man named Paden, who was the real owner of the property on which the building was to be erected.

Subsequently, at Paden's direction the blank spaces in the bond were filled in by typewriting, the amount of the bond being specified as $35,000. The contract and bond were then filed, in the office of the county recorder of Los Angeles county, the bond bearing the certificate of the notary, Davis, given and made under the official seal of his office, and which read as follows:

"State of California, County of ——— ss.:

"Mary W. Crutsinger and Josephine Hunziker, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says, that he is a resident and freeholder in said county and state, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

"Mary W. Crutsinger. [Seal.]
"Josephine Hunziker. [Seal.]

"Subscribed and sworn to before me, this 17th day of September, 1914. C. B. Davis, Notary Public in and for the County of ———, State of California. [Notarial Seal.]"

During the erection of the building plaintiff furnished to the contractors, Hunziker and Berger, cement used in the construction, to the value of $4,567, after deducting all credits. Plaintiff's assignor, the Trussed Concrete Steel Company, furnished column hooping and ceiling mesh to the value of $4,012.07, less credits and offsets. The contractors paid neither of these amounts, and the parties so furnishing materials duly filed their claims of lien for the respective sums due. The Trussed Concrete Steel Company then commenced an action to foreclose its lien, naming as defendants the ostensible owner Howard, who signed the contract, the contractors Hunziker and Berger, Mrs. Hunziker and Mrs. Crutsinger, the sureties on the bond. The plaintiff here, as a defendant and cross-complainant, filed a cross-complaint against all the parties to foreclose its lien, and for a money judgment against the contractors, Hunziker and Berger, said Mrs. Hunziker and Mrs. Crutsinger, on the said contractors' bond.

A decree of foreclosure was denied both the plaintiff, and its assignor here, in said action because of the fact the rights of both, under their respective liens, had been foreclosed and lost under a prior deed of trust of the property to other parties. Judgment was entered in the action in favor of each claimant, however, against the contractors and Mrs. Hunziker and Mrs. Crutsinger, on the bond, in favor of the plaintiff for $4,567, with interest, and in favor of the steel company for $1,614.48, with interest. These judgments have not been paid, or satisfied, and are the basis of this action against the surety on the bond of the notary, Davis.

The lower court found that in furnishing these materials the parties relied upon the certificate of the notary, Davis, that Mrs. Crutsinger and Mrs. Hunziker had severally made the statement to him, under oath, that they were each worth the sum of $35,000, the amount specified in the bond when filed, and had made the other statements certified to. The court further found that the contractors, and Mrs. Crutsinger and Mrs. Hunziker, their sureties, were insolvent at the time Davis made his certificate, and have been ever since. It therefore concluded that, because of the making of the false certificate by the notary, the plaintiff, and its assignor, had been damaged in the amount of their respective unpaid claims, and ordered judgment against the surety on the notary bond.

Appellant specifies a number of particulars in which it asserts the evidence is insufficient to support the findings. Upon the whole record we seriously doubt the correctness of the lower court's finding that in furnishing the materials to the contractors, the plaintiff and its assignor relied upon the certificate to the bond. The real fact, as shown by the evidence, is that they inspected the record "for information" as to who the sureties were, and "relied upon the bond" only in connection with an independent investigation of their worth and financial standing. However, whether the findings are supported or not, the conclusions reached by the trial court are erroneous, and the judgment must be reversed.

[1] In an action such as this it must appear that the default of the notary was the proximate cause of the loss, or there can be no recovery. 20 R. C. L. 336; Am. Security Co. v. First Nat. Bank (Ala.) 82 South. 429; Overacre v. Blake, 82 Cal. 77, 82, 22 Pac. 979. The Code declares that—

"For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Pol. Code, § 801.

But it is clear that no action will lie to recover damages if no damages have been sustained. McAllister v. Clement, 75 Cal. 182, 184, 16 Pac. 775. Assuming, therefore, that the findings, aside from mere conclusions, are true, plaintiff and its assignor suffered no loss by reason of any act on the part of Davis, the notary, for which his surety is liable. Even though the certificate had spoken truthfully, instead of being false, the position of the respondent would not have been improved thereby.

[2] If the sureties on the bond were insolvent all the time, that undertaking was no protection to the persons it was supposed to secure, and no infirmity in its due execution rendered it less valuable. McAllister v. Clement, supra; Heidt v. Minor, 89 Cal. 115, 121, 26 Pac. 627. On the other hand, if the sureties were financially sound they could not escape liability upon their undertaking by reason of the irregularity in the execution of the bond. Having signed and delivered it to Hunziker, knowing that there were blanks therein, the sureties consented by implication that the blanks might be filled, and were estopped from questioning its due execution as against those who, in good faith, supplied materials to the contractors. Dolbeer v. Livingston, 100 Cal. 617, 621, 35 Pac. 328. It did not lie in the mouth of the sureties to object to the sufficiency of the bond because of any failure on their part to comply with the provision of the law regarding justification. Moffat v. Greenwalt, 90 Cal. 368, 371, 27 Pac. 296; Carpenter v. Furrey, 128 Cal. 665, 669, 61 Pac. 369. There was nothing in the act of the notary to prevent, and, as already stated, the materialmen did obtain, judgment against the sureties on the bond, on which they are now seeking to recover against the surety of the notary.

Consequently the finding, or, more correctly speaking, the conclusion of the lower court that the plaintiff and its assignor were damaged by the act of the notary, is without support.

The judgment is reversed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. On application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1.

[3] From an inspection of the record it seems clear that, as suggested by the District Court of Appeal in its opinion, there is not sufficient support in the evidence for the conclusion that plaintiff or its assignor relied upon the affidavit attached to the bond in extending credit, and that, as said by the District Court of Appeal:

"The real fact, as shown by the evidence, is that they inspected the record for information as to who the sureties were, and relied upon the bond only in connection with an independent investigation of their worth and financial standing."

This being the situation, the finding substantially to the effect that the plaintiff and his assignor relied in giving credit upon such affidavit and the certificate of the notary that the same had been subscribed and sworn to before him is not sufficiently sustained by the evidence, with the result that the matter complained of was not the proximate cause of plaintiff's loss. In so far as the opinion of the District Court of Appeal holds or implies that the notary's default could not be the proximate cause of the loss, notwithstanding reliance is placed on the affidavit and notary's certificate in extending credit, we withhold our approval, without expressing any opinion thereon, and leaving the matter open for determination on the new trial.

The application for a hearing in this court is denied.

ANGELLOTTI, C. J., and SHAW and LENNON, JJ., and KERRIGAN, Judge pro tem., concur.

LAWLOR, WILBUR, and OLNEY, JJ., dissent from the order denying the hearing.

46 Cal. App. 675

ROSSINI v. SECURITY MUT. FIRE INS. CO. OF CHATFIELD, MINN.

(Civ. 2653.)

(District Court of Appeal, Second District, Division 1, California. March 22, 1920. On Modification of Opinion, April 7, 1920.)

1. Insurance ⊜665(4)—Evidence held to show that explosion occurred during and after commencement of fire.

In an action on fire policy defended on ground that the damage was caused by an explosion and not a fire and therefore was not covered by policy, evidence *held* to sustain finding that the explosion occurred during the fire and after the commencement thereof.

2. Insurance ⊜421—Fire the proximate cause of loss where explosion occurs during fire.

Where explosion occurred during and after commencement of fire, the fire was the direct and proximate cause of the loss, and the explosion merely the result of and an incident of the fire.

3. Insurance ⊜624(1)—Insured may sue on policy notwithstanding assignment of money due for purpose of collection.

Insured's assignment of sum due under policy merely for collection, where no adjustment is to be made without his consent, did not preclude him from bringing action on policy; he being the real party in interest.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edward Rossini against the Security Mutual Fire Insurance Company of Chatfield, Minn. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Hindman, of Santa Monica, for appellant.

Carter & Torchia, of Los Angeles, for respondent.

SHAW, J. Action to recover upon a policy of fire insurance which covered plaintiff's building and contents consisting, among other things, of a stock of merchandise, and all of which is alleged to have been totally destroyed by fire.

Judgment went for plaintiff as prayed for, and defendant appeals.

[1, 2] The policy contained a clause that "this company will not be liable for loss (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind," and availing itself of this provision defendant alleged the destruction of the property was the result of the explosion of a bomb or other explosive substance the nature of which was unknown to defendant. The finding of the court, made in response to the issue, is to the effect that, while there was an explosion, it did not precede the fire, but occurred during the fire and after the commencement thereof and while the building and its contents were in process of destruction by the conflagration. Appellant attacks this finding and insists that "in our testimony we have eliminated every possibility of fire preceding the explosion." It conclusively appears from the testimony of the only witness having knowledge of the fact that, upon going out on his porch, he saw the building was on fire, that he ran back into the house to get his hat, and while in the house he heard the explosion. Other than the fact that the front of the building and some of the merchandise were blown into the street and several hours thereafter found scorched and burned, the record discloses absolutely nothing tending in the slightest degree to overcome this direct testimony. The contention as to insufficiency of evidence to support the finding of which appellant complains is wholly without merit; indeed, the testimony upon which the court based the finding is without conflict. This being true, the explosion must be deemed the result of and an incident of the fire which was the direct and proximate cause of the loss. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; Clement on Fire Insurance, vol. 1, p. 123.

[3] While not pleaded, it was on the trial made to appear that after the fire plaintiff made an assignment of the sum due under the policy to a third person, by reason of which fact appellant insists that, having parted with all his right in the policy, he was thereby precluded from maintaining this action. Reference to this assignment shows that it was made to the assignee as plaintiff's agent merely for collection of the insurance money, as to which, however, no adjustment was to be made without plaintiff's approval. By such assignment the assignee acquired no personal interest in the benefits to be derived by the collection, and hence plaintiff, being the real party in interest, did not lose his right to sue upon the policy. Moreover, it also appears from the record, to which counsel for appellant makes no reference, that prior to the commencement of the action Jordan, to whom the plaintiff had made the assignment, executed a document reciting that the assignment so made to him was for the purpose of collection only, and whereas he was unable to collect the same, he thereby reassigned to plaintiff the said policy of insurance and all moneys due thereunder.

No grounds other than the alleged errors discussed are urged by appellant for a reversal. It is apparent not only from the record, but from counsel's argument, that the appeal was not had in good faith, but merely for the purpose of delaying plaintiff in the collection of a righteous judgment. For this reason there is imposed upon defendant a penalty of $50, the same to be paid to plaintiff as part of the cost on appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

On Modification of Opinion.

PER CURIAM. Good cause appearing therefor, it is hereby ordered that the opinion in the above-entitled cause be and the same is hereby modified by striking therefrom the following:

Moreover, it also appears from the record, to which counsel for appellant makes no reference, that prior to the commencement of the action Jordan, to whom the plaintiff had made the assignment, executed a document reciting that the assignment so made to him was for the purpose of collection only, and whereas he was unable to collect the same, he thereby reassigned to plaintiff the said policy of insurance and all moneys due thereunder

—and substituting for the last paragraphs of said opinion the following:

No grounds other than the alleged errors discussed are urged by appellant for a reversal.

The judgment is affirmed.

46 Cal. App. 612

In re CAMPBELL'S ESTATE.

TUCKER et al. v. CAMPBELL et al.

(Civ. 2059.)

(District Court of Appeal, Third District, California. March 18, 1920.)

1. Trial ⊜165—On motion for nonsuit all of plaintiff's testimony must be assumed to be true.

A motion for nonsuit presents for decision a question of law and in effect amounts to a demurrer to the evidence, and necessarily assumes the truth of all the testimony presented in behalf of plaintiff.

2. Wills ⊜324(1) — In determining whether will contest should be submitted to jury all inferences are in favor of contestants.

In determining whether or not, in a proceeding to contest a will, the evidence produced by contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases, and every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proven in contestants' favor.

3. Trial ⊜139(1)—Wills ⊜324(1)—Rule as to sufficiency of evidence where motion made for nonsuit after close of testimony stated.

The rule governing the determination whether a nonsuit should be granted in a given case does not always apply with the same strictness where the motion is made after both plaintiff and defendant, or, in case of the contest of a will, both contestant and proponent, have presented their evidence, and it is not error to grant the motion where it is clear that if a jury should bring in a judgment against the defendant it would be the court's duty to set it aside.

4. Wills ⊜52(1)—In action to revoke probate of will burden of proof of incapacity on contestant.

In a proceeding to revoke a probate of a will on the ground of testamentary incapacity, the burden is upon contestants to overcome the effect of the primary presumption of testamentary capacity, and also of the order involving an adjudication upon presumptively sufficient evidence that deceased was mentally competent, and to show that he was of such sound and disposing mind.

5. Wills ⊜53(2)—Condition of testator's mind before and after making will is admissible to show testamentary capacity.

Where a will is attacked on the ground that testator did not have mental capacity, evidence of the condition of his mind both before and subsequent to the date of the testamentary act is always admissible as having a tendency to show what the condition of his mind was at the date of the making of the will.

6. Wills ⊜324(2)—Evidence as to testator's want of capacity held insufficient to go to jury.

In an action to revoke a probate of a will on the ground of mental incapacity, evidence showing that testator was 83 years old, had been long addicted to the use of intoxicants, and had often been ill, *held* insufficient to warrant the submission to the jury of the issue of want of capacity.

Appeal from Superior Court, Butte County; Eugene P. McDaniel, Judge.

Proceedings by Katherine C. Tucker and others against Robert W. Campbell, as executor of the last will and testament of Robert Campbell, deceased, and others, to revoke the probate of decedent's will. From a judgment of nonsuit contestants appeal. Affirmed.

George E. Gardner and James A. McGregor, both of Oroville, and Mastick & Partridge, of San Francisco, for appellants.

W. E. Duncan, Jr., and Alta Duncan, both or Oroville, for respondents.

HART, J. On the 21st day of May, 1917, the will of Robert Campbell, deceased, was admitted to probate in the superior court of Butte county and letters testamentary were issued to Robert W. Campbell, as executor. On the 30th of May, following, the above-named contestants commenced these proceedings by filing their petitions praying for the revocation of said will on the ground that the deceased was, at the time of the making of the purported will, without testamentary capacity by reason of mental unsoundness. Issue was joined by the filing of answers by the proponents and the trial commenced, before a jury, on October 8, 1918. After the introduction of testimony on behalf of both contestants and proponents the latter moved for a nonsuit, which was granted, and judgment was entered dismissing the action of the contestants. The appeal is by contestants from the order granting the nonsuit and from the judgment.

The contestants and the proponents, with the exception of Sallie Moore, are nieces and nephews of the deceased and are legatees under the will; the sums bequeathed to the contestants varying from $10 to $1,000. The decedent left no wife or children, and the value of his estate was $117,000. After the payment of the legacies mentioned in the will the residue of the estate was left to Robert W. Campbell. The will in question was dated January 13, 1917, and the testator died on April 25, 1917, aged 83 years. The will consisted of six pages, each of which was signed by the testator, in addition to the sig-

nature at the bottom of the instrument, which was attested by two witnesses.

It is stated in appellants' brief that the testimony on behalf of proponents "does not appear in the engrossed bill of exceptions, for the reason that none of it was material on a determination of the correctness of the court's ruling on the motion of the proponents herein," and in respondents' brief it is stated: "At the conclusion of the contestants' case a motion for nonsuit was made and granted."

No findings were made, but among the recitals of the judgment is the following:

"The contestants introduced evidence, oral and documentary, in support of their petition for the revocation of the probate of the last will and testament of Robert Campbell, deceased. At the conclusion of the contestants' case, the proponents introduced evidence, oral and documentary, in support of the allegations of their answer. At the conclusion of proponents' case, counsel for proponents moved that the court grant a nonsuit and dismiss the action on the ground that the contestants had failed to prove the allegations of their contest or their petition for the revocation of the probate of the last will and testament of Robert Campbell, deceased, and that the contestants had * * * in particular failed to produce sufficient or any evidence to show that Robert Campbell, the testator, was, at the time of the making of said will, or at any other time, of unsound mind, or that said will was executed while said testator was of unsound mind."

The contention on this appeal is, of course, that the motion for a nonsuit was erroneously granted; the appellants claiming that the testimony presented by them was sufficient to compel the submission of the case to the jury. There was a large amount of testimony submitted by contestants, but we will refer in a general way only to so much of the testimony as we conceive bears directly or reflects any light upon the question at issue.

[1] It is thoroughly settled, as counsel for appellants declare, that a motion for a nonsuit presents for decision a question of law. Such a motion in effect amounts to a demurrer to the evidence, and therefore necessarily assumes the truth of all the testimony presented in behalf of the plaintiff. As was said in Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426:

"On a motion for a nonsuit on the close of plaintiff's case, the court is compelled to assume the truth of all of the testimony produced by plaintiff. The question of the credibility * * * or the weight of the evidence cannot under such circumstances arise. In fine, as we have * * * already in effect pointed out, the line of distinction between the power of the court when considering the evidence on a motion for a nonsuit on the close of plaintiff's case and the power vested in it when considering the evidence upon the merits is that, in the former case, a pure question of law is submitted for the court's decision, and there is therefore no discretion in the court to pass upon the credibility of the witnesses for plaintiff or the probative value of the testimony produced by plaintiff, while, in the latter case, a question of fact is submitted to the court, it then being called upon to determine whether the issue has been established by the proofs, and the court, like a jury where the issues of fact are so tried, may then weigh the testimony and to that end pass upon the credibility of the witnesses and, finally, conclusively determine the truth as to the ultimate fact."

[2] In Estate of Arnold, 147 Cal. 583, 586, 82 Pac. 252, 253, Mr. Justice Shaw, of our Supreme Court said:

"In determining whether or not in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury the same rules apply as in civil cases. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on its merits. Vermont, etc., Co. v. Declez, 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057; Freese v. Hibernia Sav. and L. Soc., 139 Cal. 392, 73 Pac. 172; Hanley v. California, etc., Co., 127 Cal. 237, 59 Pac. 577; Ferris v. Baker, 127 Cal. 522, 59 Pac. 937; Goldstone v. Merchants, etc., Co., 123 Cal. 625, 56 Pac. 776; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Pacific M. L. I. Co. v. Fisher, 119 Cal. 566, 42 Pac. 134; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; 2 Deering's Dig. p. 2105."

By the rules above stated we must be guided in determining whether the evidence presented by the contestants is of such a character in probative effect as to have justified the trial court in holding, as a matter of law, that it was insufficient to warrant, legitimately, any inference that the testator, at the time of making the testament in question, was without testamentary capacity.

[3] Although the judgment of nonsuit recites that the motion for a nonsuit was made and granted after the proponents had introduced testimony in rebuttal of the showing made by the contestants, the state of the record before us is such that we are required to predicate our conclusion here solely upon the testimony as presented by the contestants, since, for some reason, the testimony introduced by the proponents has not been brought up to this court. We must assume, therefore, that the motion was based entirely upon such proof as was made by the contestants. In this connection, it may be sug-

gested that the rule governing the determination of the question whether a nonsuit should or should not be granted in a given case does not always apply with the same strictness where the motion is made after both the plaintiff and the defendant, or, in the case of the contest of a will, both the contestant and the proponent, have presented their evidence; in other words, after the evidence on both sides is all in. In Estate of Morey, 147 Cal. 495, 507, 82 Pac. 57, 61, this proposition is thus stated:

"With regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, upon all the evidence, it is clear that if a jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial."

See, also, Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Fagundes v. Central Pac. R. R. Co., 79 Cal. 100, 21 Pac. 437, 3 L. R. A. 824; Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

In view of the rule as applied under such circumstances, it may also be suggested that had the testimony presented by the proponents in opposition to that of the contestants been incorporated into this record and thus duly certified to this court, it is probable that we would have been compelled to hold, even if the testimony of the contestants were stronger than as we view it as tending to show the testamentary incompetency of the testator at the time he executed the testament in question, that the order granting the nonsuit involved only the exercise of a discretion with which this court is not legally authorized to interfere. Thus the labor of this court would perhaps have been greatly lessened. We may further add that if the testimony of the proponents possessed any evidentiary value whatever in opposition to or rebuttal of that presented by the contestants, we are at a loss to understand why it was not brought here, duly authenticated. But, however all this may be, we are still of the opinion that the court below committed no error in granting the nonsuit.

[4] The contestants launched their attack against the validity of the will because of the alleged mental incompetency of the testator to make such disposition of his property and estate in the face of the presumption that the testator was of sound and disposing mind at the time he executed the challenged testament. Furthermore, it must be borne in mind that this proceeding does not involve a contest of a petition for the probate of the will, but an attack upon the order by the court admitting the will to probate. That order was made presumptively upon evidence showing that the testator, at the time he made the will, was of sound and disposing mind; that is, that he was possessed of testamentary capacity. Indeed, by its order (which is, of course, in the record) the court expressly found that deceased was of sound and disposing mind and therefore mentally capable, at the time of the execution of the will, of disposing of his estate by testament. It follows that the burden was upon the contestants to overcome the effect of the primary presumption of the testamentary capacity of the deceased and also of the order involving an adjudication, upon presumptively sufficient evidence to justify it, that the deceased was mentally competent to make a will at the date of the execution of the instrument whose legality is under attack here, and to show that he was not of such sound and disposing mind. Estate of Dole, 147 Cal. 188, 190, 81 Pac. 534.

[5] The testimony presented by the contestants does not, in our opinion, necessarily show or tend to show that the deceased was not mentally capable of making a will at the time that he made the will in question. It is not necessary that we should enter herein upon an analysis of the testimony to establish this conclusion. A general reference to it will be sufficient. Much of the testimony relates to acts and conduct by the deceased long anterior to the date of the execution of the instrument, and some of it relates to certain acts which occurred after the will was made and when the deceased was ill and under the care of a nurse. Of course, evidence of the condition of the testator's mind, both before and subsequent to the date of the testamentary act, is always admissible as having a tendency to show what the condition of his mind was at the date of the making of the will; but it does not always follow, from the fact that a person may, before and after the purported execution of his last will and testament, display some mental peculiarities or idiosyncracies which have not always been in his lifetime characteristic of him or which have not been exhibited by him when he has been in what may be supposed to have been the normal state of his mind, that he is incapable, mentally, of exercising a sound will and judgment in disposing of his estate by testament. Such testimony is, of course, important in the determination of such an issue as is presented here, but it must be of such character and force as very clearly to show that the unusual peculiarities which have invaded the mentality of the person are the result of the complete alienation of reason and the consequent incapacity to exercise the will in such manner as to enable him to do those things with respect to the highest concerns of life which, in his normal mind, he would want and desire to do. There must be shown a dethronement of reason and the total loss of ability to guide the

will so that its expression will harmonize with the desire and intent of a testator when mentally in a condition of sanity. It is not true in every case that an aberrated mind is wholly incapable of forming and expressing a sane and sound intent founded in a sane and sound will. But it is often true that one with a defective memory, who cannot readily recognize old friends or recall happenings, even those of more or less importance, with which he has been associated in his lifetime, is not bereft of testamentary capacity. Indeed, one of the characteristics of old age is forgetfulness or lapses of memory, and yet from the fact that an aged person may be afflicted with these mental shortcomings it does not follow that he is incapable properly of attending to his business or of disposing by testament of his estate according to the course he wishes it to take.

The situation in this case as it is disclosed by the testimony is simply this: That the deceased had been for many years a heavy drinker of intoxicating liquors, and during the latter years of his life drank such liquors to excess; that he was a very old man when he made his will and that he was feeble physically; that on occasions he was so ill as to be compelled to take to his bed, the cause of such illness, it is to be inferred from the evidence, being the excessive use of alcoholic liquors; that he could not readily remember old acquaintances when their names were mentioned to him or when they met and greeted him, and in this connection it is to be said that the testimony shows that in almost all instances where he displayed a defective memory in that particular he would, after some reflection, remember the friends referred to; that he often spoke of the Bible and would ask his friends if they thought he was saved, and would cry very often. There is nothing in the facts thus mentioned which are necessarily inconsistent with the adjudication previously made that he was, when he made his will, of sound and disposing mind in a testamentary sense. There is, in short, as we view it, nothing in the testimony which legitimately warrants the inference that the testator was, when he made his will, wanting in testamentary capacity. His feeble physical condition and his defective memory were no doubt due to the joint effect of excessive drinking and to the ravages of old age. He was undoubtedly physically infirm and feeble and his mentality not as firm and strong as in his younger years, and when this is said all that the testimony shows and every legitimate inference it warrants are stated. Some of the witnesses, it is true, expressed the opinion that he was of unsound mind, but their opinions were expressly planted upon the proposition that he was old, had been a heavy drinker, and that his physical health was impaired. The opinion of a witness that a person is of unsound mind can be no stronger than, or of superior evidentiary weight to, the reasons upon which he bases his opinion. No one will say that it is true, as an abstract proposition, that merely because a person is aged and uses intoxicating liquors in an excessive degree he is insane in the sense or to the extent that he is incapable of attending to his business intelligently or of disposing of his estate by testament according to his wishes in that regard.

But there is some testimony from which the inference that he was not of unsound mind at the times to which the witnesses referred is positively justifiable. One witness, who was an old acquaintance of the deceased said that he had often seen the latter under the influence of intoxicating liquor act like any person in a state of intoxication from drinking such liquors, but that he could not say that deceased was crazy or of unsound mind. A niece of the deceased (Mrs. Lee) testified that there were periods during his illness when his mind was clear on "little everyday topics." The nurse who attended deceased during his illness in 1915 said that deceased suffered from physical ailments and had been under a doctor's care for some time; that he seemed like a man "about half sick"; that he would talk of matters which had happened many years previously, but that current matters "slipped his mind. He often told the same story over again," she said. "But," she added, "a great many old people do that." She said that when she went to deceased's house to nurse him the doctor said to her that deceased "was getting over a big drunk." Another circumstance showing that deceased was not only not insane at the time of the happening of said circumstance but of keen intelligence was when the deceased explained to the witness Strang, an employé of the Western Pacific Company, how he (Strang) could take a drink from a flask of whisky which he (deceased) had in his possession while Strang was engaged in performing his duties at the depot of said company without being detected in the act by the foreman or other employé under whom he was working; Strang having said to the deceased, when the latter invited him to drink from the flask, that it was against the rules of the company for employés to drink intoxicants while on duty. All this testimony tended to show, not only that the deceased was of such sound mentality as that he was competent to make a will and so dispose of his property as his heart's desire dictated, but that his indisposition physically and mentally at the times referred to by the witnesses was merely the effect of overindulgence in alcoholic liquors and that, if at times from said cause he was not entirely responsible mentally, he still often had rational moments and was capable of discussing current topics.

There are still other considerations which tend to show that at the time he made his will the deceased knew perfectly well what he was doing. He was a bachelor and had no direct heirs. The principal beneficiary of his bounty was his nephew, and the contestants were also nephews and nieces (one a cousin) in kin. Each of those he mentioned by name in his will, giving to each a legacy of more or less importance in value. It is thus to be seen that he had in memory when he made his will all his relatives who are interested enough in his estate to attempt to void the testament. It will also be observed that his testamentary disposition of his estate is not an unnatural one, as he gave it entirely to his kinspeople by blood. Another fact of some significance to which attention may be directed is that the instrument consisted of six pages of writing and that he subscribed his name to each of the pages thereof, thus making certain what his intent was as to each bequest and devise. The following cases will be found, upon comparison, to be very near the instant case as to the general features thereof: In re McDevitt, 95 Cal. 22, 30 Pac. 101; Estate of Kendrick, 130 Cal. 361, 62 Pac. 605; In re Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Packer, 164 Cal. 527, 129 Pac. 778; In re Langford, 108 Cal. 613, 41 Pac. 701; Estate of MacCrellish, 167 Cal. 713, 141 Pac. 257, L. R. A. 1915A, 443; Estate of Collins, 174 Cal. 666, 164 Pac. 1110; Estate of Purcell, 164 Cal. 301, 128 Pac. 932; Estate of Chevallier, 159 Cal. 168, 113 Pac. 130; In re Wilson, 117 Cal. 271, 49 Pac. 172, 711; Estate of Carithers, 156 Cal. 423, 105 Pac. 127.

[6] But we have pressed the inquiry far enough. As above stated, the testimony to which we have herein made a brief and fair reference speaks for itself, and, while it affords the inference that deceased at the times referred to by the witnesses often used intoxicating liquors to an excessive degree, and was frequently ill, perhaps from the use of such liquors and his venerable years, there is nothing in the testimony to indicate that his mental condition was impaired when he was not under a state of intoxication. There is no evidence that he was not sober and perfectly rational at the time he made the will. Estate of Fraser, 177 Cal. 266, 170 Pac. 601. See, also, Estate of Motz, 136 Cal. 558, 562, 69 Pac. 294, and other cases cited in the opinion in the Fraser Case. We therefore repeat that we do not think that the case as made by the contestants should have been submitted to the jury, particularly in view of the proposition that the deceased had previously been judicially declared, upon evidence presumptively sufficient to support the adjudication, to be of mental soundness when he executed the will and so possessed of testamentary capacity.

In concluding, it is not improper to say that we are informed by the briefs that the contest had once before been tried and a verdict rendered in favor of the contestants, but that the trial court granted a new trial on the ground that the evidence was insufficient to justify the verdict. And in the present case the trial court (presided over by a different judge) declared, in a written opinion supporting its decision in granting the motion here complained of, and which opinion is printed in the brief of respondent, that upon the whole testimony it would grant a new trial if the case were given to the jury and a verdict for contestants returned. These matters are, of course, de hors the record, but we present them as showing that the two different judges who presided at the two different trials of this contest were of the same opinion as to the effect of the evidence presented by the contestants in support of their contest, and that it is not probable that a different result would be reached if the case were sent back for trial on the merits.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

46 Cal. App. 730

PASADENA TRUST & SAVINGS BANK v. BRYSON. (Civ. 3148.)

(District Court of Appeal, Second District, Division 1, California. March 30, 1920. Rehearing Denied April 29, 1920; Hearing Denied by Supreme Court May 27, 1920.)

1. Evidence ⊂=269(3), 313—Written declarations competent to prove intent, but not delivery.

Written declarations by a deceased husband on envelopes containing securities which had been his separate property to the effect that the securities therein were the sole property of his wife are competent to prove intent to make a gift of the securities, but insufficient to show a completed gift by delivery of the securities.

2. Husband and wife ⊂=49½(7)—Fact that donee is wife does not rebut presumption of title from possession.

The fact that the donee of securities was the wife of donor does not rebut the presumption of ownership arising under Code Civ. Proc. § 1963, from exclusive possession of property.

3. Husband and wife ⊂=49½(8) — Evidence held to show a valid gift to wife.

Where after the death of a wife securities were found in her safety deposit box bearing written declarations by her husband, who died three years before she did, that they were her sole property, and the securities had never been listed as part of the husband's estate, the

facts, and the presumption, under Code Civ. Proc. § 1963, against a wrongful act, establish a valid gift to the wife.

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Action by the Pasadena Trust & Savings Bank, as administrator of the estate of Frank E. Clark, deceased, against Frank Bryson, as administrator of the estate of Margaret T. Clark, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

James S. Bennett, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn and Arthur Keetch, Deputy Attys. Gen., for respondent.

JAMES, J. The appeal in this case is taken from a judgment entered in favor of the defendant.

Frank E. Clark and Margaret T. Clark were husband and wife. The husband died in June, 1911, and the wife three years later. Upon the death of the wife certain securities were found in a safe deposit box containing effects of the latter. The securities were contained in envelopes which bore indorsements thereon signed by the husband, who, as has been noted, had died three years previous. No administration had been had of the husband's estate prior to the 29th of September, 1915, when petition for letters of administration was filed, and thereafter the plaintiff here was appointed administrator. Besides his wife, Frank E. Clark left only one heir, to wit, a sister. There are no surviving heirs of Margaret T. Clark. In this action it was declared in the complaint that the bonds found to have been in the possession of Margaret T. Clark after her death were property of the estate of Frank E. Clark, and judgment was sought determining them so to be. These bonds were found in four envelopes. The envelopes bore indorsements over the admitted signature of Frank E. Clark, and the indorsements concluded in the respective instances with the following words:

(1) "The above bonds are and long have been the exclusive property of my wife."

(2) "These bonds are and always have been the property of my wife Margaret T. Clark. They represent unpaid coupons attached to the company's 1st mtge. formerly owned by said Margaret T. Clark."

(3) "The above bonds are and long have been the sole and exclusive property of my wife, Margaret T. Clark."

(4) "These bonds are and always have been the exclusive property of my wife, Margaret T. Clark. They were issued to replace a similar number of the company's original 6% bonds that I gave said Margaret T. Clark about eight years ago."

The finding made by the trial judge upon the important issue presented by the pleadings was that the securities belonged to Margaret T. Clark at the time of her death, and that she, "long prior to the death of said Frank E. Clark, became the owner, in possession of, and entitled to the possession of said property"; "that at the time of her death said property was the separate property of said Margaret T. Clark." A further finding, which seems to be justified by an admission in the pleadings, was made as follows:

"That prior to the time the same became the property of said Margaret T. Clark the same had been the separate property of Frank E. Clark, and the same had been delivered to him as a part of his share of the estate of his mother, Emily D. Clark."

[1] There was no evidence submitted to the court expressly showing when, if at all, the securities were delivered by the husband to the wife; there was no testimony showing that the securities were in the possession of the husband at the time of his death, so that the case must be determined upon the evidence of the indorsements appearing upon the envelopes and the fact that the securities were found in a deposit box belonging to Margaret T. Clark after the latter's death. There is the added fact to be taken notice of that three years had elapsed after the death of the husband before the decease of the wife, and that these securities had never been accounted for as a part of the estate of the husband, and no administration of the latter's estate had been made. The case, as presented by the briefs, assumes that, if Margaret T. Clark obtained title to these securities, she did so by way of gift from her husband. It is not contended that the indorsements made by the husband affirming title to be in his wife are sufficient of themselves to determine the question of ownership. That such declarations are competent to prove the intent of the donor is not questioned (Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Estate of Hall, 154 Cal. 527, 98 Pac. 269); that they are insufficient to establish delivery, that essential element of a completed gift, is denied. Each of these assertions seems to be a correct statement of the law.

[2] Section 1963 of the Code of Civil Procedure enumerates certain disputable presumptions which are to be indulged in some circumstances. One is that things which a person possesses are presumed to be owned by him; another is that a person is presumed to be the owner of property from exercising acts of ownership over it; a third is that a person is presumed to be innocent of a crime or a wrong. It is admitted that as between strangers the presumption of ownership arising from possession is sufficient to establish the fact of ownership unless overcome by other proof; in other words, that the judgment of the court in this case would be amply supported, except for the single fact that

Margaret T. Clark was the widow of Frank E. Clark; that because of this relation the presumption would not apply; and that, if anything, the contrary presumption would obtain. We think it not correct to say that the circumstance of the relation of husband and wife, with its confidential incidents, deprives either party to the marriage of the right to rely upon the presumption of possession as indicative of title. The question in such cases is an open one dependent upon the particular facts presented. The case of Chambers v. McCreery, 106 Fed. 364, 45 C. C. A. 322, cited by the appellant, was a case where the evidence affirmatively showed that a safe deposit box in which the property in dispute was found had been one used in common between the husband and wife, each having access thereto. In that case, therefore, the fact of exclusive possession in the one party was not shown; hence no case was presented to which the presumption of ownership could properly apply. Humble v. Gay, 168 Cal. 516, 143 Pac. 778, was a case where the evidence showed only a written offer to make a gift, and showed further that there had been neither acceptance nor possession taken of the property by the intended donee.

[3] Here, not only was the exclusive possession found to be in the wife, but further there were the written declarations of the husband affirming that the wife owned the property, and still further the fact that for three years she held possession of these securities and no accounting was made as that the property belonged to the estate of the husband. The withholding of such property, had there not been a completed gift prior to the death of Clark, would have been a wrong, and such will not be presumed to have been committed by the wife; rather the contrary, as is declared by the provisions of section 1963, Code of Civil Procedure. We think that to hold in a case illustrated by the facts here presented that no presumption of ownership attached to the established possession of the wife would be to announce a harsh rule, and one which, in justice, should not be enforced.

In reviewing this case we have pointed to the findings which were most vital to the controversy and summed up all of the evidence which, to our minds, is material to the main issue. There are other findings which might be discussed, especially that referring to the alleged fact that the wife, prior to her death, converted the securities (that being a questionable finding on the evidence), but we think it unnecessary to give particular consideration to those matters. The correctness of the finding adverted to would be immaterial in the view we take of the case.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(46 Cal. App. 776)

In re LITTLE'S ESTATE.

SPARLING v. STEPHENS et al.

(Civ. 2062.)

(District Court of Appeal, Third District, California. April 3, 1920.)

1. Trial ⟸139(1)—Nonsuit only where no evidence sufficient to support verdict for plaintiff.

A nonsuit may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which he is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

2. Wills ⟸50—Testamentary capacity exists in one capable of understanding acts, property, relationships, and objects of bounty.

One able to understand and carry in mind the nature and situation of his property and his relation to his relatives and those around him with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, has the capacity to make a will.

3. Wills ⟸324(2)—Lack of testamentary capacity not shown.

In a contest of a will *held* that it was not error to take the question of mental capacity from the jury.

4. Wills ⟸324(2)—Expert testimony held not sufficient to take question of mental capacity to jury.

Testimony of a physician based upon a hypothetical question that in his opinion testator was insane *held* not of sufficient weight to render it error to take the case from the jury.

5. Trial ⟸142—"Legitimate inferences" defined.

"Legitimate inferences" considered on motion for nonsuit are those inferences that necessarily follow from certain evidence—legal inferences that are reasonably and legally to be drawn from the evidence.

6. Wills ⟸44—Habit of drink or drugs raises no presumption of lack of testamentary capacity.

That a testator was addicted to the habit of drink or drugs did not incapacitate him from making a will, and did not raise a presumption that necessary intelligence was lacking, the question to be determined being the mental capacity of testator at the time he made the will.

7. Wills ⟸55(8)—Suicide no proof of insanity.

The fact that a testator committed suicide is not alone proof that he was insane.

8. Wills ⟸31—Person not entirely sane may make valid will.

It is not true that no person who is insane may make a valid will, and, to sustain the proposition that one not entirely sane has not made a testamentary disposal of his estate, it must be clearly shown that, at the time of the testamentary act, he was insane to the extent that he was mentally incompetent to do so.

9. Wills ⟸55(5)—Unsteadiness of handwriting in will does not prove mental incompetency.

That testator's handwriting as shown by his will evidenced nervousness or unsteadiness, and that he did not form the letters as evenly or regularly as was his custom, does not prove that he was mentally incompetent to make a will.

10. Wills ⟸55(5)—Misspelled name of devisee no evidence of testamentary incapacity.

To the circumstance that a testator spelled the first name of one of the devisees, a nephew, erroneously is not to be attached any significance, as showing his mind to be unbalanced to a degree that he was without testamentary capacity when he wrote the will.

11. Wills ⟸52(1)—Burden on contestant to overcome presumption of sanity.

The burden is on a contestant of a will to overcome the presumption of the testator's sanity at the time he wrote the will.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of George A. Little, deceased. Proceeding by Clara M. Sparling to contest the will of deceased, of which Joseph H. Stephens and others are proponents. From a judgment of nonsuit and an order admitting the will to probate, the contestant appeals. Affirmed.

Brittain & Kuhl, Max J. Kuhl, and Wachhorst & Wachhorst, all of Los Angeles, for appellant.

Elliott & Atkinson, of Sacramento, for respondents.

HART, J. This is a proceeding in which the admission to probate of the holographic will of George A. Little, deceased, is contested by Clara M. Sparling, a sister of the decedent. At the close of contestant's case, the court granted a motion for nonsuit, made by the proponents of the will, and admitted the will to probate. The appeal is by the contestant from said order granting a nonsuit and from said judgment.

The grounds of contest were two, viz.: (1) That at the time of the making of the will said George A. Little was not of sound and disposing mind, in this, that he was under the influence of alcoholic drinks and other intoxicants to such a degree that he did not know what he was doing at the time; (2) that on the date of said will, and for several months prior thereto, decedent was mentally incompetent to execute a will and was diseased in mind to such a degree that he was lacking in testamentary capacity and was insane.

On the morning of October 30, 1917, George A. Little was found dead in the kitchen of his home near Fair Oaks, Sacramento county. He had committed suicide by attaching a piece of twine to the trigger of a shotgun, placing the muzzle of the gun in his mouth and pulling the string with his left hand. He left an estate valued at from $35,000 to $40,000.

George A. Little was born near the town of Dixon, Solano county, in about 1871 or 1873. He was educated in the schools of Dixon and subsequently took a year's course in a business college in San Francisco. He returned to Dixon, and was employed for a time in the Bank of Dixon and afterwards in the Bank of Antioch. About 1890 or 1892 he conducted a grocery store in Dixon, and in 1902 or 1903, went into the grocery and saloon business in the city of Sacramento, with a partner named Maltby, and remained in that business for 14 years. The division of the duties of the partners was such that Little ran the saloon and liquor business while his partner attended to the grocery store.

In April, 1916, when Little was about 44 or 45 years of age, he for the first time married. After his marriage he gave up the saloon business, and in the fall of 1916 removed to a ranch which he owned near Fair Oaks. Shortly thereafter his wife became ill, and was twice taken to a hospital in San Francisco, where she died on July 1, 1917. After the burial of his wife decedent returned to his home at Fair Oaks. While living there, his barn and contents were destroyed by fire, and about the middle of October, 1917, a new automobile was stolen from him.

When the deputy coroner was called to the house of decedent, on the morning of his death, he found in the pocket of a coat hanging on the kitchen door a number of letters, a bank book, and the will in question. The deputy coroner testified that the paper upon which the will was written looked like letter tablet paper. Among the letters found was one which is called a "farewell letter," written by deceased to his sister, Edna. The will is brief and is as follows:

"Fair Oaks
"September Twenty Ninth
"Nineteen hundired and Seventeen.
"My first and Only Will & Testament.
"I give & bequeath to my Nieces and Nephews. Harlod & Robert—Stephens Ranond. Ralpha & Ruth Little Dorathia Little Sixty acres of land. near. Dixon. Share & share alike.
"The. residue. or. balance. of the estate to go to my Sister Mary. Edna. Stephens.
"to use and do. with as. she. may choose.
"And to give no bonds.
"Geo. A. Little."

Appellant contends that the will, "Contestant's Exhibit No. 1," "bears unmistakably stamped upon it an incoherent, uncertain, vacillating, legally incompetent mind."

We will now give, in as concise a manner as possible, the gist of the testimony introduced on behalf of the contestant, in addition to the facts above epitomized.

J. E. Davies, owner of a machine shop in Sacramento, testified that decedent had bought from him a gas engine, and some time later had told witness that it was not working well; that witness sent a man to look at the engine, who reported that everything was all right. About a week and a half or two weeks before his death Little came to Davies' office. The witness said that decedent spoke about the fire, the shortage of men and shortage of material, and was very much excited; that he waved his hands, walking up and down the floor, and said, "This business is driving me crazy." Witness said Little was wholly irrational for a few minutes at the time of that conversation; that he thought he was intoxicated, but it proved that he was not; that after they "got him toned down to a reasonable condition" he discussed matters very satisfactorily.

William Mullenney testified that he had known George A. Little for 17 or 18 years, very intimately for 10 years; that during the last year of his life he had seen him only once, which was in October when his automobile was stolen; that at that time decedent was irrational, seemed to be laboring under a great deal of excitement, and was a great deal thinner than when witness had seen him before; that "he seemed to be kind of staring like."

William Winn, a machinist's helper, employed by the witness Davies, testified that decedent bought an engine in the shop in August, 1917; that in about a week "he came back roaring. By roaring I mean that he was up in the air; * * * he was profane and swearing." Davies sent a man out to look at the engine, and in about one week Little again came to the shop. Witness said: "He was excited. The way he went on was something fierce. He commenced swearing. I got him by the shoulder and took him over to the bench and told him to cool down." Again a man was sent out to look at the engine, and in September, about a week before he killed himself, Little returned to the shop. At that time he told about the fire and about his wife being dead, and said: "My bad luck; I lost my wife; I got this fire; I lost everything." Witness said he was "awful flighty, and pale as a ghost, and had been drinking"; that he waved his arms, and witness grabbed him by the shoulder and held him; that he walked up and down pulling his hair; that on one occasion he said: "What in hell can I do? Is this man that keeps this place crazy or am I crazy?" The witness testified that he said to Little: "If I had as much money as you have I would not worry"—to which Little replied: "To hell with it; I don't know who is going to get my money. The saloon men will get it."

Another employé of Davies was Walter Marx, who testified that Little was in the shop and complaining that the engine he had would not run. Witness went out and coupled the batteries up to the engine, "turned it over, and away it went. There was nothing wrong with it. There was nothing unusual about Mr. Little's demeanor or conduct during the time I knew him, only he was forgetful. I would show him how to start the engine, and then when it came to him starting it he had forgotten what I had shown him. This happened upon two occasions."

G. W. Shouse had worked for Maltby & Little as a grocery clerk for 7 or 8 years. He said that during that time "Mr. Little was a drinking man. I don't mean he was a man to be drunk all the time. What I mean is that he was a man that took his drinks as an ordinary man would that is running a saloon." Witness met Little several times after February, 1917. He testified:

"I noticed a change in the appearance of George Little after the death of his wife. He seemed to be downhearted like any man would, and he told me that he lived out to the ranch all alone; he said it seemed to be very lonesome, and he was stating about what bad luck he had had, losing his wife and his barn burning down, and I believe something about his automobile burning up; and he said that a man having the luck that he had, life wasn't worth living. He stated that sometimes he felt like going down to the river and jumping in the river. The last time that he said this was not more than three days before he committed suicide. At that time he looked bad, was very peaked in the face, and did not look well; * * * he was kind of trembly like, nervous—shaky like."

Ernest Parker testified that he knew Little in his lifetime; that he last saw him two or three weeks before his death; that he seemed sad and downhearted, grieved over the death of his wife; that he also mentioned the loss of his barn by fire. "Before the death of his wife he was of a jolly nature, talkative and very sociable. After the death of his wife he was very sad. The last time I saw him he was rational."

John Hedigan testified that he had known George Little for about 12 years. Witness was stopping with Jeremiah Kenealy, who owned the adjoining farm to that of decedent. For three weeks previous to the death of George Little he and witness slept in the same bed at Kenealy's house. On the night of October 29th, the night before the suicide, Mr. Kenealy's house being filled with company, witness and George Little slept in the same bed at Little's home. The witness said that during the three weeks previous to Little's death he "acted pretty strange some-

times, to me. The last night I slept with him I thought he was insane—well, in fact for a couple of weeks, he kept jumping, and one thing another. He jumped in bed and acted funny. He would jump in bed at nighttime, and then he would ask me if they kept me awake. * * * That happened almost every night I slept with him. * * * Little groaned at nighttime; he was wide awake several times when he was groaning. Sometimes he would be lying down and sometimes sitting up. The groaning continued pretty near all night." On the night before the death of decedent witness said that at about 20 minutes to 1 o'clock Little got up and said, "I have got to go out here a little while to the kitchen;" that he went out of the room, was gone about 15 minutes and returned; that at about 5 o'clock Little said: "I am in awful trouble. Did they keep you awake?"—to which witness replied: "No, George." At about 6 o'clock in the morning witness arose first, dressed himself, and said, "I will see you over at breakfast, George," to which decedent replied, "No; I don't think you will, Jack; I don't feel just right." Witness said it had been customary for Little to eat his breakfast at the Kenealy home. He testified that Little was a drinking man; that every day he was in Sacramento he saw him take a drink of whisky. He said that the evening before the suicide Little told him he was going to stay home that night; that he had writing to do.

Jeremiah Kenealy stated that at one time after the death of Little's wife he and Little were together at a saloon in Folsom and drank some beer; that Little acted strangely. He said:

"George comes and started something like, I don't know, I think it was a dog around, and touched his leg, or something, and I said: 'What is the matter, George?' 'Oh,' he says, 'I am awful nervous; I wish I could take a drink of whisky. I was up all night. I don't feel good.' So he took a whisky." Later on they took two more whiskys.

Howard C. Tarry, an automobile repair man employed in Fair Oaks, testified as to having worked on Little's automobile and being called to his place to start a gasoline engine. The first time he found the engine was not put together right, and fixed it. At another time Little called to get witness to go out to start the engine. Witness testified:

"I rode out with him; it is about four miles and very hilly; I would not ride back with him. He drove very recklessly, and I grabbed the wheel and pulled the machine back into the road several times—a couple of times."

Witness said that Little jumped around the engine at his place and was nervous; that it was necessary to remove part of it, and he was so nervous that he could not put the parts back again; that there were several nuts to be put on, and that Little could not hold the nuts in his fingers to start them on the threads. At another time Little had taken a spark plug to pieces and put it back wrong. Witness said:

"Upon these occasions I could not notice that he was irrational, but it wasn't in the way he usually acted."

E. W. Braden testified that after Little lost his wife his conduct and demeanor were not exactly the same; that he was nervous, easily frightened, and he seemed to think everything was going wrong about the place.

J. A. Reed told of an occasion when Little was sitting in an automobile, in August of 1917, "apparently waiting for Mr. Johnson to come out of the house, and he took a paper out of his pocket. I took it to be a pack of cigarette papers, and he looked at them, throwed them down on the bottom of his machine, and commenced talking to himself and motioning with his hands."

Clara M. Sparling, the contestant, testified:

"During the last 3 or 4 years of my brother's life I saw him quite frequently. I knew his wife. He didn't visit me, but I always went to see him at his place of business. * * * I judged the relationship between my brother George and his wife was very affectionate. I was present when she died. My brother telephoned to me to come; he telephoned me that his wife was dying. I saw a good deal of my brother George shortly after his wife's death and while the funeral arrangements were being made. My brother had been a drinking man in his lifetime. During the last 10 years of his life I have talked to him about his drinking and asked him for his general health's sake not to drink. * * * During those last 10 years of his life I have seen him under the influence of liquor; not frequently, because I did not see him every day. * * * When I arrived at the hospital in San Francisco where his wife died he was very much under the influence of liquor. After that he still continued to drink more or less until I left after the funeral. I believe the last time I saw George was at the state fair. He was not intoxicated, but his general health, his appearance—he was nervous and shaking. I felt sorry because he looked so miserable. When he shook hands with me you could feel his bones through his coat. * * * At the time of his wife's death he was very nervous and crying, and said he was going to commit suicide. * * * On the day after his wife's death my brother had had a few drinks. He was not appreciably under the influence of liquor, but he was in a very nervous, sick condition. * * * Before his wife's death George was a very healthy looking person, what you would call rather stout. When I saw him at the state fair his eyes were all drawn down, and his face was thin, and he was shaking all over his body. * * * In my opinion, during the months following the death of George's wife, I do not believe that he was entirely sound on account of sickness and liquor."

C. M. Johnston was foreman on George Little's ranch between 9 and 11 days after

the 15th of August, 1917. He said that Little was rather excitable; that he walked up and down with his head down and talked to himself, making motions with his hands. On several occasions decedent said: "I will take the gun and blow my head off and end it all." Witness had known Little for about 3 years prior to his death. When he met him at the store, decedent "seemed to be a sociable, jolly man, and was stout and his cheeks were full of color, kind of rosy. He had a florid complexion, a very ruddy and rosy complexion. During the last year he seemed to be worried and thin, and did not look like the same man. He didn't seem to have any color left; he was pale, and there was a big difference in his weight. He was a good deal thinner." Witness told about Little's attempts to fix engines; that he would pull them apart and could not put them together again. "When the engine was working he couldn't let it alone; he would stop it, and it would not work right, and this ought to be done, and that ought to be done, and the first thing you know it would not work at all."

Mrs. C. M. Johnston, who lived at Little's home during the time her husband was foreman, testified that decedent was nervous; that the first day she was there he spoke about his late wife, said he had had poor luck, wrung his hands, and said this was a weary world. On the next day the engine broke down, and Little came into the kitchen to telephone, but the line was busy, and he paced the floor and wrung his hands, and said that he would take a gun and blow his brains out. "He was reticent as a rule. He was not jovial. He seemed melancholy. His spirits were not lively; his spirits were depressed nearly always. Upon the second occasion he said he was going to commit suicide, and he repeated that statement. This was a daily occurrence."

Dr. Fred P. Clark, an alienist, for 12 years superintendent of the state hospital of the insane at Stockton, was asked a hypothetical question embodying the facts above detailed, and said that in his opinion, at the time the will was written, George A. Little was insane.

[1] The rule as to motions for nonsuit is stated as follows (and which statement of said rule is affirmed in Estate of Chevallier, 159 Cal. 161, 167, 113 Pac. 130) by Mr. Justice Barry in Dublin, etc., Railroad Co. v. Slattery, 3 App. Cas. 1155:

"When once a plaintiff has adduced such evidence as if uncontradicted would justify a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury."

In Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642, it is said:

"If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. 'This is equivalent to a demurrer to evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff.'"

See, also, Byrnes v. Moore, 93 Cal. 393, 29 Pac. 70; Archibald Est. v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

It is true that, on a motion for a nonsuit, particularly when made on the close of the plaintiff's, or, in the case of a will contest, the contestant's case, "in determining whether the evidence presented is sufficient to take the case from the jury, the entire evidence presented is to be viewed from a point most favorable to the contestant." Est. of Ricks, 160 Cal. 450, 117 Pac. 532. "Disregard is had of any contradictory evidence." Est. of Ricks, 160 Cal. 450, 117 Pac. 532; Est. of Arnold, 147 Cal. 583, 82 Pac. 252; In re Ross, 173 Cal. 178, 179, 159 Pac. 603. In other words, a nonsuit may be granted "only when, disregarding conflicting evidence and giving to plaintiff's [contestant's] evidence all the value to which it is legally entitled, herein indulging in every *legitimate* [we italicize the word 'legitimate'] inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." Estate of Caspar, 172 Cal. 147, 155 Pac. 631; In re Ross, 173 Cal. 179, 180, 159 Pac. 603, 604.

[2] Testamentary capacity or what constitutes the mental capacity to make a will has been lucidly explained in Estate of Motz, 136 Cal. 562, 69 Pac. 294, in a quotation from the case of Whitney v. Twombly, 136 Mass. 145, as follows:

"If he [the testator] is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make his will."

[3] Putting the evidence presented herein by the contestant to the test of the foregoing well-established and, indeed, elementary, principles, it seems very clear to us that but one conclusion can justly follow, and that is that the court below made no error of law in taking the case from the jury.

The substantial facts as they were revealed before the court by the testimony submitted by the contestant are given in considerable detail above, and the sum of all that testimony, when reduced to its real evidential purport, is: That the deceased, a man of such education and intelligence as that jus-

tification was found for his employment as the cashier, at different times, of two different banking institutions, a position concededly of great importance and responsibility, and who later became engaged in mercantile pursuits, and whose capabilities and experience as a business man were of such high degree and value as to enable him to succeed, before passing the meridian of life, in accumulating a comfortable fortune, had suddenly met with a series and variety of reverses which so shocked his nervous organization as to have worked changes in his physical and mental characteristics; and as to his condition in those respects as thus brought about the facts are these: That he had been, during some of the years prior to the date of his self-inflicted death, addicted to the use of intoxicating liquors; that he had retired from the mercantile business and taken up farming or fruit raising, and that comparatively late in life—that is, after he had passed his fortieth year—he took to himself a wife; that, after having been married for a period only of a little more than a year, death claimed his wife; that shortly thereafter the stable located upon his farm was destroyed by fire, this misfortune being shortly followed by the theft of an automobile owned by him; that following all these troubles and misfortunes, coming as they did in rapid succession, he appeared to grow discouraged and despondent, and perhaps plied himself more liberally with intoxicants than he had ever been accustomed to indulge in prior to the date of the advent of adverse inroads into his life and his affairs; that he lost flesh and also displayed mental peculiarities to which his mind was a stranger prior to the time at which the misfortunes referred to came to him; that, according to some of the witnesses, he acted irrationally at times, but that such irrational moments were of limited duration; that he on one occasion, when dwelling on his misfortunes, wrung his hands and talked to himself, and on another occasion, while under a great nervous strain, he exclaimed that "all these things" (meaning his misfortunes) would drive him crazy; that on another occasion he complained that an engine or tractor used on his farm was out of order and would not perform its work, and that, when taken to a machinist for inspection and repair, the latter found the machine intact in all respects—in other words, in perfect workable order.

[4] The above, we repeat, is about all that can be said that the oral evidence shows as tending to establish the mental incompetency of the deceased to perform or execute the testamentary act, save and except the testimony of a physician who testified, basing his testimony upon a hypothetical question, that in his opinion the deceased was insane, but as to this character of testimony the Supreme Court, in Estate of Dolbeer, 149 Cal. 227, 243, 86 Pac. 695, 702 (9 Ann. Cas. 795), has justly declared:

"The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person and who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory. Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousandfold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value."

See, also, Estate of Chevallier, 159 Cal. 161, 170, 113 Pac. 130.

Some of the witnesses for the proponents, speaking of the peculiar actions or conduct of the deceased prior to the date he wrote his will, testified that, while on certain occasions he acted very peculiarly and like one laboring under a severe nervous and mental strain, he did not appear to be irrational. There is no positive testimony that he was under the influence of intoxicating liquor when he wrote the will whose validity is here challenged.

[5] What are the legitimate inferences from all the testimony? By "legitimate inferences" are meant those inferences that necessarily follow from certain evidence—legal inferences that are reasonably and legally to be drawn from the evidence.

[6] It is true that it appears from the oral evidence that the deceased had suffered a severe nervous shock as the result of the reverses with which he had met. He was undoubtedly much discouraged and very despondent, particularly because of the loss of his wife. But does it follow from this that he was bereft of testamentary capacity at the time he made his will or at all? Does it follow from this condition that he did not know what he was doing when he executed the testamentary act? Is the inference to be indulged that a man is insane or irrational to the extent that he is lacking in intelligence enough to dispose of his estate by last will and testament because it transpires that at times he has been in a state of alcoholic intoxication?

"A person may drink and yet retain his mental faculties. * * * The effect of alcohol and of drugs wears off, and although they may leave the user weakened both in mind and body, yet so long as there has not been destruction of that mentality which the law requires for the

making of a will, it cannot be said that the fact that the testator is addicted to the habit of drink or of drugs incapacitates him from making a will. Such fact, alone, does not raise the presumption that the necessary intelligence is lacking. The question to be determined is the mental capacity of the testator at the time he makes his will, and the fact that he may then be under the influence of liquor does not invalidate his testament unless he had no intelligent comprehension of what he was doing." Alexander on Wills, vol. 1, § 350.

There is, as we have in other words declared, nothing in the testimony from which the inference necessarily follows that the deceased "had no intelligent comprehension of what he was doing" when he wrote his will. To the contrary, the will itself is mute but convincing evidence of the fact that he fully comprehended what he was doing when he wrote it. Indeed the fact that the will is holographic, and that it was prepared by himself in strict accord with the law prescribing the requisites of such a testament—that by it he indicated that he knew that, as the law requires, such a will, to be valid, must be in the testator's own writing and dated by him—is itself well-nigh indubitable evidence that he was very much "at himself" when he drew the instrument, and at that time knew precisely what he was doing and how he desired to dispose of his estate. By the instrument he disposed of his entire estate, and some of it by specific devise to his nephews and nieces (near relatives), giving the location of the property so devised, and appears to have been able "to understand and carry in mind the nature and situation of his property, and his relation to his relatives and those around him with clear remembrance as to those in whom and those things in which he had been mostly interested." Whitney v. Twombly, supra. Moreover, the disposal of his estate by the testament in question is not an unnatural one. All the devisees and legatees under his will were closely connected with him by blood. It is true that, in the testamentary disposal, he pretermitted the contestant, a sister, but that fact does not render the disposal an unnatural one, and it must be assumed that he had a reason, sufficient to his mind, for thus omitting her as a beneficiary of his bounty.

[7, 8] Nor does the fact that he committed suicide alone prove that he was insane. It is not true that no person who is insane may make a valid will. Estate of Chevallier, 159 Cal. 161, 168, 113 Pac. 130. And to sustain the position that one not entirely sane has not made a valid testamentary disposal of his estate it must be clearly shown that, at the time of the testamentary act, he was insane to the extent that he was mentally incompetent to do so.

[9] But counsel for the contestant, in their briefs, make a minute and, withal, an ingenious examination of the handwriting of the deceased, as evidenced by the will and a letter written by him to his sister, Mrs. Stephens, near in point of time to the date of the execution of the will, and so undertake to show, and by a comparison of his handwriting in those two documents with a letter written by him to the contestant in July, 1917, when, as is conceded, he was in his natural and normal state of mind, that his handwriting as evidenced by his will was not as regular and symmetrical in form as his letter to the contestant showed was the characteristic style of his handwriting. A photographic copy of the will is reproduced in the record. We have carefully examined and compared it with the handwriting of the letter to the contestant, likewise reproduced. There are, it is true, some evidences in the writing in the will of nervousness or unsteadiness in the manipulation of the pen in the writing of the document, but it will readily be perceived, by an inspection and comparison of the handwriting of the will with his letter to the contestant that the only difference between them is that one was written with an unsteady hand and the other when the writer apparently had full command of his physical power. The one was undoubtedly written while the testator was suffering from nervousness, due, no doubt, to the mental and physical strain under which he was laboring by reason of his misfortunes, while the other was written while he was in a normal physical and mental condition. But the fact that in the testator's handwriting as shown by his will there is evidence of nervousness or unsteadiness and for that reason he did not form the letters in the words as evenly or regularly as was his custom proves nothing as against the proposition that he was mentally competent to make a will at the time he wrote the document in question. All persons, it is undoubtedly true, are, in their handwriting, subject to such inperfections. In other words, it is the rule and not the exception that the handwriting of people is not always uniform or precisely their characteristic style of handwriting. A person, enfeebled from physical illness, would not, generally speaking, write in his usual hand, and the difference would be obvious. In this case, the deceased, for several weeks prior to his death, was admittedly in enfeebled physical health and undoubtedly in a measure and in a sense mentally affected. Besides, he had been more or less under the influence of intoxicating liquors. It is therefore not strange or a matter of surprise that he should have been incapable, at the time of writing his will, of so using his hand in writing a letter or a document of any character as to make his handwriting therein altogether the same as his chirography

would be when he was in good health and in every respect in a normal condition.

[10] Nor do we think that to the circumstance that the deceased, in his will, spelled the first name of one of the devisees, a nephew, erroneously, is to be attached any significance as showing his mind to be unbalanced to a degree that he was without testamentary capacity when he wrote the will. Such a mistake is not uncommon in those in a perfectly normal state, and much more readily is it to be perceived that a mistake of that character may be made by one under the influence of the nervous strain from which the deceased had for some time previously been suffering through the misfortunes with which he had been afflicted.

[11] The burden was on the contestant to overcome the presumption of the testator's sanity at the time he wrote his will. This burden, we think it will appear clear from an examination of the testimony, the contestant has not sustained. In other words, the evidence produced by the contestant is not of "sufficient substantiality to support a verdict in favor of contestant if such a verdict were given." Estate of Caspar, 172 Cal. 147, 150, 155 Pac. 631, 632, supra. The evidence does not "warrant a recovery," or a verdict for the contestant. Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642, supra.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge, pro tem.; BURNETT, J.

46 Cal. App. 624

HILL v. CITY OF OXNARD et al.

(Civ. 2073.)

(District Court of Appeal, Third District, California. March 18, 1920. Hearing Denied by Supreme Court May 17, 1920.)

1. Municipal corporations ⟸692—Permanent structure or purpresture encroaching on street may be abated.

Public highways belong from side to side and end to end to the public, and any permanent structure or purpresture, as a tree, which materially encroaches upon a public street and impedes travel, is a nuisance per se, and may be abated, though space is available for passage of public.

2. Dedication ⟸51 — Entire width of street generally dedicated.

Generally when a piece of land is dedicated to the public as a street by its owner its entire width is dedicated, and the principle that the public is entitled to the open use thereof free of encroaching structures and purprestures is applicable.

3. Municipal corporations ⟸658 — City took highway for street burdened with exceptions in deed to county.

When a city transformed a highway through plaintiff's land into a street, it took it burdened with exceptions contained in deed of land for street from plaintiff to county as city's predecessor.

4. Municipal corporations ⟸696—City cannot remove trees reserved by plaintiff granting land to county for highway.

In view of Const. art. 1, § 14, where plaintiff granted a strip of land to the county for a highway, reserving trees which the county agreed not to interfere with, and a city took over highway from county and made a street of it, it cannot cut down and remove plaintiff's trees which it alleges cause excess water to collect and prevent the proper grading of the street, on the theory that such step would be proper exercise of police power.

5. Constitutional law ⟸121(2)—Deed of land to county for highway with reservation a "contract."

Deed of land to county for a street with reservation of trees was an executed "contract" within protection of Const. U. S. art. 1, § 10, providing no state shall pass any law impairing the obligation of contracts, and fixes and limits rights of grantor and county and a city, its successor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

6. Injunction ⟸52 — Writ issues to prevent wrongful cutting down of trees.

An injunction may issue at suit of the owner to prevent the cutting down of growing trees by a party without right.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Aranetta Hill against the City of Oxnard and Joe Sailor and others, as its Board of Trustees. From a judgment for defendants, plaintiff appeals. Reversed.

Orr & Gardner, of Ventura, for appellant.
Charles F. Blackstock, of Oxnard, for respondents.

ELLISON, P. J., pro tem. The plaintiff is now and for more than 46 years has been the owner of certain real estate in Ventura county. She had created on her land an avenue for her convenience and pleasure and planted thereon as early as 1880 some 55 walnut trees of the variety known as black walnuts in parallel rows, the rows being some 20 feet apart. They have grown to be large trees, some of them 30 inches in diameter, and, having been planted by her own hands in her younger days, she is, naturally, very much attached to them. About the year 1898, and prior to the incorporation of the city of Oxnard, the board of supervisors of Ventura county desired a roadway through the property of the plaintiff taking in as part thereof the strip upon which said walnut trees were growing. At first she refused to allow them to do so. Thereafter they called in a body at

her house and discussed the matter with her. At that time she stated that under no circumstances would she sell a right over her real property for road purposes to the county, stating, as her objection, that the roadway would destroy the walnut trees which she had planted years before and which she prized so highly. She stated her fears, if a right of way were granted it might cause the trees to be removed at some future date. The board of supervisors assured her that if she would deed the roadway, the county would not ask her to deed the trees, but would allow her to keep title to the same; and promised her that under no circumstances would they remove them or cut them down without her consent, the county specifically offering at that time to put through the roadway, and subsequently maintain it in such a way that her trees would not be injured, and that she would retain the sole title to them. After this understanding had been reached, the plaintiff executed to the county a deed for the desired right of way. This deed, after describing the right of way by metes and bounds (said description covering the land upon which said three rows of trees were standing, in addition to other lands), contains this exception:

"Reserving, however, to the party of the first part from said grant of land, all of the trees growing on said three strips of land above described and reserving, also to the party of the first part, the right to trim or remove said trees, or any of them at any time, provided that the party of the second part shall have the right to trim said trees as may be necessary to prevent their growing limbs interfering with the use of said strip of land for road purposes."

After this written dedication of the property, the board of supervisors accepted the same, and in their acceptance of said right of way for road purposes used the following language:

"It is ordered that the deed from Aranetta Hill and John G. Hill, dated March 15, 1898, for a strip of land for a roadway on the west end of Fifth street, in the town of Oxnard, westerly (etc.), be accepted, subject to the terms and conditions therein contained, which the county of Ventura in accepting said deed agrees to comply with, and the said strip of land in said deed described and conveyed to the county of Ventura is hereby established and declared to be a public road and highway, and the same is hereby named and established and known as Hill avenue."

About the year 1903 the city of Oxnard was incorporated as a municipal corporation of the sixth class, its corporate bounds including the strip of land referred to on which are the three rows of walnut trees, and said strip of land, being a continuation thereof, is now known as Fifth street in the city of Oxnard.

The plaintiff recently ascertained that the city of Oxnard, through its board of trustees, threatened to cut down and remove the walnut trees, and each and all of them, against her will and without her consent, and without awarding her any compensation. Upon learning this, she brought suit, and asked for a perpetual injunction, restraining the city of Oxnard from cutting down, removing, killing, destroying, or damaging said walnut trees.

After trial the court found, among other facts, that said trees are a public nuisance, that they interfere with and prevent the construction of sidewalks, curbs, and gutters along the portion of Fifth street where said trees are growing, and prevent the grading of said Fifth street to the official street line grade, and interfere with and prevent proper drainage of the portion of said city in proximity to said trees; that they were injurious to the health and safety of the city of Oxnard; and denied the plaintiff any relief. From this judgment she appeals.

The real question presented by this appeal for consideration and decision is whether the city of Oxnard, under the circumstances as they appear in the record, has any right to destroy said walnut trees, or in any way injure or damage them.

[1] As a general proposition, it may be stated that the public authorities have the right to the use of the entire right of way that has been acquired for highway purposes, and to use all of it, if deemed necessary or proper, and to that end to remove from it trees, embankments, or other obstructions which in any way interfere with its use for public travel. Or, as stated in Elliott on Roads (2d Ed.) § 645:

"Public highways belong, from side to side and end to end to the public, and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public."

[2] Generally, when a piece of land is dedicated to the public by its owner, its entire width is dedicated, and the principles above stated, declaring the rights of the public therein, are applicable to such highways. A typical case applying these general principles is Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267. There was a street in the full meaning of the term. The land had not been dedicated with exceptions and reservations. No right had been reserved by its former owner to keep trees thereon or to plant others. After the town became a city and after the land had become a street the plaintiff planted in the right of way certain trees, and they were permitted to grow to a considerable size. They became an obstruction to the free use of the city, and were declared an unlawful interference with the use of the street, and in the litigation that arose, the court, following the line of decisions

above referred to, held that the city had a right to remove them.

Cases like the above and the principles upon which they were decided are not controlling and of but little value in disposing of cases life the one now under consideration where special property and contract rights are involved and the dedication a restricted one. Sometimes the dedication is so worded that the public does not acquire an easement perfect in all details and giving it an unlimited right to use all the surface for public purposes between the side lines of the right of way that is dedicated. There may be a part of it excepted and reserved to the owner, and in such case the public gets the right of way so dedicated burdened with the reservations or lessened by the exceptions contained in the dedication. Such highways are very rare, and as a result but few cases can be found defining the rights of the parties, in such circumstances.

In Elliott on Roads and Streets, section 122, it is said:

"Where the common-law dedication is an express one, and there is a writing evidencing it, the extent of the dedication will be measured by the writing, except where the use controls and has been of such a character and so long continued as to change the extent of the easement. If the instrument creating the easement annexes terms and conditions, the public is bound by them in case of an acceptance."

"It is well settled that in dedicating land to the public the dedicator may impose such reasonable conditions, restrictions, and limitations as he may see fit, and in order to vest the easement in the dedicatee the terms of the dedication must be strictly complied with." 13 Cyc. 456.

"The dedicator may prescribe the terms, restrictions, and limitations on which the land is given." 8 Ruling Case Law, p. 909.

"Dedication of a street must arise from some act of the owner of the land. * * * State v. Society, 44 N. J. Law, 502; Ayers v. Penn. Ry. Co., 48 N. J. Law, 44, 48, 3 Atl. 885. * * * The public cannot get anything more than he gives; and if he dedicates a street 100 feet wide, subject to the restrictions and use as mentioned, the public takes subject to the restrictions. The filing of a map and selling lands thereby would be evidence of a dedication, but, if he did not file the map, and did not adopt it, by reference thereto in the deeds, the filed map would not be conclusive evidence against him; and, if the map he made and sold lots by showed the trees set out to be as testified to by the surveyor, it would be a question of fact to be determined by judicial authority as to whether this dedication of Landis avenue was not subject to the setting out and existence of the trees in accordance with Mr. Landis' scheme of ornamentation and use of this avenue." Avis v. Vineland, etc., 56 N. J. Law, 474, 28 Atl. 1039, 23 L. R. A. 685.

The same controversy went to the Supreme Court of New Jersey two years later, and the right of the city to destroy the trees was denied. In the last case it is said:

"It is a settled legal rule that land may be dedicated to a restricted public use, and if accepted must be taken for the limited purpose only." Young v. Landis Township, 73 N. J. Law, 266, 62 Atl. 1133.

In that case the reservation of the trees in the act of dedication was proved by circumstances as indicating the intent of the dedicator. In this case, the exception is contained in the deed of a right of way in express language.

The trees referred to in the deed made by the plaintiff and her husband to the county of Ventura are real estate.

"The timber was part and parcel of the real property referred to in the deeds. Civ. Code, §§ 658, 660. The title to it in fee simple had been in Sears prior to the execution of the deeds by him, and it being by the language thereof clearly excepted from the operation of the deed, this title in fee simple remained where it had been." Sears v. Ackerman, 138 Cal. 586, 72 Pac. 172.

The deed, in which the city of Oxnard, as successor to the county of Ventura, claims a right of way for highway purposes, does not convey all the real estate to the county between the side lines of the proposed highway. It excepts therefrom a part of the real estate that would otherwise have passed.

The plaintiff is in the same position as would be a grantor of a right of way to a county for a highway, who, in his deed, after describing a piece of land 80 feet wide, reserved a strip through the entire length thereof in its center 10 feet wide, upon which was already established a blue grass plat with shade trees thereon. Such parks are not infrequent in the center of highways in some of our most important cities, notably in the city of Washington. In such a case no one would claim that the grantee in a deed, although a municipal corporation, would have the right, without the consent of the grantor, to appropriate such excepted plat 10 feet in width for city purposes, to plow up the blue grass, cut down the trees, and put the excepted strip in a condition for public travel, or perhaps, utilize it for the purpose of a public sewer.

[3] When the city of Oxnard transformed the highway through plaintiff's land into one of the streets of the city, it took it burdened with the exceptions contained in the deed from the plaintiff to the county.

"The creation of a city, village, or incorporated town, or the extension of its limits, vests in the municipality the power and jurisdiction to regulate and control highways which have hitherto been under the control of the county or township organization, and transfers to the city or village the duty of maintaining and repairing them, unless the statute otherwise provides." Dillon on Municipal Corporations, § 1138.

"Where a municipal corporation succeeds by annexation to the rights and powers of a town, it cannot repudiate a franchise granted by the town to a telephone company to construct and maintain poles, wires, etc., in the streets. The town in granting such right acted as agents for the state in its governmental and not in its proprietary capacity and therefore neither the town nor any other municipality succeeding to its governmental powers could have any right to repudiate the contract or take back the grant without the consent of the telephone company." People ex rel. Rockwell v. Chicago Telephone Co., 245 Ill. 121, 91 N. E. 1065, and same case in 245 Ill. 154, 91 N. E. 1070; also, Elliott on Roads (2d Ed.) § 116; Belle v. Glenville, 27 Ohio Cir. Ct. R. 181.

We start with the fact that these 45 walnut trees, together with the ground occupied by them, are the property of the plaintiff in this case, she having the title therein in fee simple, good against all the world. The defendant, without her consent, and without compensation, purposed to take this property and appropriate it to the uses of the city. We are of the opinion that this contemplated procedure is unauthorized by law and may not be carried out.

The fact that these trees interfere with defendant's plans in the matter of paving and curbing Fifth street is not a justification for taking plaintiff's property. It might be convenient to it to take a strip of her land lying south of Fifth street and thereby widen the street to that extent for sewer or sidewalk purposes, but no one would contend that it could do so without her consent, or without a judgment in condemnation proceedings.

The plaintiff's title to these trees and to the land upon which they stand is just as perfect in her as is the title to her holdings lying south of the highway, and the city can no more take the one in the method proposed than it can take the other.

Counties and municipalities often enter into contracts which subsequently prove a source of inconvenience. But such inconvenience is no justification for their repudiation. Thus, South Bend. Ind., granted to a railway company a franchise to lay a double-track railway upon certain of its streets. The company built a single track, but before it had its double track completed the city repealed so much of the ordinance as related to double tracks. Whereupon suit was brought. The city attempted to justify its action under the police power. It was claimed that the presence of two tracks in the street was an inconvenience to the public and a source of danger, and that in the exercise of the police power the city could prevent the laying of the second track. The case went to the United States Supreme Court, and in deciding the case, this language is used:

"If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure."

And, again, it is said:

"Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when * * * acted upon became an irrevocable contract, and the city is powerless to set it aside." Grand Trunk R. R. Co. v. South Bend, 227 U. S. 557, 33 Sup. Ct. 307, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405.

The court finds that the trees obstruct the flow of the drainage water from the streets of Oxnard; that it is stopped in its course by the presence of these trees, and there is evidence that a pool of water is formed near the trees, which becomes stagnant and is detrimental to the health of the people of the city of Oxnard and is a public nuisance.

It occurs to us that the existence of the nuisance is attributed to the wrong party and the wrong source. The trees are not a public nuisance. They are not injurious to health. A pool of water standing near them may be injurious to the public health and may be a public nuisance, but such a pool of water is formed, not by the plaintiff, but by the defendant in not taking care of the surface water. It is permitting it or causing it to flow against the plaintiff's property, where it has no outlet, and where it remains until it is stagnant. If the surface water flowing down the streets were stopped by the higher lands of the plaintiff on the south side of Fifth street, and formed a pool, no one would claim that the city, on the ground that the pool was a public nuisance could, without the plaintiff's consent, cut a drainage canal through her farm. Neither can it, in order to get an outlet for its drainage, destroy her fee-simple title in and to the trees involved.

[4] The contemplated action of the city of Oxnard was attempted to be justified on the ground that it is an exercise of the police power for the benefit of the health and convenience of the community, but we know of no decision which extends the police power of a municipality to such contemplated end. The plaintiff in asserting her rights is buttressed by a provision of the Constitution of the state of California, wherein it is provided in general terms that private property shall not be taken or damaged for public use without just compensation first having been ascertained and paid.

In Nickey v. Stearns Ranchos Co., 126 Cal. 152, 58 Pac. 459, it is said:

"But in this state private property may not be taken or damaged for private use at all. It may be taken only for public use after just compensation made or paid. Const. art. 1, § 14. It is beyond question that the digging and maintaining of ditches and drains across private lands is a taking of property."

[5] The record shows that the defendant in this case desires to remove some of these

trees for the purpose of getting proper drainage for its water. In other words, it purposes to put a drain, without plaintiff's permission, across and through that part of her real estate which she expressly reserved in the deed she executed to the county. She is further justified in the position she takes by that provision of the federal Constitution, article 1, section 10, wherein it is provided:

"No state shall pass any law impairing the obligation of contract."

Her deed to the county of Ventura was an executed contract, and it fixes and limits the rights of the respective parties thereto, and it is beyond the power of the state of California, or any municipal subdivision thereof, by any ordinance or resolution, to impair the obligations of such contract.

The proposed action of the city of Oxnard in passing its ordinance, declaring that these trees interfere with the laying of sidewalks in accordance with the ordinances of the city, and prevent the free flow of the surface water, and therefore shall be taken and used by the city, is a violation of the plaintiff's rights, as outlined, fixed, and determined by the express provisions and terms of her written contract.

Her contract cannot be impaired by resort to what is known as the police power. This principle is very clearly discussed in one of Justice Harlan's luminous opinions, in deciding the case of New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. In that case it appeared that the New Orleans Gas, Light & Banking Company, the predecessor in interest of the plaintiff, had obtained a franchise from the Legislature of Louisiana by which it was given the sole and exclusive privilege of vending gaslights in the city of New Orleans and its faubourgs and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same. Subsequently the Legislature gave another corporation the right to lay its mains and manufacture and sell gas in the city of New Orleans, and the action was brought to restrain it from so doing on the ground that the second franchise was a violation of the contract given to the first, wherein it was granted the exclusive privilege of manufacturing and selling gas in the territory. In the course of the decision it is said:

"It will, therefore, be assumed in the further consideration of this case, that the charter of the Crescent City Gas Light Company—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted, to use the language of this court in the case of the Delaware Railroad Tax, 18 Wall. 206, 'a contract between the state and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts,' and therefore 'equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators.'

"But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one Legislature to limit or restrict the power of a subsequent Legislature in respect to those subjects. It is, consequently, claimed that the state may at pleasure recall the grant of exclusive privileges to the plaintiff, and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the national Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered.

"In the Slaughterhouse Cases, 16 Wall. 36, 62, it was said that the police power is, from its nature, incapable of any exact definition or limitation; and, in Stone v. Mississippi, 101 U. S. 814, 818, that it is 'easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate.' That there is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all cases. * * * In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. * * * As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

In the same case it is said:

"Yet, if the contract was within the scope of the authority conferred by the Constitution of the state, it is, like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution."

The decision then cites numerous cases wherein the states have attempted to do things, the effect of which was to impair the obligations of contracts, by a supposed exercise of the police power, and wherein the Supreme Court of the United States, in every instance, held that that police power could not be used for such purpose.

The case is well worthy of a careful perusal by any one interested in the principles involved.

[6] It is claimed that the plaintiff can obtain all the relief she may be entitled to without resorting to equity, but the decisions seem pretty generally to hold that injunction may be had to prevent the cutting down of growing trees.

"An entry upon land, and digging up and removing fruit trees growing upon it, is waste, and an injury to the inheritance, and are acts which a court of equity may enjoin." Silva v. Garcia, 65 Cal. 591, 4 Pac. 628.

In Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544, it was said that—

"The cutting, destroying, and removing of growing timber on the premises in controversy constituted, without other matter, sufficient ground for the issuance of the writ."

To the same effect are U. S. v. Guglard (C. C.) 79 Fed. 23, and Hicks v. Michael, 15 Cal. 107. A threatened injury to real property in the nature of waste may be restrained. More v. Massini, 32 Cal. 590; Hatton v. Gregg, 4 Cal. App. 542, 88 Pac. 594.

We are of the opinion that the evidence did not justify the finding of the court that the trees were a public nuisance, nor the findings that pecuniary compensation would give the plaintiff all the relief to which she is entitled. On the facts disclosed by the record, the defendants have no right to cut down or destroy the trees.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

46 Cal. App. 603

CITY LUMBER CO. et al. v. BROWN et al.

(Civ. 2085.)

(District Court of Appeal, Third District, California. March 18, 1920. Hearing Denied by Supreme Court May 17, 1920.)

1. Deeds ⟸54—Delivery necessary to consummate conveyance.

Delivery of a deed is necessary to consummate the conveyance.

2. Deeds ⟸208(2)—Possession of grantor evidence of no delivery.

Where deed is found in possession of grantor, the fact is evidence that it was not delivered.

3. Deeds ⟸208(1)—Evidence held to sustain implied finding of delivery.

In action to foreclose mechanics' liens, evidence *held* sufficient to support implied finding that deed from original owners of property to party who contracted for the work was delivered.

4. Deeds ⟸58(2) — Delivery to agent by agreement sufficient.

Where grantee directs or agrees that deed may be left for him with a third party, delivery to the latter is equivalent to delivery to the grantee through an agent appointed for the purpose.

5. Mechanics' liens ⟸76—Application of principle of estoppel in favor of lien claimants against person who stated he was owner.

Under Code Civ. Proc. § 1962, subd. 3, if the former owner of property on which liens are claimed had stated to the claimants that he was the owner of the property before they furnished the material, and they had relied on his assertion of ownership, the principle of estoppel would apply in their favor against him.

6. Mechanics' liens ⟸76—Principle of estoppel can be invoked to prevent owner from asserting title only in case of fraud.

The principle of Code Civ. Proc. § 1962, subd. 3, that where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or encouragement induced the other party to change his position so that he will be prejudiced by the adverse claim, can be invoked against the legal owner of land to prevent him from asserting his title only when he is chargeable with fraud, actual or constructive, against the opposite party.

7. Mechanics' liens ⟸76—Claimants cannot assert lien on theory of estoppel against former owners who again secured title.

Where owners of land conveyed to another who contracted for erection of buildings when deed to him was of record, lien claimants who furnished materials cannot assert their liens as against former owners who subsequently secured title again by foreclosure of mortgage or through sale under a trust deed.

8. Mortgages ⟸591(3) — Difference between mortgage and deed of trust as affecting subsequent lienholders' right of redemption.

Where security on land is in form of mortgage, there must be foreclosure and sale to subject property to debt, and subsequent lienholders may have opportunity to join in action and to promote sale for enough to satisfy their own as well as the prior claim, and under Code Civ. Proc. § 701, are entitled to right of redemption, but in case of a deed of trust no suit is required for sale of property, there is no right of redemption, and, if property is sold for only enough to satisfy claim of beneficiary, subsequent liens fall.

9. Mechanics' liens ⟸78 — Partnership in building venture held to subject property to lien in absence of notice to prevent.

Where owners conveyed their lot to another, and took back a deed of trust or mort-

gage with understanding and agreement that such other was to build, and that both should be equally interested in property, former owners and their grantee are liable for cost of building, which is subject to lien for labor done or materials furnished, in absence of notice provided by Code Civ. Proc. § 1192.

10. Mechanics' liens ⟸281(3)—Evidence held to show grantee represented himself and grantor in ordering material.

In action to foreclose mechanics' liens on property conveyed by certain defendants to another, evidence *held* to show that such other represented both himself and his grantors in ordering materials for a building, and that both were equally bound for the indebtedness; finding to contrary being unsupported.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the City Lumber Company and others, against J. T. Brown and others. From judgment refusing to foreclose mechanics' liens, plaintiffs appeal. Reversed.

John F. Poole, G. C. De Garmo, and Daniel Beecher, all of Los Angeles, for appellants.

Will Hays, Milton K. Young, and Lyndoll L. Young, all of Los Angeles, and Byron Coleman, of San Francisco, for respondents.

BURNETT, J. The plaintiffs filed mechanics' liens on the property at issue herein amounting to the sum of $1,850 for materials and labor actually used and furnished in the construction of a four-flat building, and they brought suit against A. F. Whittington, J. T. Brown, and others for a personal judgment, and also to foreclose said liens. The court found all the liens valid, and gave judgment accordingly as against A. F. Whittington, but would allow no foreclosure on the property upon the theory that the liens were wiped out by the sale under an instrument in the form of a trust deed, in favor of defendant Brown, for $1,850, and the court gave Brown judgment for his costs. The court also found:

"That from on or about the 17th day of March, 1916, to on or about the 17th day of December, 1916, the defendant, A. F. Whittington, was the owner" of the property; "that on or about the 24th day of March, 1916, the defendant A. F. Whittington, as owner, entered into the construction of a building upon said premises; that the defendants J. T. Brown and Marie M. Brown were not connected or associated in any way, either as owners or otherwise, with the said defendant A. F. Whittington in the construction of said building; that said J. T. Brown and Marie M. Brown were not connected or associated with the said defendant A. F. Whittington in any contract or contracts in regard to the furnishing of labor or materials upon said building with the plaintiffs, * * * or any or either of them, but that all contracts entered into in regard to the construction of said building by the said plaintiffs and cross-complainants aforesaid, and each of them, were entered into solely by the said A. F. Whittington; that all materials furnished in the erection of said building, and all work and labor done thereon by plaintiffs, * * * or any or either of them, were furnished to the said A. F. Whittington and at his request, and not at the request of the defendants and said defendants J. T. Brown and Marie M. Brown or either of them."

There is a further finding that on the 11th day of March, 1916, said A. F. Whittington executed and delivered to said Brown his promissory note in the sum of $1,864, and at the same time executed a certain deed of trust of said property to the Title Guarantee & Trust Company in favor of said Brown to secure the payment of said promissory note, and that said deed of trust was recorded on March 13, 1916. It further appears from the findings that said Whittington made default in the payment of said promissory note, and that on the 7th day of December, 1916, according to the terms and provisions of said trust deed, the property therein described was regularly and duly sold to said Brown, and that said company thereupon executed to said Brown its deed to said property, and that ever since that date said Brown has been, and now is, the owner of the property. It is further found:

"That said trust deed last mentioned in favor of said defendant and cross-defendant J. T. Brown was executed, delivered, and recorded prior to the commencement of work or the delivery of any materials upon the premises described herein by any of the plaintiffs or cross-complainants herein."

The foregoing recital of the findings is sufficient to indicate the theory upon which the court declined to subject the property to any lien for the labor and materials furnished by said plaintiffs or to hold the defendant Brown personally liable for said claims.

[1-3] The first point made by appellants is that there is no evidence to sustain the finding as to the ownership of Whittington. The particular contention in that respect is that there was no delivery of the deed from Brown to the grantee. In support of their view they quote from the testimony of Mr. Whittington to the effect that Mr. Brown said he was the owner of the lot; that he (Whittington) never got a deed from Mr. Brown and never saw a deed; that he received nothing for the property and gave nothing for it; "that he had never seen any deed for this property from Mr. Brown to himself; that he never recorded any deed." Appellants assert also that "the evidence shows without conflict that the so-called deed was never in the possession of Whittington, and was at all times in the possession of defendant Brown." Certain cases are cited in support of the position of appellants, but we need not review them, as the necessity for a delivery to consummate the

conveyance is not and cannot be disputed. Nor can there be any question that, where the deed is found in the possession of the grantor, this fact is evidence that it was not delivered to the grantee. The trouble is, however, that there is other testimony in the case that places the question of delivery in an entirely different light, and such testimony is sufficient to support the implied finding of the court that the deed was delivered. For instance, the defendant Brown testified:

"I told Whittington that my wife and I would sign the deed and leave it with the Fidelity for them. When I told him I would leave the deed at the Fidelity, he said he would come there and get them when the time came and was ready for them."

It thus appears that by agreement Brown was to leave the deed with the Fidelity—meaning the Fidelity Savings & Loan Company—for Whittington. There is evidence that this was done.

[4] It will not be disputed that, where the grantee directs or agrees that the deed may be left for him with a third party, the delivery to the latter is equivalent to a delivery to the grantee; the third party being thus constituted the grantee's agent for such purpose.

[5] The second contention of appellants is that Brown stated to the lien claimants that he was the owner of the property, and that he is, therefore, now estopped from denying it. If he had made such statements to the lien claimants before they furnished the material, and they had relied upon his assertion of ownership, the principle of estoppel would manifestly apply. Code Civ. Proc. § 1962, subd. 3. But it does not appear that such declaration of Mr. Brown was prior in time, and, besides, he testified substantially that he told these claimants that he had owned the property, but that he then was secured by a trust deed for the payment of $1,850. Hence we are satisfied that appellants cannot prevail upon this ground.

Again, appellants claim with much earnestness that, since Mr. Brown has had the benefit of the flats, "the most elementary principles of common honesty" prevent him from asserting his title in opposition to the claims of those having bestowed upon him such advantage. In this connection quotation is made from various decisions, from which we reproduce from Scott v. Jackson, 89 Cal. 262, 26 Pac. 899, the following:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by assertion of such adversary claim."

[6, 7] That principle is, of course, well settled, and is embodied in the statute as a rule of conduct. Subdivision 3, § 1962, Code Civ. Proc. But it can be invoked against the legal owner of land to prevent him from asserting his title only when he is chargeable with fraud, actual or constructive, against the opposite party. Treat v. Treat, 170 Cal. 334, 150 Pac. 53, 57. In this case there is no doubt that Brown had knowledge of the fact that said services were performed by plaintiffs, and if they had no notice, either actual or constructive, of his title, and he permitted them to supply said materials for the building without disclosing his ownership, then, manifestly he would be estopped from setting up his title to the prejudice of the claimants. But we must consider this point upon the theory of respondents that, while the services were being performed, with the exception possibly of a portion of the lumber, Brown was not the owner at all, but had conveyed the property to Whittington, and that the deed was a matter of record of which the claimants were required to take notice. In this aspect the case is essentially the same as though A., owning a lot, had conveyed it to B., the deed having been recorded, and thereafter B. built a house upon the lot, obtaining certain materials therefor with the knowledge of A., but without any agreement by the latter to pay for said material; A. having become the owner again after the completion of the building. The statement of the case is sufficient to show that A. would not be precluded from asserting the title which he subsequently acquired. It can make no difference that he originally owned the property, or that his second title was obtained upon the foreclosure of a mortgage or through a sale under a trust deed; it being assumed, of course, that the transaction was free from fraud and conducted in good faith.

Another question of importance is whether the liens of plaintiffs were extinguished by the sale of the premises to Brown under the trust deed. It seems to be the contention of appellants that, in effect and characteristics, said trust deed is similar to a mortgage, and that they had at least the rights of redemptioners. In support of their view they cite MacLeod v. Moran, 153 Cal. 100, 94 Pac. 605, wherein it was said:

"The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that, while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. * * * The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them."

That was a sufficient definition for the purposes of that case, as the question involved therein was whether the execution of

such trust deed operated as an abandonment of a previous declaration of homestead.

But it is clear that between the ordinary mortgage and a trust deed like the one before us there is a vital difference in respect to the equity of redemption. This was recognized in the early decisions in this state, and they have been followed ever since. In Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651, in an opinion by Chief Justice Field, it is said that—

"In mortgages there exists the right to foreclosure, after condition broken, and the right of redemption from forfeiture," but in a deed of trust to secure the indebtedness a suit to foreclose would not lie, but "a sale could only be made by enforcing the trust," and "from sales under such trusts, there is no equity of redemption, for there is no forfeiture."

The foregoing is approved in Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745, wherein it is said:

"This view of the nature of such a trust deed, and the difference between it and a mortgage, has not been departed from, and its validity as an instrument passing title, and not merely creating a lien as a mortgage to be foreclosed, has been constantly upheld"—citing cases.

The latest expression upon the subject which we have found is contained in Metropolis, etc., Sav. Bank v. Barnet, 165 Cal. 449, 132 Pac. 833, a case in its facts quite similar to the one before us. In that case the deed of trust was executed prior to the filing of the mechanics' liens and the debtor defaulted in the payments provided for in the trust deed, and at a sale thereunder the beneficiary became the purchaser of the property. Subsequently, in the mechanic's lien suits, judgment was awarded the lien claimants, making certain sums a lien upon all of the real estate, subject and subordinate, however, to the lien of respondent under the deed of trust, and authorizing the property to be sold. The Supreme Court said:

"But this interest—the interest of Brand in the property [Brand being the original owner]—which was subject to the mechanic's lien and ordered sold and which appellants undertook to have sold, had, even before the judgment in the mechanic's lien suit had been entered, ceased to exist or to be subject to the mechanic's lien judgment by virtue of the trustee's sale and deed to the respondent under its superior and recognized lien. This latter conveyance vested the absolute title in respondent, and thereby effectually destroyed the lien of the mechanic's lien suit judgment."

That the claim of such lien claimants is subject to the right of a mortgagee under a prior mortgage is, indeed, not disputed; the rule being recognized as set forth in Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 Pac. 58.

[8] Where the security is in the form of a mortgage, there must, of course, be a foreclosure and sale in order to subject the property to the satisfaction of the debt, and subsequent lienholders may have an opportunity to join in the action and to promote, if possible, a sale for a sufficient amount to satisfy their own as well as the prior claim, and they are also entitled to the right of a redemptioner. Section 701, Code Civ. Proc.; Whitney v. Higgins, 10 Cal. 547 70 Am. Dec. 748. In case of a trust deed, however, no suit is required for the sale of the property, there is no right of redemption, and, if the property is sold for no more than sufficient to satisfy the claim of the beneficiary, then the subsequent liens fall. Of course, the subsequent claimants have an opportunity to promote the sale of the property or to purchase it themselves for their own protection, but beyond that, it would seem, they cannot go.

Awarding, therefore, full force and effect to said written instruments and records, according to their apparent intent and purpose, we can find little comfort for appellants. There is, however, another view of the evidence, which seems to place the situation in a different light.

[9] It appears that there was an agreement between Brown and Whittington that the improvement and sale of the lot were to constitute a joint enterprise, and they were to share in whatever profits might be enjoyed. No objection was made to this evidence, and the fair purport of it is that Whittington held the property for the benefit of himself and Brown, and that in making the improvements he represented both parties. He was thereby authorized to bind Brown in making engagements for the construction of the flats. His contract, therefore, became also the contract of Brown. If A. conveys a lot to B. and takes back a deed of trust or mortgage, and there is between them an understanding and agreement that B. is to construct a building, and both are to be equally interested in the property, does it not follow that both are liable for the cost of the building, and is not the building itself subject to a lien for labor done or materials furnished in the absence of the notice provided by section 1192, Code of Civil Procedure? In other words, the parties being jointly interested in the property as a matter of fact, notwithstanding the said conveyance and deed of trust, and each having knowledge that said material was furnished for and was used in said building, and no notice having been given by either that he would not be responsible for the claim, the interest of both, the law says, shall be subject to said claim. Section 1192, supra.

This view, we may add, would compel Brown to pay for the building less than it is apparently worth. He will still get it for some $700 less than it cost. Defendant A. F. Whittington testified that he and defendant Brown agreed that the cost of the building, according to the plans furnished by said Brown, would be between $6,500 and $7,000. The actual cost for materials and labor was

$6,175. Nothing was paid for superintending the construction of the building, and there was no compensation paid to the contractor. The actual money paid out for the construction of the building for materials and labor was $3,613.80.

To show the ground for this conclusion, we call attention to the evidence on the subject. Mr. Whittington testified:

That he was taken to Brown's office by another Mr. Brown, and that the former produced some plans and asked him if he could build that house, and he told him he could; that Brown said he drew up the plans himself with the assistance of his wife; "that it was agreed the price of the building would run somewhere between $6,500 and $7,000; that he told him that he owned the lot and asked him to go out and look at it; that he went into the figures with Mr. Brown to see what it would cost; that Brown said that it would take $2,500 to pay off the mortgage on the lot; that he (Whittington) said he did not have the money to pay it off; Brown said he could arrange that; that Brown said if they could get together on it they could go ahead and make a good clean-up on it, make some money; that he (Brown) said that he would take care of all the bills if he (Whittington) could get a 30-days' credit for a little bill of sale that would be left with the lumber yard; that they went ahead and constructed the building; that it was finished about October 24; that he went there on that date and found three apartments rented; that Brown said he was owner of the lot; that nobody else ever claimed it; that he apparently purchased the lot, but that it was intended that Mr. Brown and he would be together, and that they would make a clean-up of it at the finish; that if they were to get the building built they would trade it or sell it at a good advantage; that they were to share the profits in the deal; that he never received any of the $1,800 trust deed money; that he was on the job working all the time; that Mr. Brown was to finance the deal absolutely."

He was not contradicted as to the agreement to treat the project as a joint enterprise and to share the profits. Mr. Brown, as a witness, did not deny it, and the conduct of the parties confirms the theory that Brown and Whittington were to be equally concerned in the property. For that reason Brown did not require of Whittington the payment of any of the so-called purchase price of the lot nor did the latter concern himself about the delivery of the deed from Brown and his wife. In consonance with this view, Brown O. K.'d the bills, and told various parties that he was the owner of the property.

[10] Viewing the whole record we think it appears without substantial conflict that Whittington represented both himself and Brown in ordering the material for said building, that they were both equally bound for said indebtedness, and that the finding of the court to the contrary is unsupported.

Of course, if Brown had denied that there was such an agreement as Whittington testified to, the case would present a different aspect. But, as we have said, it stands uncontradicted, and it cannot be ignored.

We are satisfied the trial court was in error in relieving Brown of all responsibility for these claims, and the judgment is therefore reversed.

We concur: HART, J.; ELLISON, Presiding Judge pro tem.

46 Cal. App. 636

Ex parte LAPIQUE. (Cr. 710.)

(District Court of Appeal, Second District, Division 2, California. March 18, 1920.)

Habeas corpus ⊂=109—Petitioner remanded where he admits being in custody under bench warrant issued on indictment.

Where petitioner for habeas corpus in open court concedes that if the return which the sheriff proposes making were filed it would show, in accordance with the facts, that petitioner is lawfully in the custody of the sheriff, under a bench warrant issued on an indictment filed by the grand jury, the writ will be discharged and petitioner remanded.

In the matter of the application of John Lapique for a writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County. Writ discharged, and petitioner remanded.

See, also, 181 Pac. 227; 185 Pac. 178; 189 Pac. —.

John Lapique, of Orange, in pro. per.

Tracy Chatfield Becker, Deputy Dist. Atty., of Los Angeles, for respondent.

PER CURIAM. Petitioner, in open court, concedes that if the return which the sheriff proposes making were filed it would show, in accordance with the facts, that petitioner is lawfully in the custody of the sheriff of Los Angeles county under a bench warrant issued on an indictment heretofore filed by the grand jury.

The writ therefore is discharged, and petitioner remanded.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

182 Cal. 706

Ex parte LAPIQUE. (Cr. 2313.)

(Supreme Court of California. April 29, 1920.)

Habeas corpus ⟸54—Petition raising inference of restraint under process held insufficient.

Petition for habeas corpus on the ground of the legal insufficiency of the process issued in a contempt proceeding to afford justification for petitioner's further confinement thereunder, which did not assert that the process in the contempt proceeding constituted the only or the sole ground of detention by the sheriff, and from which it was inferable that petitioner was lawfully in the custody of the sheriff under a warrant based upon a grand jury indictment charging him with the commission of a public offense, *held* not sufficient to show petitioner unlawfully imprisoned or restrained of his liberty.

In Bank.

In the matter of the application of John Lapique for a writ of habeas corpus to John C. Cline, as Sheriff of Los Angeles County. Writ denied.

See, also, 181 Pac. 227, 185 Pac. 178, 189 Pac. 834.

John Lapique, of Orange, in pro. per.

Haas & Dunnigan, of Los Angeles, for respondent.

PER CURIAM. The petitioner's claim that he is illegally held in custody by the sheriff of Los Angeles county is based entirely, in so far as this particular habeas corpus proceeding is concerned, upon the legal insufficiency of process issued in a contempt proceeding to afford justification for his further confinement thereunder. He does not assert that such process issued in said contempt proceeding constitutes the only or sole ground of retention by the sheriff. It is fairly inferable from the allegations of his petition that he is lawfully in the custody of said sheriff under a warrant based upon a grand jury indictment charging him with the commission of a public offense. Of course, if he is lawfully held in custody by the sheriff under process issued upon the indictment he is not entitled to his release on habeas corpus, whatever be the situation with regard to the warrant issued in the contempt proceeding. As it stands the petition does not show that the petitioner is by the sheriff of Los Angeles county unlawfully imprisoned or restrained of his liberty.

The application for a writ of habeas corpus is denied.

All concur, except SHAW, J., and WILBUR, J., absent.

182 Cal. 669

OLINSKY v. RAILWAY MAIL ASS'N. (S. F. 8719.)

(Supreme Court of California. April 16, 1920. Rehearing Denied May 13, 1920.)

1. Insurance ⟸455 — Overexertion not "accidental means of death."

Overexertion is not an accidental means of death within accident policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

2. Insurance ⟸455—Distinction between "accidental death" and "death by accidental means" stated.

Where the death is the result of some act, but was not designed, and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death, but where death is caused by some act of the deceased not designed by him or not intentionally done by him, it is death by accidental means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

3. Insurance ⟸719(1) — Amendment of by-laws so as to define accidental death not applicable to previously issued certificate.

The amendment of by-laws of fraternal association so as to define "accidental death" did not affect previously issued certificate insuring the member against death by accidental means, and not "accidental death," and which did not use such term.

4. Insurance ⟸719(1)—By-law provision held applicable to death by accidental means rather than accidental death.

Amendment of by-laws so as to entitle beneficiary to specified amount "upon suitable proof of the death by accident alone within one hundred and eighty days after the occurrence of such accident" *held* applicable to death by accidental means of injury rather than to accidental death.

5. Insurance ⟸719(1) — Terms of certificate not to be changed by amendment of by-laws.

Amended by-laws of fraternal society should not be construed to completely change the terms of the certificate concerning the nature of the casualty insured against.

6. Insurance ⟸787—Death from hemorrhages caused by swimming against current not result of "accidental means."

Where insured, who was apparently in good health, but was suffering from tuberculosis, sustained a hemorrhage while swimming against a strong current, and died within a month as the result of violent and successive hemorrhages, the death did not result from "accidental means" within certificate insuring against death from injuries received through "accidental means."

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William Olinsky against the Railway Mail Association. Judgment for plaintiff, and defendant appeals. Reversed.

J. E. White, of San Francisco, for appellant.

Edgar D. Peixotto, of San Francisco, for respondent.

WILBUR, J. This is an action brought by the plaintiff, a beneficiary, to recover for death under an accident insurance certificate issued July 27, 1908, to Nathan Olinsky by the defendant, a fraternal beneficial order. In 1913 certain by-laws were enacted by the association which were in force at the time of the death of the insured, which plaintiff claims modified the certificate. On June 19, 1915, while at a summer resort on the Russian river, the insured, who was then apparently in perfect health, entered the river for a swim. The only witness to the incident testified that he attempted to swim up stream against a very strong current, and after swimming eight or ten strokes returned to the shore, bleeding from the mouth. The water was not more than 4½ feet deep and the deceased was 5 feet 8 inches in height. There was no evidence of slipping or other similar accident. The hemorrhage continued for some time and was followed by others. The insured was brought to San Francisco, placed in a hospital, and died on July 9, 1915. The cause of his death was the violent and successive hemorrhages which, so far as the evidence shows, began at the time mentioned.

The deceased had been suffering for some time with tuberculosis. From June 18, 1914, to July 28, 1914, he was an inmate of a sanitarium for tubercular patients, but had apparently fully recovered. However, the autopsy showed that he was suffering from tuberculosis at the time of his death.

There is no evidence of overexertion other than the natural inference from the testimony that the deceased swam eight or ten strokes in the face of a very strong current in the river and immediately came ashore with a hemorrhage from the lungs, which in his condition might result from sudden and violent overexertion. Under the evidence the verdict of the jury must be held to have established the inference that the death was the result of sudden and violent overexertion at the time in question. It remains to be determined, in the absence of any other evidence as to accidental means of injury, whether this conclusion is sufficient to justify the verdict. It may be conceded that the evidence was sufficient to justify the verdict of the jury under the instruction of the court defining an accident or casualty as follows:

"A casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without any design on the part of the person injured"

—this language being taken from Richards v. Travelers' Ins. Co., 89 Cal. 170, 175, 26 Pac. 762, 763, 23 Am. St. Rep. 455, and covering what is known in accident insurance law as an accidental death, as differentiated from a death by accidental means. The jury was justified in finding that the first hemorrhage was accidental in the sense that it was "something out of the usual course of events, and which happens suddenly and unexpectedly and without any design on the part of the person injured," but the insured was doing exactly what he intended to do, and, if the contract of insurance is the same as there considered, it brings the case within the principle of Rock v. Travelers' Insurance Co., 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196, where a pallbearer in lifting a heavy casket down a narrow stairway collapsed and almost immediately died from acute dilatation of the heart due to overexertion. The court there said:

"Rock undertook to carry a heavy casket down a flight of stairs. In carrying it he did not slip or stumble nor did the casket fall against him. The entire operation was carried out in precisely the manner intended and designed by Rock. The exertion which he thus assumed was, however, beyond his strength, and imposed upon his vital organs a burden which, as it turned out, they could not bear. The result of this exertion was a dilatation of the heart and death. On these facts, which appear in the record without substantial conflict, it cannot be said that the plaintiff sustained a burden which was on her of proving that the death of the insured was caused by bodily injuries effected through accidental means."

[1] In other words, overexertion is not an accidental means of death. It has been so held in the following cases: Pervangher v. Union Casualty & Surety Co., 85 Miss. 31, 37 South. 461; Niskern v. United Brotherhood, etc., 93 App. Div. 364, 87 N. Y. Supp. 640; Appel v. Ætna Life Ins. Co., 86 App. Div. 83, 83 N. Y. Supp. 238; Id., 180 N. Y. 514, 72 N. E. 1139; Shanberg v. Fidelity & Casualty Co., 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206, lifting heavy weight. See note to latter case 19 L. R. A. (N. S.) 1206. The rule is thus stated in 1 C. J. 429, § 73:

"An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means. This rule has been applied to death or injuries caused by or resulting from ordinary exertion, carrying heavy baggage, lifting heavy weights, contact with a poisonous substance, jumping from a railroad car, reaching out to close a window, resisting arrest, riding a bicycle, stooping, or sunstroke."

[2] The distinction between accidental death and death by accidental means is carefully pointed out in Pledger v. Business Men's Ass'n of Texas (Tex. Civ. App.) 197 S. W. 889, where it is held that death resulting from the lifting of heavy cotton bales was an ac-

cidental death, but not a death resulting from accidental means. The uniform rule on the subject is thus well stated in that case:

"Where the death is the result of some act, but was not designed and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death. Where death is caused by some act of the deceased not designed by him, or not intentionally done by him, it is death by accidental means. In other words, accidental death is an unintended and undesigned result, arising from acts done; death by accidental means is where the result arises from acts unintentionally done."

The importance of this distinction in this case arises from the fact that the certificate covers injuries received—

"through external violent and accidental means which shall wholly and continuously disable the insured. * * *

"3. If death result from such injuries alone within one hundred and twenty days."

Or, to put it in the language of the authorities, the insurance is against death resulting from "accidental means," and not accidental death. See Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 Pac. 1022. But it is contended by respondent that by-law XVII, added in 1913, amended the contract of insurance so as to cover "accidental death," as defined by the above cases. This section reads as follows:

"*Accidental Death Defined.*—Accidental death shall be construed to be either sudden violent death from external causes, not the result of the member's own vicious conduct, or death within one hundred and eighty days from injuries received by accident alone."

The other provisions of the by-laws added after the certificate was issued to the insured and relied upon by the respondent as a basis of recovery, and as a part of the contract of insurance, is as follows:

"Upon suitable proof of the death by accident alone within one hundred and eighty days after the occurrence of such accident of any member of the beneficiary department of this association, the beneficiary named in the certificate of said member shall receive from the benefit fund the sum of four thousand dollars."

[3, 4] The pleadings admit that the by-laws were amended as alleged by the plaintiff, but deny that such by-laws were applicable to the decedent. No evidence was introduced to show such applicability, nor were the other by-laws offered in evidence. We are therefore under the necessity of determining the applicability of these by-laws without reference to such other provisions or other evidence which might clarify their meaning. Article XVII defines the term "accidental death." In the certificate of insurance issued to decedent we look in vain for the phrase "accidental death." This by-law, therefore, defining the term "accidental death," has no application either to the language or to the substantial effect of the certificate issued to the decedent. It may be that at the time of the amendment to the by-laws the appellant was issuing certificates in which the phrase "accidental death" was used, or article XVIII may have been adopted to interpret such phrase used elsewhere in the by-laws or in the constitution. Whether or not this is the fact is not disclosed by the evidence, but it is sufficient to say that the definition has no application to the certificate insuring the decedent; for a definition of "accidental death" could have no applicability to a certificate which did not insure "accidental death" or use the term, nor could such a definition have the effect of changing the terms of such a contract to which it is not applicable. The other amendment to the by-laws that "on suitable proof of death by accident alone within one hundred and eighty days after the occurrence of such accident" seems to apply to accidental means of injury rather than accidental death, and evidently refers to the provision of by-law XVII defining accidental death as "death within one hundred and eighty days from injuries received by accident alone." In such case it is not the death which is a sudden and unforeseen casualty, but the accidental means which may have occurred 180 days before death. If, however, we assume the correctness of the respondent's position that these new provisions of the by-laws apply to the decedent, they must be construed with the terms of the certificate, and, when so construed, it is evident that the phrase "accident alone" must refer to the means of injury; for it is such accidents alone that are insured against.

[5] The amended by-laws should not be construed to completely change the terms of the certificate concerning the nature of the casualty insured against. If, therefore, the phrase "death by accident alone" in the by-law has not the same legal effect as the terms of the certificate insuring against death by accidental means, when construed with the certificate, the whole contract must be so interpreted, although the certificate of the insured provides that it is subject to future by-laws. We hold that by-law XVII does not apply to such certificate, and that the other by-law, even if applicable, does not change the certificate in so far as the casualty insured is injury or death by accidental means. Whether the death benefit is $3,000, as provided in the certificate, or $4,000, as stated in the by-law, we consider doubtful, but do not deem it necessary to pass on the matter under the very meager and incomplete evidence in the record with reference to such by-laws, believing that additional evidence on a new trial will clarify that matter.

[6] The evidence fails to sustain a conclusion that the death of the insured resulted from accidental means, and the instructions

of the court to the general effect that the appellant could recover if the death was accidental, and also in giving the jury by-law XVII as a part of the insurance contract, were erroneous.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.

182 Cal. 691

HENRY COWELL LIME & CEMENT CO. v. WILLIAMS, County Auditor. (Sac. 2857.)

(Supreme Court of California. April 19, 1920.)

1. Highways ⇐113(4)—Right to compensation for materials not dependent on validity of improvement proceedings.

Under St. 1907, p. 669, § 9, providing relative to the improvement of highways thereunder that, as soon as funds from the sale of bonds are in the treasury, the Highway Commission shall prepare detailed specifications, plans, and profiles for the work to be done or such parts of it as they deem advisable to have done separately, where it was determined that the county would purchase cement separately and furnish it to the contractor, the right of the seller of the cement to payment did not depend upon the validity of proceedings leading up to the highway improvement, but on whether the contract of sale was a valid contract.

2. Highways ⇐113(3)—Materials can only be purchased after advertisement and from lowest bidder.

Under St. 1907, p. 669, § 9, providing relative to the improvement of highways thereunder that the board of supervisors shall advertise for bids for doing the work or any part thereof which the Highway Commission recommends shall be done separately, if the board may segregate the work so as to make the furnishing of cement a separate and distinct contract, the purchase of the cement should be made after advertisement and from the lowest bidder.

3. Highways ⇐113(3)—Statute does not dispense with advertisement under contract by purchasing agent for cement for highway; "all other supplies."

St. 1913, p. 667, adding subdivisions 21 and 22 to section 4041 of the Political Code, and authorizing the employment of a purchasing agent to purchase certain county supplies and all other personal property or supplies, and providing that it shall not be necessary to advertise for bids for furnishing county supplies as required by section 4048, does not dispense with the advertisement for bids in purchasing cement for highway improvement, as the clause "and all other supplies" is limited by the context to ordinary county supplies.

4. Highways ⇐113(3)—Contract for cement without advertisement void and will not support recovery.

A contract by a county purchasing agent for cement for highway improvement, having been made without advertising for bids in violation of the express requirement of the statutes, is void, and the seller cannot recover thereon.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Application by the Henry Cowell Lime & Cement Company for a writ of mandate directed to L. P. Williams, as Auditor of the County of Sacramento. From a judgment denying the application, the petitioner appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant.

Meredith, Landis & Chester, of Sacramento, for respondent.

WILBUR, J. This is an appeal from a judgment denying an application for a writ of mandate to require the respondent auditor to draw a warrant upon a claim for cement furnished by the petitioner to the county of Sacramento, which claim has been duly approved by the board of supervisors. The cement was purchased by the purchasing agent of the county without advertising for bids, for the purpose of constructing certain highways in the county of Sacramento. The improvement of these highways was provided for by a county bond issue of $1,750,000 at an election held under the provisions of the Statutes of 1907, p. 666, authorizing the calling of such election. The bonds were sold and the proceeds thereof paid into the county treasury. The petitioner furnished the cement upon the orders of the purchasing agent of the county, who made such purchase in pursuance of a requisition by the Highway Commission upon the supervisors and by them authorized. The purchase was made upon the written request from the purchasing agent to the petitioner to furnish bids. The statute authorizing the performance of the work provided that—

"As soon as the funds raised by the sale of said bonds are in the treasury the commission shall proceed to prepare detailed specifications, plans and profiles for the work to be done, or for such parts of it as they deem it advisable to have done separately * * * and they shall then present said specifications, plans and profiles, with their recommendations in regard to the doing of the work and letting of contracts to the board of supervisors, who shall either adopt or reject the same as presented." Stats. 1907, p. 669, § 9.

Respondent claims that no such plans and profiles, as provided by the statute, were prepared or adopted by the board of supervisors, and that therefore the county was without jurisdiction to order the cement in question. The proof shows that the specifications for the cement required were prepared and

adopted by the board of supervisors, and that the specifications for the performance of the work were also prepared and adopted. The general nature and character of the improvement were set forth in the report made by the Highway Commission to the board of supervisors before the election upon the bond issue, and contemplated the improvement of the highways by a concrete base five or more inches in thickness and an asphalt surface. It having been determined by the board of supervisors that the county would furnish the cement to the contractor, no plans or profiles were necessary for the purpose of determining the kind or quality of cement to be used in the concrete base which was provided in the original plan of the Highway Commission and adopted by the voters at the election.

[1] The first question is whether or not the adoption of plans and profiles before entering into any contract for the furnishing of materials was a jurisdictional prerequisite, and, if not, whether or not the county was authorized by law to purchase cement for the purposes stated and in the manner in which it was undertaken to be done. In proceedings under the Vrooman Act (St. 1885, p. 147) and similar statutes for the improvement of streets and assessing the cost thereof upon the property benefited thereby, it is necessary to strictly conform to the requirements of the statute in adopting the plans and specifications, and in the event of a failure so to do the contract for the performance of the work and assessments made or bonds issued for the payment thereof are void. Fay v. Reed, 128 Cal. 357, 60 Pac. 927; Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; McDonnell v. Gillon, 134 Cal. 329, 66 Pac. 314; Williamson v. Joyce, 137 Cal. 107, 69 Pac. 854. But the question involved in this case is entirely different. The money is already in the county treasury. So far as the persons who performed work or furnished materials for the improvement in question are concerned, it merely represents a fund properly applicable to the expenses of improving the highways. The right of the petitioner to a warrant for the claim for cement, approved by the board of supervisors, does not depend upon the validity of the proceedings leading up to the improvement of the highway, but depends upon the question of whether or not the petitioner's contract with the county, made through the purchasing agent, was a valid contract. This question turns upon the provisions of the statutes for the improvement of these highways, construed in connection with the provisions of the Political Code regulating the powers and duties of the various county officers. The first question is whether or not the statute authorizes the board of supervisors to segregate the various portions of the work into separate contracts and to treat the furnishing of cement as a separate and distinct contract authorizing the purchase of such cement as an independent portion of the entire scheme of improvement.

[2] The statute reads:

"If the board adopts the same they shall thereupon advertise for bids for doing said work, or any part thereof which the highway commission recommend should be done separately, in accordance with said plans, profiles, and specifications, by publishing a notice," etc.

If the furnishing of material can be treated as a part of the work within the meaning of this clause, then the general plan of improvement, coupled with the specifications for cement, would be a sufficient foundation for the advertising for bids for such cement. It is next provided that—

"Every contract for doing any part of said work shall be let, after advertisement as above provided, to the lowest responsible bidder," etc.

It is conceded that the contract for the cement furnished by the petitioner was not let after advertisement to the lowest responsible bidder. The statute makes provision for such purchase as follows:

"Provided however, that the board may authorize the Highway Commission to make a contract, without advertisement, for any part of said work the cost of which does not exceed $1,000."

In this case the requisition was for 2,000 barrels of cement, the purchase price of which was over $2 per barrel. The statute also authorizes the rejection of all bids, and the performance of the work by the Highway Commission upon the authority of the board of supervisors, as follows:

"And provided further, that the board may reject all bids and may thereupon readvertise for bids for doing any part or the whole of said work, or in their discretion authorize the Highway Commission to purchase the necessary material, purchase or hire tools and appliances, and hire laborers, and to do the work or any part thereof without letting any contract therefor. In such case all contracts for materials, tools or appliances, amounting to more than one thousand dollars in value shall be let by the commission to the lowest responsible bidder, after advertisement as above provided."

The supervisors in the present instance decided that the county should purchase the cement and furnish the same to the contractor, thus commingling the two methods of procedure, one by contract and the other without contract. But in either case, so far as material is concerned, it was essential that the purchase should be after advertisement and from the lowest responsible bidder. It is conceded that this was not done. For the

purpose of this decision we may assume that the supervisors had a right to so segregate the highway work as to make the furnishing of cement a separate and distinct contract. This view seems to be sustained by our decision in Perry v. Los Angeles, 157 Cal. 146, 150, 106 Pac. 410.

[3] Petitioner, however, claims that the statute of 1907 requiring the purchase of supplies from the lowest responsible bidder after advertisement is modified by the provisions of the statute authorizing the employment of a purchasing agent for the county and fixing his duties, added to section 4041 by amendment of 1913 (Stats. 1913, p. 667, § 4041, subds. 21, 22), which reads as follows:

"21. To employ a purchasing agent, whose duties shall be to purchase for the county and the offices thereof all stationery, clothing, bedding, groceries, provisions, drugs, medicines, furnish machinery, implements, and all other personal property or supplies, the same to be purchased only upon a proper requisition therefor; also employ for said purchasing agent such assistants as may be necessary for him to properly fulfill his duty.

"22. Whenever a board of supervisors shall employ a purchasing agent as herein provided for it shall not be necessary for them to advertise for bids for furnishing county supplies as provided in section 4048 of the Political Code, with the exception of advertising."

Previous to the adoption of this amendment, the method of securing supplies for the county was by annual advertisement as required by the provisions of section 4048 of the Political Code, which was substantially the same as the County Government Act of 1897 (Stats. 1897, p. 464, § 25, subd. 21). This scheme called for a general advertisement for all sorts of supplies furnished to the county, the bids so received to be a basis of subsequent purchases to be made during the year as needed by the county officials. This section, and a similar statute preceding the same, have been construed in a number of instances. Swasey v. County of Shasta, 141 Cal. 392, 395, 74 Pac. 1031; County of Riverside v. Yawman & Erbe Mfg. Co., 3 Cal. App. 691, 86 Pac. 900; People v. Nellis, 14 Cal. App. 252, 111 Pac. 631; Sarver v. County of Los Angeles, 156 Cal. 188, 103 Pac. 917. See, also, Vale v. Boyle, 179 Cal. 180, 175 Pac. 787. Subdivision 22, supra, simply authorizes the purchasing agent to purchase "stationery, clothing, bedding, groceries, provisions, drugs, medicines and all other supplies" mentioned in section 4048, Political Code, without the annual advertisement therefor, as therein provided. The clause "and all other supplies," if not limited by the other provisions of the section in which it is found, would be broad enough to cover cement furnished to the Highway Commission. But under the cases last cited the phrase "and all other supplies" is limited by the context of section 4048 to ordinary county supplies, and would not apply to the furnishing of a large amount of cement for the carrying out of a specially authorized highway improvement. In accordance with this view, it has been held that it would not apply to furnishings for a county courthouse (County of Riverside v. Yawman & Erbe Mfg. Co., supra; People v. Nellis, supra), or to furnishings or jail fixtures (Sarver v. County of Los Angeles, supra), or to the erection of a fence, or, under similar provisions in the charter of San Francisco, to the purchase of automobile busses to be used as a public utility. The provisions of subdivision 21, supra, are broader than the original section 4048, in that it includes the furnishing of machinery, implements, and all other "personal property." There is no express provision contained in subdivisions 21 and 22 with relation to the method of furnishing machinery, implements, and other personal property except the provision that it shall be done upon a proper requisition therefor. Nothing in this method of purchase is inconsistent with the plan of advertising for such property and letting a contract therefor to the lowest bidder.

[4] It follows that the purchasing agent, under the new scheme of purchasing contemplated by subdivisions 21 and 22 of section 4041, Political Code, must advertise for cement in the manner provided by the act authorizing the purchase (Stats. 1907, p. 666, § 9, above quoted), though he need not do this annually or for the supplies, etc., covered by section 4048, Political Code. Subdivision 22 does not purport to authorize the purchasing agent to purchase personal property without advertisement where such property is not covered by section 4048, and where such an advertisement is required by the statute authorizing the purchase. As we held in Vale v. Boyle, supra, the contracts for the purchase of personal property are proper without advertisement, notwithstanding a general provision requiring advertisement for supplies similar in terms to section 4048 of the Political Code. There is no method pointed out for the purchase of personal property in the amendment of 1913 to section 4041, Political Code, adding subdivisions 21 and 22. There is therefore no conflict between the statute of 1907 requiring the letting of contracts after advertisement to the lowest responsible bidder, and the later statute which is silent upon that subject. The purchasing agent was not authorized to purchase the cement in question except from the lowest responsible bidder after advertisement as required by section 9, supra. The contract between the petitioner and the purchasing agent acting for the county, having been made in violation of the express requirement of the statute, is void, and the petitioner cannot recover thereon. Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731; Reams v.

Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

(46 Cal. App. 524)

SOUTHERN CALIFORNIA HARDWOOD & MFG. CO. v. BORTON et al. (HURD, Intervener). (Civ. 2118, L. A. 5825.)

(District Court of Appeal, Third District, California. March 12, 1920. Opinion of Supreme Court Denying Hearing, May 10, 1920.)

1. Sales ⟸454—Contract held conditional.

A contract for sale of wall beds, *held* a conditional contract under which title did not pass until payment, and not an absolute sale.

2. Fixtures ⟸27(1)—Where parties agreed that title to wall beds should not pass, they did not become fixtures.

Where the parties agreed that title to wall beds should not pass until the purchaser's payment, such beds as between the purchaser and the seller did not, under Civ. Code, § 1013, become fixtures, though installed and attached to building.

3. Fixtures ⟸28 — Assignee has no greater right than assignor to assert wall beds were fixtures.

Where woman building a flat building made an assignment for benefit of creditors with the understanding that if anything remained after payment of debts the assignee should deliver the remainder to her, the assignee had no greater rights than his assignor and could not as against the seller assert that wall beds were fixtures, where the assignor could not make that assertion.

4. Sales ⟸477(1)—Failure of seller to retake property not waiver of the right.

Where a conditional contract of sale expressly provided that the failure to exercise its option of recaption should not affect such right, the seller's failure to retake property immediately on default will not operate as a waiver of the right.

On Denial of Hearing by Supreme Court.

5. Fixtures ⟸21—Wall beds held not to be fixtures.

Wall beds which were placed in closets being installed on fixtures attached to the doors and floors are not themselves to be deemed as affixed to the realty, where they could be taken out without removing any of such fixtures so as to pass title as between a person who sold the same retaining title, and a subsequent purchaser of the premises without notice of such reserved title.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Southern California Hardwood & Manufacturing Company against Laura E. Borton and C. F. Borton, her husband, in which C. C. Hurd intervened. From a judgment for plaintiff, defendants and the intervener appeal. Affirmed.

H. M. Hurd and R. L. Horton, both of Los Angeles, for appellants.

Arthur Wright, of Los Angeles, for respondent.

ELLISON, Presiding Judge pro tem. On the 22d day of January, 1917, defendant Laura E. Borton was building a house upon a described lot in the city of Los Angeles. At the same time the plaintiff was the manufacturer for sale of various kinds and classes of wall beds. The defendant Laura E. Borton, being desirous of having installed in the house that she was building certain wall beds that were being manufactured and sold by the plaintiff, entered into a written contract with it in and by which it agreed to and did install in said house 77 Murphy beds. The agreement is a long one, and it will not be necessary for the decision of the case to set it out in full. The following quotations from it are deemed sufficient for a determination of the controversy: After reciting that Laura E. Borton desired to purchase from the plaintiff the wall beds, but was unable to pay for them at that time, it proceeds:

"Whereas, both parties are agreeable that the seller deliver to the proposed purchaser the said wall beds with the understanding that the sale is not complete until the beds are paid for in full, in cash, and with the further specific understanding that until they are so paid for in

actual cash, they shall remain the property of the seller," the seller promises to install the said beds in a building to be erected by the purchaser upon certain real estate in Los Angeles, describing it.

And then it is said:

"It is agreed the proposed purchaser shall pay to the seller the sum of $2,184.00, payable as follows: $873.69 when beds are delivered and installed, and $1,310.40 in sixty days thereafter."

Proceeding, the agreement says:

"This agreement is made with the specific following understandings which are the material inducements leading the seller to accept the same and to deliver and install said beds for the proposed purchaser without payment in advance. That the title to said beds and each and every one of them, shall remain in the said Southern California Hardwood & Manufacturing Company until the said full purchase price is paid in cash."

It also provided:

"Should any installment of the purchase price not be paid when due, then the whole of said purchase price unpaid shall become immediately due and payable at seller's option. If the proposed purchaser fails to pay any installment of the said purchase price, or upon any other default hereunder or breach hereof on the part of the proposed purchaser, the seller shall have the right of recaption and may, without let or hindrance, retake said beds into its own possession to be its own property, and for that purpose it shall have the privilege and right to enter said building and detach and remove said beds and carry them away as its own property."

It is further provided:

"Upon payment of full purchase price as herein called for, the seller shall execute and deliver to the proposed purchaser a bill of sale transferring title from the seller to the proposed purchaser. * * *

"The failure of the seller to exercise its right of recaption at any time it may have the right to do so herein, shall not be a waiver of its said right, and at any time thereafter it may so exercise its right of recaption without demand or notice."

The defendant Laura E. Borton having made default in the payment of the installments due, as provided by said contract, the plaintiff, after demand for the money due and demand for the possession of the property, brought this action to recover possession thereof. One C. C. Hurd filed complaint in intervention in said action, claiming that he was the owner of all of said beds. His right of ownership was based upon the fact that on September 29, 1917, the defendant Laura E. Borton and her husband had executed and delivered to him a grant deed to the real estate upon which said building was located; that said 77 wall beds were, as claimed by him, a part of the realty and attached to and made a part of said building; and that by virtue of said deed he became and is the owner of all of said wall beds.

After trial, the court filed its findings and conclusions of law, finding that the plaintiff was the owner of all of said beds, and had the right to the possession thereof, and that neither the defendant Borton, nor the intervener Hurd, had any right to retain the possession thereof. It made a lengthy finding, which is numbered finding 7, describing said wall beds in detail, the manner in which they were installed in the house, their manner of operation, and to what extent, if any, they were attached to the building, and closed said finding with this:

"The court finds that the beds described in the complaint were not at any time attached permanently to the building nor did they become, nor are they now, a part of the building. The court finds that the beds in this case are personal, movable property."

The court also made this finding:

"That said real estate and building were conveyed to the said intervener with the understanding and knowledge that he represented certain of the creditors of the defendants, and was with the agreement that the said intervener was to retain the legal title to said property, operate the same, and sell the same, and if there was any excess above certain obligations due to said creditors, that such excess would be paid over to the defendants"—and entered judgment for plaintiff for the possession of the beds or their value.

The defendants and the intervener appeal from the judgment.

[1] The intervener claims that the contract entered into between the plaintiff and Mrs. Borton in reference to the wall beds was not a conditional sale contract, but was a present sale of the property from the plaintiff to her. We are unable to accede to this claim. The contract between them seems to have been drawn with consummate skill, and a reading of it leads to the conclusion beyond question that no title passed or could pass from the plaintiff to the property until it was fully paid for. This is stated emphatically in numerous parts of the lengthy contract with clearness and emphasis. We deem it unnecessary to enter into an elaborate discussion of its terms, or to cite authorities, because the matter seems to us very clear that the contract was simply one of conditional sale of the property, and that the title did not pass and could not until full payment was made.

[2] The briefs of counsel on both sides contain very able and illuminating discussions of when personal property becomes so much attached to real estate as to become a part thereof and be immovable. In the view we take of the case it will be unnecessary to follow this argument, or to determine whether the finding of the court that the beds, as installed in the house, were personal prop-

erty is sustained by the evidence. Whether they were personal property, or became a part of the realty, under the contract between plaintiff and Mrs. Borton, the plaintiff, upon nonpayment of the installments as they became due, had the right to remove them from the house.

Section 1013 of the Civil Code provides:

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it."

The converse of this is equally true that, when a person affixes his property to the land of another with an agreement permitting him to remove it, the thing affixed does not belong to the owner of the land. So, by virtue of the contract between the plaintiff and Mrs. Borton, giving it the right to remove these beds unless they were paid for, the plaintiff, as between it and said defendants, was acting within the terms of the written contract in attempting to remove the beds, and if they were the only parties interested in this case it would have the clear right to the judgment, as given by the court, to the possession of the beds or their value. This point is clear, and it seems to us to be indisputable.

[3] We think it equally clear that the intervener has no defense to this action brought by the plaintiff for the possession of the property. It is to be observed that the finding of the court above quoted, to the effect that the real estate was conveyed to the intervener with the understanding that he represented certain of the creditors of the defendant, and with the agreement that he was to retain the title to the property, sell the same, and if there was any excess above certain obligations due to said creditors, that such excess would be paid to the defendant, is fully sustained by the evidence. In fact, the finding is almost a repetition in narrative form of the testimony of the intervener himself. The situation then is that, while holding the legal title, he is the voluntary assignee of the defendants to the property, including the beds, for the benefit of their creditors, with the distinct agreement that, after selling the property, whatever excess there might be is by him to be paid over to them. This being his relation to the property, he has no greater rights therein than his grantors would have had had such conveyance not been made. This principle of law is very clearly enunciated in the case of Francisco v. Aguirre, 94 Cal. at page 180, 29 Pac. 495. In that case it appeared that one Mrs. Edmondston, being the owner of certain furniture, executed a bill of sale thereof to Martha O'Hara, but did not deliver possession. Thereafter Mrs. O'Hara made a demand on her for the possession of the furniture, and, being refused such possession, she began an action of claim and delivery therefor. At the time of the making of the bill of sale to Mrs. O'Hara, Mrs. Edmondston was indebted to various parties, and on the morning of February 2d made an assignment to the plaintiff for the benefit of creditors. Mrs. O'Hara brought a replevin suit against Mrs. Edmondston to recover the property, and the sheriff took possession of it. The plaintiff then, as assignee of Mrs. Edmondston, and representing her creditors, sued the sheriff and Mrs. O'Hara for the property, claiming that he had right to it on the ground that the sale to Mrs. O'Hara as against the creditors of Mrs. Edmondston was void for want of delivery and possession. The court, in commenting upon this situation, said:

"Upon the execution of the bill of sale to Mrs. O'Hara, the title to the property therein vested in her; and, although, without an actual delivery and a continued change of possession, such title could not be asserted by her against the creditors of her vendor, yet, as between the parties to the instrument, she could at any time maintain an action to recover the possession from her vendor, irrespective of such nondelivery. The plaintiff, as the voluntary assignee of Mrs. Edmondston, acquired no greater right in the property than she had at the time of the assignment.

"Upon the principle that an assignor cannot confer upon his assignee any greater right than he himself had in the property, it is held, in an almost unbroken line of authorities, that, in the absence of any statute giving such power, the assignee cannot maintain an action to recover property that had been conveyed by his assignor in fraud of his creditors. This rule rests upon the ground that the assignee is merely the representative of his assignor, and does not represent the creditors.

"Under the common law of assignments, the assignee stands in the place of the assignor, and can assert no claim to property which the assignor might not. The assignment, therefore, does not carry with it to the trustee the title to property which the assignor had previously transferred in fraud of his creditors, for the purpose of hindering, delaying, and defrauding them."

See, also, Ruggles v. Cannedy, 127 Cal. 305, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; First National Bank v. Menke, 128 Cal. 105, 60 Pac. 675; Babcock v. Chase, 111 Cal. 351, 43 Pac. 1105.

The intervener, as the voluntary assignee of the defendant Mrs. Borton to the property, to be sold by him for the benefit of her creditors, the balance to be paid over to her, has no greater rights to this property than she had at the date of this assignment, and is not a purchaser for value. As the defendant Mrs. Borton has no legal right, by virtue of the terms of her contract, she having defaulted in the payment, to withhold

possession of the property from the plaintiff, neither has the intervener, under the circumstances, and the judgment of the court—regardless of whether the property continued to be personal property, or was so affixed to the building as to become a part thereof—awarding the possession thereof to the plaintiff, is in harmony with the findings and the law applicable thereto.

[4] The appellant raises the point that, because the plaintiff did not exercise its right to take possession of the property immediately upon default in the payment thereof, that it is estopped from exercising such right, especially against the intervener in this case; but this suggestion is fully answered by the provisions of the contract itself, above quoted, wherein it is provided:

"The failure of the seller to exercise its right of recaption at any time it may have the right to do so herein, shall not be a waiver of its said right, and at any time thereafter it may so exercise its right of recaption without demand or notice."

We think the judgment is in accordance with the law and the facts and the same is affirmed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. The petition for a rehearing is denied.

[5] In order that the effect of the decision may not be misunderstood, we deem it necessary to add some details not given in the opinion of the district court. In the house in question certain fixtures were attached to the closet doors and to the floors of the closets in the rooms in which the beds in question were installed, by means of which the beds, which were the subject in controversy in the action, could be placed in the closet and hooked onto the aforesaid fixtures. The effect was that when the closet door was opened the bed would swing around into the room, whereupon, by letting it down upon the floor, it was ready for use. The beds were not built in the wall with the house, nor were they a necessary part of the house itself. They could be taken out without unscrewing any screws or removing any fixtures, and the house would remain habitable as before, except that it was not furnished with beds. It is obvious, therefore, that they were not affixed to the building in the ordinary sense of the word so as to become a part of the realty as between the person who sold the same, retaining title in himself, and a subsequent purchaser of the house without notice of such reserved title. These beds were not fixtures, but were a part of the furniture of the house, not essentially different from beds of any other description. So far as the opinion of the district court places the affirmance upon the proposition that the plaintiff would have effectually retained title to the property as against the defendants, even if the beds had been built in or permanently affixed to the house, we are of the opinion that the question was not involved in the case and was unnecessary to the decision, and we withhold approval of the expressions therein to that effect.

All concur.

46 Cal. App. 707

BARTON et al. v. STUDEBAKER CORPORATION OF AMERICA et al. (Civ. 2037.)

(District Court of Appeal, Third District, California. March 29, 1920. Hearing Denied by Supreme Court May 27, 1920.)

1. Master and servant ⟸301(1), 316(1)—Negligent driver of auto, salesman on commission for auto company having no "control" of him, held not a "servant," but an "independent contractor."

Driver of auto, by whose negligent driving of his car plaintiff was injured, *held* not a "servant," defined by Civ. Code, § 2009, of defendant automobile company, for which he was salesman on commission, but an "independent contractor"; it having no authoritative "control" of him with respect to the manner in which the details of his work were to be performed, except right to require him to conform to its instructions in his representations as to the cars, that is, no complete control, and it being immaterial that he used the rooms of the company's plant for showing machines to prospective customers, or that his authority to act for it was evidenced by its card, on which his name was printed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Control; Independent Contractor; Servant.]

2. Master and servant ⟸301(1)—Doctrine of ostensible agency will be applied in tort case only in exceptional circumstances to prevent manifest injustice.

An automobile company *held* not liable, on the doctrine of ostensible agency, resting in estoppel in pais, for the negligent driving of its salesman on commission, an independent contractor, resulting in injury to his customer riding with him in his auto; for application of the doctrine to a tort the case must be characterized by such peculiar and exceptional circumstances that it is necessary to invoke an estoppel to prevent manifest injustice.

3. Trial ⟸296(3)—Instruction as to right and duty of one whose auto, changing its course, was struck by another passing, held not erroneous.

As applied to one with whose auto another, attempting to pass, collided, both having changed their course to the left, an instruction, considered with others relative to statute and ordi-

nance as to operation of motor vehicles, and in view of phrase "acted with ordinary care," *held* not to contain an erroneous statement of her right of assumption as to compliance with the law by others and her duty in that respect.

4. Municipal corporations ⟸705(2)—The rear one of two autos turning to the left into a street has not right of way.

Neither an ordinance giving right of way, as against a vehicle turning to the left into a street, to another vehicle already on the street traveling in the same direction, nor any law, gives right of way to the rear one of two autos so turning into a street.

5. Appeal and error ⟸1170(9)—No reversal for error in instruction not causing miscarriage of justice.

Under Const. art. 6, § 4½, reversal is denied for error in instructions where, after an examination of the entire cause, it cannot be said a miscarriage of justice has followed the giving of the instructions.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Tillie Barton and another against the Studebaker Corporation of America and others. From a judgment for plaintiffs, the named defendant and defendant D. V. Owen appeal. Reversed as to corporation, and affirmed as to individual.

Gurney E. Newlin and Dave Smith, both of Los Angeles, for appellants.

B. J. Bradner and Seward A. Simons, both of Los Angeles, for respondents.

HART, J. The action was brought to recover damages for personal injuries sustained by plaintiff Tillie Barton in an automobile accident. Plaintiff Henry Stephen Barton is her husband. A jury found in favor of plaintiffs and against defendants Studebaker Corporation of America and D. V. Owen, and assessed the damages at the sum of $10,000. From a judgment in this amount said defendants, the corporation and Owen, prosecute this appeal.

Vermont avenue, in the city of Los Angeles, runs north and south, and there are double car tracks thereon over which street cars are run. Pico, or Thirteenth street, intersects Vermont avenue at right angles, running east and west. Next on the north is Twelfth street, which runs westerly from Vermont avenue, being closed to the east.

On the 28th day of January, 1916, defendant Lila Parker was driving north on Vermont avenue in an electric automobile, accompanied by her sister, Mrs. Rosa. Defendant Owen was driving a Studebaker gasoline automobile, also in a northerly direction, and was accompanied by Mrs. Barton. A street car was proceeding northerly on the easterly car track. Owen passed the street car at a point about halfway between Thirteenth and Twelfth streets, and overtook the electric driven by Mrs. Parker at a point very near Twelfth street. He was about to pass the electric when Mrs. Parker turned suddenly to the left. Owen also swerved to the left, but the right front fender and the forward portion of the running board of his car struck the electric, with the result that the Studebaker car was overturned on a steep incline and Mrs. Barton suffered severe injuries.

It is stated in appellants' opening brief:

"While we do not believe that the evidence was sufficient to justify a finding that the accident was due solely or at all to negligence of Owen, and while we do believe that the verdict is excessive, we shall not argue those points separately, because of the established principle of review which must apply thereto. We will, however, call attention to the meager nature of the evidence in connection with our argument as to errors of law."

[1] Appellants' first contention is that the evidence is insufficient to support the jury's finding that the defendant Owen was the employé of defendant Studebaker Corporation. The evidence as to the relationship between Owen and the corporation is quite voluminous. We will state, as briefly as possible, a synopsis thereof.

A. P. Drayton, who for two years had been cashier of the Studebaker Corporation, was called as a witness on behalf of plaintiffs and testified:

"Mr. Owen has been commission salesman as far back as I know anything about the records, which is about for two years, up to the present time. When I came here I found him as a commission salesman. He had no particular desk that he used other than any other salesman would use. * * * There was a desk which he could use if he saw fit. I have never seen him use it, not particularly—I couldn't remember whether I saw him use it or not. I have frequently seen Mr. Owen in the office and premises of the Studebaker Company during the time that I have been there. * * * The company has literature and advertising matter which is sent out to their prospects. * * * We keep a ledger account with Owen. I found one there when I came into the position of cashier and have kept it ever since. * * * We furnish business cards with the agent or salesman's name on it. We did that for Mr. Owen as far back as January, 1916. * * * I have the account of Owen covering the period from 1916 down to the present time. The following card was furnished by Studebaker Corporation to Mr. Owen:

" 'Home 60439
" 'Studebaker Main 3640

" 'The Studebaker Corporation of America,
" 'Los Angeles Branch.

" 'D. V. Owen. 1047 So. Grand Ave.'

"The Studebaker Company did not furnish oil and gas to Mr. Owen at any time prior to the accident. The sheet which I have is headed

'Accounts Receivable Ledger.' It is used for any ledger work. The word 'Employés' simply means that that is the title of the account. The name 'Dan V. Owen' indicated the defendant. * * * The debit items which occur continuously from the 1st of October, 1915, down to and including the 1st day of February, 1916, represent gasoline, oil, and grease commissions charged back by default on contract which should be borne and paid for by Mr. Owen. He paid us for his oil and gas by allowing a portion of his commissions to be applied against it, or anything else which should be paid by him, by allowing that much of his commissions to be paid on it. * * * I understand that the salesmen carried regular sales contract blanks for the purpose of familiarizing themselves with them, but they are usually signed up in the office. When the prospect has reached the point where he is about to make a decision, the sale must meet with the approval of the manager and the final arrangements are made in the office and the prospect is usually there in person—when you can bring him there. That was so with Owen as with other salesmen."

On cross-examination the witness testified:

"I first became connected with the company in Los Angeles in October, 1915, and Mr. Owen had been with the company a long time. * * * Mr. Owen was a commission salesman and received no salary or drawing account whatsoever. The company did not advance Mr. Owen any expenses at all. * * * The only compensation that Mr. Owen received from the company was the commission on cars that he had sold or were sold through his efforts, and if he sold no cars at all, he received nothing at all from the company. He signed no contracts for the company and closed up no deals for the company—that is, he did not accept them as final. All he did was to bring in a purchaser or prospective purchaser and present him to the manager or assistant manager or some one in the office to sign the contract. * * * The items shown in the credit column of the ledger sheet are a summary of the commissions Mr. Owen was entitled to, from the sale of cars."

The ledger accounts referred to by the witness were received in evidence. They are headed:

"Studebaker. Accounts Receivable Ledger. Name, D. V. Owen. Address, Employé."

As to his relations with defendant corporation, defendant Owen testified:

"Up until July, 1915, I was floorman for Studebakers. * * * My occupation in January, 1916, was selling Studebaker automobiles; not necessarily only Studebaker automobiles; any used car of any other make that Studebaker might have owned at that time, on a compensation basis or commission only. During January, 1916, and the two or three months prior thereto I did not receive any salary from the Studebaker Corporation, only commission on cars sold by me. I would get into communication by various means with people whom I thought wanted to buy automobiles. * * * Such person was then my prospect. No one controlled me as to when I should go or when I should come. * * * I went when I thought best and where I thought best. * * * Of course, there are office hours there. If it suited me I was down at office hours, and if it did not I was not. I did not make any report to the company as to what I did during the day or what I was going to do the next day. * * * The automobile I had was owned by myself and my stepson, O. B. Sawyer. I paid the bill for repairs on the car caused by the collision. * * * I used the rooms of the Studebaker plant for showing automobiles at various times from the 15th of July, 1915, on to the time of the accident. I had been bringing people there and closing the contracts there. There is where they are closed. That is where I brought my people under the rules of the company, to close the contract. I did not close any contracts. * * * I made no written report to the Studebaker Corporation. We would sometimes go in and tell them who our prospects were and filed a list in the office from time to time and they kept them on file. I used the automobile in which I was driving on that afternoon in bringing customers to the company when I saw fit. * * * I occasionally acted on the floor of the salesroom. I watched for people to come in, found out what they wanted, answered the telephone; anything that might happen to come up to be done. If anybody wanted to see a car, showed it to them. If they wanted to buy it, I sold it to them. * * * The number of times we could be on the floor depended on how many men were working. We had the right to take turns. If I did not see fit to be on the floor, I wasn't. I went to other work if I wanted to. If we get a prospect we make a note of it and take it down to the place and file it. That entitled me to work that prospect. * * *"

On cross-examination the witness testified:

"I have been with the Studebaker since 1910 as floorman up to July, 1915. That was the designation of employés of the company who remained on the floor itself where the machines stood upon the floor for the purpose of meeting customers or people who were brought there to show the cars. Some time in July I went on a commission basis. I did not act as floorman after that time; not in the capacity that I did prior to that time; not in the same way; nor did we necessarily act at least one day in a week. I used the rooms of the plant for showing automobiles at various times from the 15th of July, 1915, on to the time of the accident. By 'we' I mean to include myself just the same as the regular salesmen, the usual salesmen, and during this period of time I had been bringing people there, that is, from the time I changed to the commission basis until the time of the accident, and closing the contracts there. * * * It was one of the rules of the company that we must close deals with prospects at the office. The prospects were filed under a card system in the office. In the transaction of my business I usually ask advice of the city sales manager or some other official, the assistant manager and general manager."

F. N. Dalton, assistant manager of the defendant corporation, corroborated, generally, the above testimony.

Section 2009 of the Civil Code thus describes a servant:

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

The evidence disclosing the nature of the contractual relationship between the Studebaker Company and Owen is undisputed, and it is clear therefrom that the relation of master and servant, within the legal definition of that relation as given by the section of the Code above mentioned, did not exist between the defendant Studebaker Corporation (to be hereafter referred to as the Corporation) and the defendant Owen at the time of the accident in which the plaintiff Tillie Barton was injured. On the other hand, it is clear that Owen, while engaged in the business of procuring customers for the Corporation at the time mentioned, was exercising an independent calling. He was, in other words, an independent contractor, and as to the means by which he was to execute or perform the work which he assumed in his engagement with the Corporation to do, the latter had no control over him.

The real test as to whether a person is an independent contractor or a servant is whether the person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner in which the details of the work are to be performed, and therefore this test or element "must, in the last analysis, always determine what was the essential nature of the relationship between the person who performed the given work and the person for whom it was performed." Labatt on Master and Servant, § 18, p. 56. As some evidence of the nature of the relationship existing between the Corporation and Owen, in this case, we may refer to the fact that Owen received no definite compensation; that the automobile used by him for the purpose of facilitating conveniently the work he engaged himself to perform for the Corporation was his property; and that he himself paid the expense of its maintenance and care and for the gasoline necessary to run it. But more important than these considerations, which really involve evidence only tending to show the relationship, the probative value of which as disclosing the nature of the relationship must, of course, be measured by other considerations more directly addressed to the fact, is the fact, clearly and unquestionably established, that his business under his engagement with the Corporation was merely that of seeking and finding and procuring purchasers of its automobiles (for which service he was paid a commission), and the further fact that, in prosecuting that business or work, he was at liberty under his engagement with the company to go where and when he pleased and to exercise his own judgment and discretion as to the parties whom he should seek as purchasers or to whom he might present propositions for the sale and the purchase of the Corporation's automobiles. He was, in other words, perfectly free, under his engagement with the Corporation, to choose his own time, place, and means of seeking and procuring purchasers. There was nothing in his agreement with the Corporation to prevent him from employing assistants to aid him in the work of seeking and securing purchasers of the company's automobiles and agreeing to compensate and compensating them out of his own commissions for any customers they might bring to him. In brief, he was perfectly free to prosecute the work he agreed by his contract to do for the Corporation in any manner he saw fit, using such means or methods as to his judgment might seem the most effective for accomplishing the ends of his business. When a sale was made through him he was paid his stipulated commission, but received no compensation unless a sale was effected through him. He was as much engaged in business for himself when prosecuting the work called for by his contract with the Corporation as is the contractor who engages to construct a building for a stipulated sum of money, he agreeing to furnish the labor and materials and not being under the control or direction of the owner as to the means by which he performed the contract or as to the place where he purchased the materials or as to the persons—mechanics and laborers—he employed to assist him in fulfilling the terms of his contract, or as to the wages he should pay such mechanics and laborers. In such case, the limit of the owner's right to interfere in the matter of the performance of the contract is to see that the building is constructed according to the plans and specifications, in conformity with which the contractor has agreed to do the work. And in this case the corporation could exercise no authoritative control over the work of Owen, except perhaps merely the right to require him to carry out its instructions as to the representations he should make to proposed or prospective purchasers of the character of the automobiles in mechanical construction and their durability or serviceable quality, and this authority is analogous only to that of the owner with respect to the contractor who has contracted to erect a building upon the former's land according to certain plans and specifications.

No better description of an independent contractor or a person who is engaged in performing certain acts or work for another but who, in performing such acts or work, exercises an independent calling—that is, a calling as to the means or methods of accomplishing the ends of which no right of control or direction is reserved to or vested in

or exercisable by the party for whom the acts or work are to be done—is to be found than is given in Green v. Soule, 145 Cal. 96, 99, 100, 78 Pac. 337, 339, as follows:

"An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. * * * The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. 16 Am. & Eng. Ency. of Law (2d Ed.) p. 187. The fact that the work is to be done under the supervision of an architect, or that the employer has the right to make alterations, deviations, additions, and omissions from the contract, does not change the relation from that of an independent contractor to that of a mere servant. 16 Am. & Eng. Ency. of Law (2d Ed.) p. 187; Frassi v. McDonald, 122 Cal. 402. These principles apply 'likewise in favor of the principal contractor as against any liability on his part for the acts of a subcontractor, or of a subcontractor's servants.' 16 Am. & Eng. Ency. of Law (2d Ed.) p. 194, and cases cited."

See, also, Buckingham v. Commary-Peterson Co. et al., 178 Pac. 318, 325, 326; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Louthan v. Howes, 138 Cal. 116, 70 Pac. 1065; Johnson v. Helbing, 6 Cal. App. 424, 92 Pac. 360.

The test of control in such cases means "complete control," or the full and unqualified right to control and direct the details of or the means by which the work is to be accomplished. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 Pac. 721. See, also, Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 Pac. 491, Ann. Cas. 1917E, 390; Wood, Master and Servant, § 317; concurring opinion of Mr. Justice Shaw, in Brown v. Industrial Accident Commission of California et al., 174 Cal. 457, 163 Pac. 664, 665; Giacomini v. Pac. Lumber Co., 5 Cal. App. 218, 221, 89 Pac. 1059; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; Chicago, R. I. & Pac. Ry. Co. v. Bond, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735; Fink v. Mo. Furnace Co., 82 Mo. 276, 52 Am. Rep. 376, 378; Thompson on Negligence, vol. 2, 899, § 22; Fay v. German Gen. Ben. Soc., 163 Cal. 119, 121, 124 Pac. 844; Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645; Goodrich v. Musgrave Fence & Auto Co., 154 Iowa, 637, 135 N. W. 58.

In the case of Chicago, R. I. & Pac. Ry. Co. v. Bond, Adm'r, etc., supra, the intestate of plaintiff in the trial court, one Turner, was engaged under certain contracts with the railway company to perform certain services for the company, he (Turner) to furnish all the labor required to perform the services. While Turner was walking between the car tracks of the company on his way to attend to some duty connected with his contracts, an engine, two box cars, and a flat car, backing on one of the tracks, ran over and killed him. Damages were sued for for his death under the Employers' Liability Act of Congress (U. S. Comp. St. §§ 8657–8665), and the question was whether deceased was an employé of the company. The United States Supreme Court answered the question in the negative, and, among other things said:

"There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control to be done by him and those employed by him. * * * The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employés. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employé and a remedy against his incompetency or neglect."

It is to our minds a very plain proposition that, according to the evidence in this case and the criterion by which it is to be determined whether in a given case a party is a servant or an independent contractor, or one exercising an independent calling in his contractual relationship to the party for whom he has engaged to perform a certain service, the defendant Owen and the Corporation defendant did not, at the time the injuries complained of were received, maintain the relation of master and servant, but that Owen was then attending to and managing his own business, that is, engaged in performing work for himself, of course, under his contract with the Corporation.

But the fact is emphasized, as showing that Owen was the servant of the Corporation, that the former used the rooms of the Corporation's plant for showing automobiles to prospective customers he secured. That fact possesses no significance as showing the nature of the contractual relationship between the parties. We apprehend that there was no other place where the automobiles could be as conveniently exhibited to customers or those contemplating purchasing than at the rooms or in the building where the machines were kept on sale. Owen's engagement was to seek, secure, and bring to the Corporation purchasers of its automobiles, and when taking them to the plant it was only an act which he was required to do to accomplish the work he had assumed to do. If a person should engage to haul grain to another's warehouse and place it therein at a stipulated amount per ton and agree to furnish his own equipment and labor for the doing of the work, it would not, we imagine, be contended that such person would be any the less an independent contractor merely

because he was required to use the warehouse of the party with whom he made the engagement to accomplish the results required by his agreement.

Much stress is also laid upon the fact that Owen's authority to act for the Corporation was evidenced by a printed card of the latter and on which Owen's name was printed. The character of the relation maintained by Owen to the Corporation was not stated on the card. This is only and no more than an evidential circumstance, and, under some circumstances, it might cut some figure as proof of the nature of the relationship existing between the parties, but in this case it possesses no significance, in view of the undisputed evidence disclosing the terms of the agreement between the parties and thus the nature of the relationship which said agreement established between them. Naturally, whether a servant or an independent contractor, a party engaged to perform for another acts or work requiring dealings with the public would carry with him some evidence of his authority to do what he claimed the right to do.

We have not thought it necessary to review herein the many cases cited by respondents in support of their position as to the nature of the relationship existing between the Corporation and Owen at the time of the collision. There is one case so cited, however, which we will briefly examine here, inasmuch as counsel insist that in the facts it is precisely analogous to the case at bar. The case is Standard Oil Co. v. Parkinson, 152 Fed. 681, 82 C. C. A. 29. In that case the injury complained of was caused by the negligent act of one Perry, who had a contract with the defendant to sell and deliver oil in four different towns, and who was to receive as his compensation one cent per gallon for each gallon so sold and delivered. During the existence of this contract the company ordered Perry to deliver oil to its customers in a town other than any of those included in the contract of employment. It was while Perry was obeying this order that the accident occurred and the injuries were received. The fact that Perry was shown to be subject to the orders of the defendant as to when and where and to whom he should deliver the oil was, with the other facts, sufficient to uphold the finding of the jury that Perry, at the time of the accident, was acting as a servant of the defendant. In this case, as the undisputed evidence shows, the defendant Owen was not subject to the authoritative control of the Corporation in respect of the details of his work or as to how it should be performed. This was entirely up to him. He could work when he pleased and seek out and select such persons as he pleased as purchasers of the automobiles of the Corporation. Indeed, he was so far from being subject to the control or direction of the Corporation as to the means or mode of and the time for doing his work that he was under no obligation to give any particular time or service to the Corporation. When he brought a "prospect" to the Corporation, he was acting for himself as well as for the Corporation, and if such prospect was transformed into a purchaser, he received his stipulated share of the money for which the machine was sold and nothing if a sale was not effected. It is manifest that there is a marked distinction as to the facts between the two cases.

[2] But the theory is advanced by the respondents that an ostensible agency or the ostensible relation of master and servant between Owen and the Corporation was shown to exist at the time of the accident. The point is argued in respondents' brief exhaustively and authorities are cited in support of that theory as applicable to the instant case.

The doctrine of ostensible agency rests in estoppel in pais or by conduct. It is applicable in particular to contractual obligations and generally invoked in actions sounding in contract, and not in those sounding in tort. There are, however, some cases in tort in which the doctrine of ostensible agency has been applied, and the one upon which the respondent here principally relies is that of Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559. In that case the defendant company had taken a contract to construct a pier on the beach near the Cliff House, in the city of San Franciso. One Stone was the superintendent of the company and was in immediate charge of the work. The plaintiff was employed by the company through Stone, its superintendent. The plaintiff was engaged in working on the pier and was sent by the superintendent, with other employés, to lay a foundation for a jackscrew to raise a pile which had been driven too deep. The blocks were thrown down from a place some 12 feet above where plaintiff was working, and as he stooped to pick up a block he was struck by one thrown from above. Before throwing the block the man who did it asked if all was clear below and was answered in the affirmative by the superintendent and others, and the block was thrown below. At the trial the defendant company attempted to show that it had, previously to the accident, transferred the contract to Stone, its superintendent, and that when the accident occurred it had nothing whatever to do with the contract or the work of constructing the pier. In rebuttal of this defense, the plaintiff was permitted to show and did show that—

Stone "continued at least to be the ostensible agent of the defendant in charge of the work. * * * He showed that no notice was ever given to him of the pretended change of his employers; that the work was conducted under

the direction of Stone after the date of the contract in precisely the same manner as that which characterized it before."

The court said:

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is really not employed by him. Civ. Code, § 2300. There is shown in this case an existing agency, a secret termination of it under circumstances designed to transform the agent into the principal, and this, without any knowledge or means of knowledge of the changed conditions afforded to those who had taken original employment under the defendant. The doctrine of ostensible agency draws its support from the equitable principles of estoppel in pais, and it would not be easy to call to mind a clearer instance of ostensible agency than that here presented by the evidence."

The proposition decided in that case could have been disposed of upon the hypothesis that the question whether the defendant was still the principal or master of the plaintiff when the latter received his injuries was one for the jury to determine upon the evidence, and that the evidence, though conflicting, was sufficient to support the theory of the plaintiff that the defendant had not transferred its contract to Stone and was still the employer of plaintiff. But readily it may be perceived how the doctrine of ostensible agency may well be invoked in a case of such circumstances as those of the Donnelly Case, but there is to be noted a marked distinction between that case and this in the facts—a distinction which renders the former case of no force as an authority here. In the Donnelly Case the plaintiff's contract of employment was originally with the defendant. He had no notice of the transfer of the contract which he had been employed to aid in performing, if there was, in fact, any such transfer. A contract of employment presupposes the existence of a number of considerations or elements. It presupposes that the laborer or servant desired to work or perform services for the particular person by whom he was employed. He is entitled to know definitely for whom he has engaged himself to perform labor. He is entitled to know the responsible party. If he should find that he was not in the employ of the person by whom he was led to believe when he entered into the contract of employment he was employed, he might, for reasons sufficient to his mind, cease to labor or to perform the services he had agreed to do or perform. In the Donnelly Case, if there was a transfer to Stone by the defendant of the contract whereby the pier was to be constructed, the laborers employed on that work were entitled to notice of such transfer, so that they might be given an opportunity to determine whether they would continue in their employment, so that they would know to whom they should look for their compensation and know who was the responsible party in case controversies of any character should grow out of the work of performing the contract. In this case the plaintiff was not an employé either of the Corporation or Owen. It was of no interest to her to know whether Owen was a servant of the Corporation or, in the sale of the latter's automobiles, was exercising an independent calling. The only interest she could have in the nature of Owen's contractual status with respect to the Corporation was that he was vested with authority to solicit her trade for the Corporation and to consummate a sale of an automobile upon the terms of his agreement with her. It is not shown that she was influenced in the least degree to ride with Owen because she believed that he was the servant of the Corporation. It is undoubtedly true that she never gave any thought whatever to the nature of the business relation existing between Owen and the Corporation.

A master can be held liable for a tort committed by his servant in the course of his employment as such servant only upon the doctrine of respondeat superior, that is, upon the theory that the torts of a servant committed while the latter is engaged in the performance of the duties of his employment are the torts of the master himself. Therefore, in applying the doctrine of ostensible agency to torts, the case must be characterized, as was true in the Donnelly Case, supra, by such peculiar and exceptional circumstances as that it is necessary to invoke an estoppel to prevent manifest injustice from being done. The authority for applying the principle of equitable estoppel in such a case is statutory, and is found in section 2330 of the Civil Code. That section reads:

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

But the case of Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834, is a direct authority against the position of respondent, and between that case and the Donnelly Case we perceive no inconsistency.

In the Smith v. Belshaw Case, the defendant was the owner of a coal mine in which the plaintiff was employed, and while so employed received the injuries to secure compensation for which he brought the action. The evidence was—

"undisputed that at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of defendant Dickenson, under a contract with Belshaw, who was the owner thereof; that under such contract Dickenson employed and paid the workmen; had entire control of and authority over the mine, and received a fixed rate per

ton, from Belshaw, for the coal taken therefrom, when the same was delivered to him."

The court, answering the several contentions of respondent which were advanced to support the judgment against Belshaw, said:

"The fact that the miners were paid their wages at defendant Belshaw's store, where they had been paid prior to the contract with Dickenson, and the further fact that some of the miners *thought* they were working for Belshaw, are circumstances too slight to defeat the express and uncontradicted testimony as to the terms of the contract and the labor performed under it.

"What the *miners thought* as to who was their employer is entirely immaterial. There is no question of estoppel involved in the case, and appellant, in order to escape liability for the negligence of Dickenson, was not bound to give any notice to the miners that he had given up the control of the mine. This is not an action on contract based upon ostensible agency, but is an action in tort, and *must rest upon the actual facts, and the actual relations existing between the parties.* Samuelson v. Cleveland Iron M. Co., 49 Mich. 164, 43 Am. Rep. 456; Rourke v. White Moss Colliery Co., L. R. 2 C. P. D. 206."

(Latter italics ours.)

Smith v. Belshaw was approved in Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377, and Raftis v. McCloud River Lumber Co., 35 Cal. App. 397, 170 Pac. 176. In the last-named case it is said:

"The case of Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559, in no way militates against this conclusion. In that case the evidence showed a clear case of ostensible agency. The prior relations between the parties to the action created a duty upon the defendant therein to notify the plaintiff that their former foreman had become an independent contractor."

The respondents cite other cases, but therein the doctrine of ostensible agency as applied to torts did not arise. In most of said cases it is merely held that where there is conflicting evidence upon the question as to the nature of the relationship existing between the parties, upon the familiar rule respecting a substantial conflict in the evidence addressed to a vital issue of fact, the findings of the court or the verdict of the jury will not be disturbed on review. This is really in effect what is held in Raftis v. McCloud River Lumber Co., supra, and in Giacomini v. Pacific Lumber Co., supra.

We are convinced that there is no room in this case for the application of the doctrine of ostensible relationship, and that the nature of the relationship existing between the Corporation and Owen when this accident occurred must be determined, as is said in Smith v. Belshaw, supra, "upon the actual facts, and the actual relationship existing between the parties," as disclosed by the evidence.

We will now leave that branch of the case and proceed to an examination of some of the other assignments. The rulings respecting the evidence of which complaint is made need not be noticed herein, inasmuch as they affected the question only of the nature of the contractual relation existing between the Corporation and Owen at the time of the accident. Certain given instructions, however, affecting the case of Owen are criticized, and to the criticism of some of these only do we deem it necessary to give special attention herein.

It is deemed proper first to say that the evidence abundantly supports the verdict as against the defendant Owen. Indeed, the evidence clearly shows, that, just prior and down to the very moment the collision occurred, Owen was driving his machine apparently with reckless indifference to the rights of pedestrians and others using the street at the time of the collision.

[3] The following is one of the instructions to which objection is urged by the appellants:

"Defendant Mrs. Parker had a right to assume, until actually aware of the contrary, that any automobile approaching her from the rear would be operated with reasonable care and at a reasonable rate of speed and with the exercise of reasonable caution in giving warning of its approach if reasonable prudence so required, and Mrs. Parker had a right to act on that assumption until actually aware of its violation. And if, in proper reliance on that assumption Mrs. Parker acted with ordinary care, your verdict must be given in favor of defendants Parker."

The converse of the proposition stated in said instruction was embodied in an instruction requested by the defendants, but the court, in view of its position as shown by the above instruction, rejected it.

The state Motor Vehicle Law, as does, substantially, a local regulation of the city of Los Angeles, provides that—

The driver or "person in charge of any vehicle in or upon any public highway, before turning, stopping, or changing the course of such vehicle, and before turning such vehicle when starting the same, shall see first that there is sufficient space for such movement to be made in safety, and if the movement or operation of other vehicles may reasonably be affected by such turning, stopping or changing of course, shall give plainly visible or audible signal to the persons operating, driving or in charge of such vehicles of his intention so to turn, stop, or change his course." Subd. J, § 20, Stats. 1915, p. 408.

It is said that a similar instruction was held to be error and prejudicial in the case of Starck v. Pac. Ry. Co., 172 Cal. 277, 278, 281, 156 Pac. 51, L. R. A. 1916E, 58. In that case, the instruction, as it is given in the opinion, read:

"In determining whether plaintiff was negligent, you will take it that she had the right to assume, until she knew to the contrary, that

defendant would not violate the city ordinance and run at a speed over 20 miles per hour."

We should think that it is correct to say that every person using the public streets and highways for the purposes for which they are established and maintained has the right to assume that other persons using such streets and highways for the same purpose will, when so using them, obey the law regulating their use by pedestrians and drivers of vehicles of any kind. But this is not to say that any person, whether pedestrian or the driver of a vehicle, when using such thoroughfares for the purposes they are intended for is not also himself required to exercise due care for his own safety or to observe the duties with which the law expressly charges him. Runnels v. United Railroads, 175 Cal. 528, 531, 166 Pac. 18; Scott v. San Bernardino Tract. Co., 152 Cal. 604, 610, 93 Pac. 677. And, as we read the opinion of Mr. Justice Melvin, in Starck v. Pacific Elec. Ry. Co., supra, what we here say is in effect what is said there. As is to be observed from the language of the state Motor Vehicle Act above quoted herein, there are certain duties imposed upon a person in charge of a motor vehicle who may be in the act of turning or about to turn his machine when driving over a public thoroughfare, and these he is required to discharge, notwithstanding that he has the right to assume that other persons who may be affected by the act of turning will do their duty or obey the law, and in any case where the driver of a vehicle violates the requirements of the law regulating the use of the public thoroughfares, the violator is guilty of negligence per se if there be damage done as a result, even though it may transpire that such negligence is not the proximate cause of such damage.

The instruction in this case, it will be noted, declared that Mrs. Parker, driver of the electric car with which Owen's machine collided, had the right to assume that any automobile approaching her from the rear would be operated with reasonable care and at a reasonable rate of speed, etc., and then adds that—

"If, in proper reliance on that assumption, Mrs. Parker acted with ordinary care, your verdict must be given in favor of the defendants Parker."

If by the phrase "acted with ordinary care" the court intended to refer to the care as applied to drivers of motor vehicles specifically standardized by the statute, then the instruction, although not as clearly phrased as it should be, would not involve an erroneous statement of the rule. And we think it is, when considered in connection with the instructions explaining the provisions of the statute and the local ordinance regulating the operation of motor vehicles, reasonably susceptible to that construction, and that we may fairly assume that the jury so understood it; and the instruction as so construed does not conflict with instruction No. 12, given at the request of the defendant.

[4] The court instructed as follows in instruction No. 17:

"You are instructed that a vehicle, turning to the left in an intersection and passing the center of the highway in making such turn, has the right of way over any vehicle which it may have preceded into such intersection, and which may be to the left of said vehicle so turning."

Said instruction, it is contended, does not state the law correctly, and as an abstract enunciation of the rule to be observed in such instances prescribed by the ordinance of the city of Los Angeles it may not. But, as applied to the facts of the present case, it states a correct rule.

Section 41 of said ordinance provides:

"The driver of a vehicle turning to the left from one street into another street shall allow the right of way to vehicles traveling in the direction in which such vehicle is turning; and the driver of any vehicle traveling in the direction in which such vehicle is turning shall have the right of way over such vehicle so turning."

As we understand that provision, when a driver of a vehicle turns to the left into a street on which another vehicle is traveling in the direction of the former, the driver turning to the left must yield the right of way to the driver thus traveling in his direction. In this case Owen was traveling on the same street on which Mrs. Parker was traveling, but was in the rear or back of the Parker machine. We can conceive of no reason or principle of law which would require the party turning to the left from one street to another to yield the right of way to the vehicle following his on the same street. If Mrs. Parker, as she testified, gave the required signal of her intention to make the turn and otherwise exercised due care in doing so, she had the right to proceed on beyond the center of the street into which she had turned or was about to turn without yielding the right of way to another vehicle back of her, unless such vehicle was traveling in the direction in which she was turning on the street into which she was thus entering or about to enter. Where two vehicles are traveling in the same direction on the same street, one in the rear of the other, it is the duty of the driver of the rear car to exercise reasonable care with respect to the forward car, and if the driver of the latter indicates by the proper signal his intention of turning to the left into another or cross-street, to yield to him that right. Ordinance or no

ordinance, the driver of the rear car would certainly be guilty of the grossest negligence if he attempted to make the same turn in such manner as to cut in on the forward car. The driver of the latter car would certainly have the "right of way" in such a case as between him and the driver of the rear car operating on the same street and in the same direction; and, as before stated, as applied to the facts of this case, the instruction involves a correct statement of the law and did not invade the province of the jury (as counsel contend) by taking from them the determination of a question of fact.

Instruction No. 18 is subjected to the criticism that it, too, passes upon a question of fact, in that, like the instruction last above considered, it told the jury that, under certain indicated conditions, Mrs. Parker had the right of way over Owen's car. What we have said of instruction No. 17 as to a like criticism is applicable to the objection made against instruction No. 18.

[5] There are other instructions the legal soundness of which is challenged. We have examined them with care, and while it may be conceded that they are subject to just criticism because they are not as clearly framed as they should have been, we are persuaded, in view of the convincing proof of Owen's gross negligence in driving his machine at the time of the accident, and also in view of our conviction, founded in an examination of the evidence, that if he (Owen) had exercised reasonable or ordinary care in operating his machine at the time the accident would not have occurred, that the rights of Owen were not materially affected by the errors of said instructions, if indeed, the errors were of such magnitude as to do any harm at all under any set of circumstances. At any rate, we cannot find any reason sufficient to justify us in holding that, after an examination of the entire cause, a miscarriage of justice has followed the giving of the instructions referred to. Const. art. 6, § 4½; Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 Pac. 238. The charge of the court generally viewing it appears to embrace a fair and reasonably accurate statement of all the principles of law applicable to the case as made by the pleadings and the proof, and such a statement as was calculated to lead the jury to a just and enlightened consideration of the evidence.

For the reasons herein given, the judgment as against the defendant Studebaker Corporation of America is reversed, and the judgment as against the defendant Owen is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

(47 Cal. App. 23)

LEE v. DE LA MOTTE et al. (Civ. 2556.)

(District Court of Appeal, Second District, Division 1, California. April 7, 1920.)

1. Sales ⟸24—Purchaser of automobile had reasonable time to exercise option to repurchase automobile applied on price.

A purchaser of an automobile who received a credit of $450 upon delivery of a Studebaker car to the seller, "to be held for 30 days at a price to net purchaser $650, if not sold in 30 days purchaser has option to buy Studebaker for $500 plus repairs put on it," had reasonable time after the expiration of 30 days within which to exercise his option.

2. Sales ⟸24—Fifteen days a reasonable time within which to exercise option to repurchase automobile.

Where purchaser of an automobile, who received credit of $450, delivered a Studebaker car to the seller "to be held for 30 days at a price to net purchaser $650, if not sold in 30 days purchaser has option to buy Studebaker for $500 plus repairs put on it," 15 days after the expiration of 30 days was a reasonable time within which to exercise the option; the seller having undertaken to make repairs which were not completed prior to such time.

3. Replevin ⟸103(2)—Defendant cannot have return of property in absence of formal demand in answer.

In an action in claim and delivery for recovery of possession of personal property, where plaintiff is put in possession of property by the sheriff, defendant is not entitled to a return of the property, where he does not assert a formal claim for a return in his answer, in view of Code Civ. Proc. § 667.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Don Lee against J. De La Motte and Dorothy Millais. Judgment for defendants, and plaintiff appeals. Reversed.

W. R. Law, of Los Angeles, for appellant.
Henning & McGee, of San Diego, and J. De La Motte, of Los Angeles, for respondents.

JAMES, J. Action in claim and delivery for the recovery of possession of a certain automobile or its value, which latter was alleged in the complaint to be the sum of $850, together with damages. Defendants had judgment, from which plaintiff has appealed.

In addition to determining that the plaintiff was neither the owner nor entitled to the possession of the automobile in question, the trial court found that the plaintiff had preliminarily obtained the possession of the automobile through the sheriff, and by the judgment directed that the defendants have possession of the same, or recover the value thereof, which was fixed at the same sum alleged by the plaintiff, to wit, $850. The appellant's points may be summarized under

two heads: (1) That the evidence was insufficient to support the finding against the ownership or right to the possession of the automobile in the plaintiff; (2) that under the pleadings the judgment directing the return of the automobile to the defendants was unauthorized. A consideration of the first point involves an examination of the main facts of the case as shown by the evidence. Necessarily, in considering the findings as made by the trial court, the evidence introduced on behalf of the plaintiff must be considered in its strongest light. As defendant De La Motte appears to have been the actual contracting party in the transaction about to be described, we will hereinafter refer to him as the defendant. Defendant Millais, it seems, had possession of the automobile at the time this controversy arose, but her possession was derived from De La Motte, and no question is made but that De La Motte was the party responsible to the plaintiff.

[1-3] On the 17th day of November, 1916, plaintiff made a contract of conditional sale whereby he agreed to sell to the defendant a used automobile for the sum of $850. The contract of sale, signed by both parties, acknowledged the receipt of $450 on account, and provided that payments should be subsequently made, to wit: $75 on December 17, 1916; and $65 on the 17th day of each of the five months immediately following. It was provided that interest at the rate of 8 per cent. per annum should be paid by the vendee. In conjunction with this contract, promissory notes covering the deferred payments and corresponding to the terms of the contract as to amounts and due dates were made. As a matter of fact, the initial payment of $450, which the contract acknowledged, was not a cash payment, but was a credit which the plaintiff agreed to allow in consideration of the delivery to him by defendant of another used automobile. In other words, the transaction took the form of a partial exchange of automobiles. As a part of the transaction, however, an additional agreement was made, evidenced by the following written term:

"Studebaker car (that being the car delivered by the defendant to the plaintiff), to be held for 30 days at a price to net purchaser $650, if not sold in 30 days purchaser has option to buy Studebaker for $500 plus repairs put on it."

The automobile received from the defendant was not sold within the 30 days by the plaintiff, but was sold on the 6th day of January, 1917, for the sum of $750. Prior to this time, and while the machine was in the hands of the plaintiff, extensive repairs had been made upon it. The installment which fell due on December 17th of $75, by the terms of the contract as hereinbefore stated, was paid by the defendant. The installment due on January 17, 1917, which, as will be noted, was 10 days after the automobile delivered by the defendant to the plaintiff had been sold, was not promptly paid; that is, on January 25, 1917, defendant forwarded to the bank which was making collection of the notes a check for $65, but did not include the small amount of interest due, claiming that he had been overcharged on the interest account. On the same date he wrote to the plaintiff as follows:

"I have been waiting for you to make a settlement of my account on the sale of the Studebaker car which you sold for the sum of $750. I have to-day sent to the bank a check for the sum of $65 and a request that they correct their account with me on account of an overcharge on the interest on all of the notes they have collected, which I have no doubt they will do. I will turn over the car to you if you wish, upon your turning over to me the Studebaker car, or upon the payment to me of the amount of money paid for the same. I think that it is usual under circumstances like that which now exists between us, to at least notify me of the fact that the car was sold and what was paid for the same, so that I would know what was coming to you on that account. I desire a complete statement of the account before the next payment is made."

On January 26th the check was returned to the defendant by the bank with the suggestion that the matter of any offsets be taken up with the plaintiff directly. About the 1st of February defendant appeared at the place of business of the plaintiff and found that the car which he had delivered in part payment was still in the shops of plaintiff, and that the repair charges in full, as stated to him by the plaintiff, amounted to $204. He testified that the manager of plaintiff asked him whether he desired to exercise his option to purchase the car, and that he (defendant) stated that he would so exercise the option, but that on the following morning the same manager told him that the car had been sold and that he could not have it. The defendant demanded that a credit of $650 be given him on his account, instead of $450, which credit, if it had been made, would have more than satisfied the installment notes both for the January and February payments. Under the terms of the contract the defendant had no option to repurchase the Studebaker car until the 17th of December, 1916, or 30 days after the contract was entered into; the plaintiff, within the first 30 days, was required, if he sold the machine, to sell it for a price that would produce for the defendant a credit of not less than $650. Defendant could not have been called upon to exercise his option to repurchase the machine immediately upon the expiration of the 30 days, but must be deemed to have been allowed a reasonable time thereafter within which to exercise that option. Furthermore, certain

repairs had been undertaken to be made by the plaintiff on the machine, and these repairs were not completed at the end of the 30 days, and in fact were not completed at the time the defendant had his further dealings with the manager of the plaintiff in February, when, for the first time, the cost of the repairs was calculated and stated to him. This latter date was approximately 45 days after the option period had commenced to run. In view of the fact that the repairs had not been completed and no statement of the same made to the defendant, we think it just to hold that a reasonable time had not elapsed subsequent to the expiration of the first 30 days at the early date in February to which we have referred. That being true, and as it appears that the defendant manifested his desire to repurchase at that time, and the fact being that the machine had been sold on the 6th day of January by the plaintiff, we think that defendant was entitled to have credited the amount received from the sale of the automobile, less the repair costs as they were stated to him, and less $50, that being the difference between the $450 mentioned as a credit in the contract and the amount for which the defendant was to be permitted to repurchase. If there was no other point to be considered in the case, we might easily determine that these implied findings were made by the court.

The finding that the plaintiff was not the owner of the automobile, possession of which was sued for herein, finds no support in the evidence, although the more material finding that the plaintiff was not entitled to possession of the same is, for reasons already appearing, sufficiently sustained. As to the ownership being in the plaintiff contrary to the finding, the written contract particularly and expressly reserved title in the plaintiff until the automobile purchased by the defendant from him was completely paid for. Under any view of the evidence, it does not appear that the purchase price had been satisfied at the time this action was brought. However, upon a retrial, which it seems is necessary to be had, different findings may be arrived at. Defendant did not, in his answer, claim the right to have the automobile, taken under claim and delivery process, returned to him. Section 667, Code of Civil Procedure, relating to judgments in this kind of action, declares:

"If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

Defendant did, by way of counterclaim, show the fact that the automobile had been taken from his possession by the sheriff at the instance of the plaintiff, and alleged certain damages which he had sustained by reason of such act. In his prayer for judgment he made no demand whatsoever for the redelivery of the automobile; his answer, after enumerating damages, concluding with the following words:

"For which sum, together with the costs and disbursements of this action, defendant asks judgment; and that the plaintiff take nothing by his action, and that plaintiff's action be dismissed with costs."

Under the authorities, this answer is insufficient to support a judgment for the return of the property. Pico v. Pico, 56 Cal. 453; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772. In Pico v. Pico, supra, the court points out that, ordinarily, in an action of replevin where the issue is made as to the right of the plaintiff to the possession of the property and the facts showed that the defendant was entitled to that possession, a judgment for the return of the property to the defendant was permissible. However, attention is called to the fact that the Code section above cited requires something more:

"Nevertheless, a defendant cannot have judgment for a return of the property or its value, unless he has claimed a return in his answer. But this, even if it be held to require a formal demand, is not because such demand is necessary to eke out the denials, or constitutes of itself an affirmative allegation, but because it is arbitrarily made the duty of defendant to assert his formal claim for a return as a prerequisite to a judgment for the return of the property or its value. Except for this arbitrary requirement of the statute, the formal claim for a return of the property would not be necessary. We have seen that where the facts set forth in a plea of replevin showed that defendant was entitled to the possession of the property when the action was commenced, a formal claim or demand for a return was not essential. In reference to replevin, courts and legal writers have said that a defendant was entitled to a judgment for a return whenever the question, whether a return should be had, was presented by the pleadings; that is, whenever the right of plaintiff was contested, and the right of possession in defendant, or a third person, asserted. Under our system, the general denial contests the right of plaintiff, and under it may be shown the right of defendant or a third person. The denial of plaintiff's right to the possession necessarily includes an assertion of right in defendant, from whom the possession of the property has been taken under the writ; and would authorize a judgment for the return, were it not for the provision of the Code which requires a return to be claimed in the answer."

We are not permitted to assume, under the record as it is presented, that the plaintiff tacitly agreed that a judgment for the defendant for the return of the property would be made. The evidence introduced was pertinent to a claim for damages, which is all

that defendant seems to have sought by his answer.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

46 Cal. App. 692

MARSH v. SMITH et al. (Civ. 3142.)

(District Court of Appeal, Second District, Division 2, California. March 25, 1920.)

1. Appeal and error ⟸1011(1) — Judgment on conflicting evidence not disturbed.

A judgment supported by evidence, although conflicting, cannot be disturbed on appeal.

2. Trusts ⟸371(2)—Complaint alleging absolute deed was a trust held sufficient.

A complaint, in an action by a mother against her daughter to quiet title as against a conveyance, alleged to have been in trust, but claimed by the daughter to have been absolute, *held* sufficient as against general demurrer.

3. Appeal and error ⟸193(1) — Special grounds of demurrer to complaint must be made below.

Under Code Civ. Proc. § 434, special grounds of demurrer to complaint not made in lower court cannot be considered on appeal.

4. Trial ⟸140(1)—Refusal proper where affidavits contradicted by affiant's oral testimony on trial.

On motion for new trial in a suit to quiet title, motion *held* properly denied, where the supporting affidavits were contradictory to oral evidence by affiants in the trial.

5. New trial ⟸102(1) — Properly denied, where affidavits show that new evidence sought to be introduced was known to affiants.

Where affidavits for a new trial show on their face that the evidence sought to be introduced on a new trial was in the possession of affiants long before and during the time the cause was pending, and that they did not see fit to avail themselves of it, a motion for new trial is properly denied.

6. Trusts ⟸43(3)—Evidence as to defendants' expenditures on land held properly stricken out.

In a suit to quiet title, brought by a mother against her daughter as against a conveyance alleged by plaintiff to have been in trust, but claimed by the daughter to have been absolute, evidence relative to expenditures made by defendants on the property was properly stricken out; it appearing that defendants claimed the property absolutely and would have made such improvement regardless of whether the deed had been made or not.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Suit to quiet title and for injunction by Sallie P. Marsh against Carrie F. Holder Smith and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

S. M. Davis and E. T. Langley, both of Santa Ana, for appellants.

Williams & Rutan, of Santa Ana, for respondent.

THOMAS, J. This is an action brought to quiet title, and for an injunction to restrain defendants from interfering with plaintiff's possession of the property in question, and the defendant Carrie F. Holder Smith from conveying or incumbrancing the title thereto, with a further prayer "that it be adjudged and decreed that, if said defendant Carrie F. Holder Smith has any title in said property, the said title is that of a trust only for the benefit of said plaintiff," as well as for general relief.

The defendants appeared separately. For our present purposes it will suffice to say that each of them, except as to certain formal averments, denied the material allegations of the complaint. The defendant Carrie F. Holder Smith set up, as a further defense, a certain deed alleged to have been executed and delivered to her by the plaintiff, and in consideration therefor the expenditure by said last-named defendant of the sum of $1,100 to satisfy a certain mortgage, and an agreement on her part to advance such other and further sums as might be necessary for the continued maintenance, support, and living of the plaintiff, with the additional proviso that she (plaintiff) "was to live and reside upon said property during the remainder of her natural life"; and that said defendant had done her part since, and expected to continue to carry out her part of the agreement. This defendant further claims to have expended a large sum of money in improving, by certain repairs and the erection of a structure thereon, the property in question, and that she did so in good faith, "understanding that the title to said property was vested in this defendant absolutely"—praying that her title therein be quieted in herself. After trial the court found in favor of plaintiff, and judgment was entered accordingly. There was a motion for new trial, which was denied. The appeal is from the order denying such motion and from the judgment so entered.

Plaintiff is an old lady—nearly 74 years of age at the time of the trial. She is the mother of the defendant Carrie F. Holder Smith, and apparently is a woman of the type of "the good old days." The testimony of herself, as well as that of her daughter, shows that she was familiar with the Biblical truths, and that she tried to apply their principles in her daily walks and conversation. The defendant Carrie F. Holder Smith, her daughter, had herself arrived at the age of discretion, being at the time of the trial

52 years of age. She seems to have had a wide experience, both in business and matrimonial enterprises, having been in the real estate calling, and, at the time of the trial, living with her fourth husband, the defendant George Washington Smith. Her first husband, it appears, died; the marriage relation between herself and her second, as well as her third husband, was dissolved by the surgery of divorce.

From the record before us we gather that plaintiff's husband had died several years prior to the trial; that for a long time prior to his death plaintiff and he had owned the particular land described in the complaint, and which is the land in controversy here, as joint tenants with the right of survivorship; that, on the probation of the estate of said deceased, the life estate of the latter was terminated, and the sole title, both legal and equitable, became, and was by the court declared to be, vested in the plaintiff by virtue of a decree duly and legally entered under and in pursuance of the provisions of section 1723 of the Code of Civil Procedure; that the defendant Carrie F. Holder Smith, for some reason, was not pleased with this disposition of the property; and that she apparently then devised a plan whereby she might become the owner thereof, notwithstanding said decree.

For many years an intimate acquaintanceship had existed between plaintiff, plaintiff's said husband, and one William Freeman, a reputable member of the bar of this state. In fact, the plaintiff and her husband had known Mr. Freeman from his boyhood, and each of them regarded him with high esteem, having absolute confidence in him. The trial court found—and, we think, correctly, too—"that said William Freeman acted at all times in the utmost good faith in the settlement of said estate." Notwithstanding this fact, the defendant Carrie F. Holder Smith originated and maintained for a considerable time a propaganda designed to and which eventually did arouse in the mind of this plaintiff a doubt as to the integrity of said Freeman, which doubt finally occasioned the supplanting of Mr. Freeman by another equally reputable member of the bar—Mr. Horace C. Head of Santa Ana, Cal.—who, however, would not accept such employment until determining that such substitution was entirely satisfactory to Mr. Freeman. The hook, upon which the argument used by said defendant Smith in poisoning plaintiff's mind against said Freeman was hung, was the fact that the latter had, as a matter of convenience and for the saving of expense, procured a deed from plaintiff, as the administratrix of her deceased husband's estate, to one Dr. Talley and wife, which deed was to be used in a contemplated compromise, authorized at the time by the judge of the probate court wherein the proceedings relating to the probate of said decedent's estate were pending, of certain claims presented by Dr. Talley and wife against said estate. This deed, however, was never used. During the time subsequent to its execution, though, the defendant Mrs. Smith, according to plaintiff's testimony—which was believed by the trial court—kept up her propaganda, insisting that plaintiff "may have signed away" her rights, that she was signing papers the contents of which she did not know, that Freeman might get the property, etc. In this connection plaintiff testified:

"Well, I studied over it and prayed over it, and I thought, well, there couldn't be any harm in it. She and the children would be the only heirs I would have; what difference would it make? I felt that way; but still I thought, well, there could be such a thing that William [Mr. Freeman] might have done such a thing. Of course, things happen we never expect in this life. * * * Honestly, I didn't have any peace now. Every few days we would go over that. I got nervous over that. It worried me to lose confidence in my friend."

This was kept up so long that plaintiff concluded that perhaps, in order to avoid any such possibility as suggested, the best thing to do was to give her daughter, Mrs. Smith, a deed to the property in question, in compliance with the latter's suggestion that by so doing she, the defendant, would thus save the home for plaintiff. According to one of plaintiff's witnesses—Mrs. Wells—a daughter of the defendant Carrie F. Holder Smith, the latter said to plaintiff:

"You have signed some papers or deeds, and you do not know but what you have signed away your rights to the place, and Freeman will defraud you from it, and I will protect you in this if you will give me a deed."

The instrument, in the form of a gift deed, was executed accordingly. The trial court found that—

Plaintiff had "no intention of making a gift or parting with her title to the said property. * * * That the said deed was made for the sole purpose of conveying the said property to said defendant, Carrie F. Holder Smith, in trust for plaintiff, to be held for said plaintiff and conveyed to her upon demand, or to carry out plaintiff's wishes in regard to the same."

[1] There is direct conflict on this point, and the findings of the learned trial court are amply supported by the evidence. We cannot, therefore, interfere. The trust referred to above was thereafter deliberately repudiated by said defendant. Her conduct toward plaintiff was, according to a legitimate inference which may be drawn from the evidence, cruel, and almost ruthless. The record shows that she tried to throw things from the house on the premises in question; broke the screen door open by force; took things away; locked up one room which plaintiff had rented; and herself demanded the payment of rent from

plaintiff's renters who were occupying rooms upstairs in plaintiff's said premises, which rent, according to plaintiff's own testimony, was her sole source of income.

Appellants urge five points for reversal:

(1) "The complaint does not state a cause of action, and is subject to general demurrer. The causes of action are inconsistent and repugnant, and would not be joined. They are stated and commingled in such a manner that the defendants could not be informed by the complaint of the ultimate facts upon which the plaintiff relied, and whether the plaintiff claimed the property as the owner in fee or as beneficiary of an express trust or of a constructive trust." (2) "The object of the parties and deed at the time of its execution was to convey a legal estate in fee simple as a gift to the defendant for her own use, and not in trust for the plaintiff." (3) "The motion of the defendants for a nonsuit, when plaintiff rested her case in the trial, ought to have been granted by the trial court." (4) "The motion of defendants for the appointment of a receiver should have been granted by the trial court." (5) "The motion of the defendants for a new trial should have been granted by the trial court."

In other words, these five "points" may be divided, for convenience, into two divisions: (1) Errors of law occuring at the trial; and (2) insufficiency of the evidence to support the findings.

[2, 3] As to the first point urged—the demurrer—it should be suggested that no demurrer, general or special, was on file or before the trial court, but is urged here for the first time. As against a general demurrer, the complaint in this action is sufficient. As to any ground for the special demurrer, that was waived, and cannot be considered here. Section 434, Kerr's Cyclopedic Code of Civil Procedure, and cases cited thereunder.

With respect to the second point, as we have already seen, the trial court found against defendants' contention, and there is abundant evidence to support such finding.

As to the third and fourth points, it logically follows, from what we have said above, that the learned trial court was correct in its ruling denying defendants' motion for nonsuit. And with the same force it may be stated that, the findings being supported by the evidence, and they being in favor of plaintiff, it is not only apparent, but, we think, must now be obvious to all, that no order which the trial court might have made appointing a receiver for plaintiff's property, under the facts disclosed by this record, could stand. The ruling thereon was correct.

A consideration of the fifth point urged discloses the fact that, upon the presentation of the motion for a new trial, two affidavits were filed and presented to the court—one by each of the defendants here. The affidavit of defendant Carrie F. Holder Smith shows, among other things, that her mother (plaintiff) was very much opposed to affiant's marriage to her defendant husband; that the plaintiff had, "about three months prior to said trial," told affiant-defendant that "there is a scheme—we have a scheme by which you will be compelled to give me the property. * * * You had better deed me the property before it is too late"; that she (affiant) forgot to call this fact to the attention of her attorneys before and during the trial; that because of said alleged fact she claimed and charged that there existed between the plaintiff and certain witnesses who testified at the trial, a conspiracy to defraud her out of the property in controversy; and that she did not believe until after the trial that such a conspiracy existed. The affidavit of the defendant George Washington Smith was intended to bolster up the defendant wife's affidavit as to the plaintiff being opposed to their marriage; but even although he claims to have had the conversation to which he refers in his affidavit with the plaintiff shortly after the marriage of defendants, that notwithstanding this fact, he did not mention the incident to defendants' attorneys nor to his defendant wife for the reason, among others, "that this affiant did not wish to prejudice and bias the mind of his wife against her mother," plaintiff here. There were no counter affidavits.

On the trial the defendant George Washington Smith testified in part as follows:

"Q. You are one of the defendants here? A. I ain't much interested in it. Q. You have been attending the trial here? A. Yes. Q. You have heard Mrs. Marsh testify as to certain statements you made to her with reference to her property in question? A. Yes. Q. I will ask you to state whether or not you made such statements? A. That's not true, because I never talked to any of them about that proposition whatever; I would swear to it."

[4] If this testimony be true, then it is unnecessary to point out that the statements made in his affidavit, to which we have just referred, cannot also be true. Under this state of the record, therefore, we cannot say that the trial count erred in refusing to believe the statements made in such affidavit, or in denying the motion for a new trial.

[5] But there is, we think, a stronger reason why the action of the court in denying the motion for a new trial should be sustained, viz.: Assuming that the court believed the affidavits presented, in their entirety, still the motion would have to be denied because they show on their face that the evidence sought to be introduced on a new trial was in the possession of defendants and affiants long before and during the time the cause was pending, and that they did not see fit to avail themselves of it. Hence the motion was very properly denied. County of Sonoma v. Stofen, 125 Cal. 32, 57 Pac. 681. James v. Oakland Traction Co.,

10 Cal. App. 785, 103 Pac. 1082. Defendants certainly cannot be permitted to assert their own alleged forgetfulness—which is, so far as this case is concerned, but another term for negligence—and expect to succeed in maintaining their contention thereunder.

[6] But one other question need be considered: Did the court err in striking out certain evidence regarding moneys claimed to have been expended upon the property by the defendant Carrie F. Holder Smith? We think not. As already stated, defendants claimed to be the actual owners in fee of said property. There was no cross-complaint served, filed in the case or considered by the trial court. Indeed, the defendants claim here to be the absolute owners of the property. Had a cross-complaint been filed, therefore, it might have been stricken from the files. Miller v. Luco, 80 Cal. 257, 22 Pac. 195. With this condition of the record, can it be successfully maintained that defendants could legally obtain a judgment against the plaintiff for any moneys which they might have expended?

It is contended by appellants that the defendant Carrie F. Holder Smith "has made large expenditures in the improvement of the property, and it would be inequitable and unjust that these amounts should not be repaid to said defendant in case she is deprived of the property and the deed canceled"; and in support of such contention we are cited the following cases: Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767, Clint v. Eureka Oil Co., 3 Cal. App. 463, 86 Pac. 817, Herman v. Haffenegger, 54 Cal. 161, and Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188. None of these cases is, we think, in point. The first case cited does hold that the failure of the trial court to allow defendant expenses necessarily incurred, etc., was error; but that holding was upon a state of facts much different from those with which we are here confronted. In that case it appears from the evidence that the defendant, with plaintiff's consent, had the entire management of the property—a condition not presented in the case at bar. Indeed, there was no dispute in that matter on this phase of the question. Nor was there any evidence indicating an abuse of authority by one occupying a position of trust. This being true, defendant there was entitled, both in law and morals, to the return of any moneys expended by him while so acting. In the case at bar no such facts are found. We have already seen the methods employed by the defendant Mrs. Smith to procure the deed in the first instance. No equity is acquired through fraud. By her own testimony it conclusively appears that the expenditures claimed to have been made were not made because of a reliance upon the deed, but because she claimed that it was her own property—"my father died and he gave me this part of it, as I understood it"; in short, that the expenditures would have been incurred, deed or no deed.

The answer to our query must be in the negative.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

46 Cal. App. 738

WILSON v. SOUTHERN PAC. LAND CO.
(Civ. 3237.)

(District Court of Appeal, First District, Division 1, California. March 31, 1920. Rehearing Denied April 30, 1920; Hearing Denied by Supreme Court May 27, 1920.)

1. Trial ⟸156(2, 3)—Every favorable inference given plaintiff on, motion for nonsuit.

On motion for nonsuit, every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts proved in favor of plaintiff, and any contradictory evidence must be disregarded.

2. Principal and agent ⟸48 — Gratuitous agent must exercise good faith.

A gratuitous agent is obliged to exercise good faith toward his principal.

3. Principal and agent ⟸70—Acceptance by gratuitous agent of commission from other party renders contract voidable.

Where gratuitous agent for purchaser of land, in accordance with a prior contract with an agent for the seller, received commissions, the contract was voidable at the election of purchaser within a reasonable time after discovery of the fraud, but was not absolutely void.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Charles S. Wilson against the Southern Pacific Land Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

C. E. Spencer, of Los Angeles, for appellant.

Frank Thunen, of San Francisco, for respondent.

GOSBEY, Judge pro tem. This is an appeal from a judgment of nonsuit in an action for the rescission of three separate executory contracts for the sale of real property from the respondent to the appellant. Each contract is the subject of a separate count in the amended complaint. A fourth count was added, being a common count for money had and received.

The plaintiff sought to have said contracts rescinded because of some alleged fraudulent

transaction on the part of the person, who, he alleges, was representing him in negotiating for the purchase of the land described in the amended complaint.

Two of the contracts referred to in the amended complaint are dated the 30th day of January, 1914, which we shall hereinafter designate as contracts A and B; the third contract is dated the 14th day of April, 1914, which we shall designate as contract C. Each contract describes certain land located in the county of Riverside, state of California.

The purchase price of the land described in each contract and the payments to be made thereon were agreed to as follows: For the land described in contracts A and B it was $2,080 for each piece, and for that described in contract C it was $3,200. The initial payment mentioned in each contract was 10 per cent. of the purchase price, to be made on the execution of the several contracts. Payments were made as follows: $208 on the 30th day of January, 1914, on each parcel of land described in contracts A and B, and $320 on the 14th day of April, 1914, on the land described in contract C. Payments on the balance of the purchase price, as mentioned in each contract, were to be made in nine equal annual installments, beginning (as per stipulation made between the parties subsequent to the dates of said contracts) on the 30th day of January, 1916, on each of the parcels of land described in contracts A and B, and on the 14th day of April, 1916, on the land described in contract C. Each deferred payment was to bear interest at the rate of 6 per cent. per annum from the dates of the contracts, respectively. The contracts further provided that the plaintiff should pay all taxes and assessments against the land described in contracts A and B, beginning with the fiscal year July 1, 1914, and on the land described in contract C, beginning with the fiscal year July 1, 1915.

The plaintiff alleges that the interest and taxes on the land described in contracts A and B were paid up to January 30, 1916, while the interest and taxes on the land described in contract C were paid up to July 31, 1915, and to November 26, 1915, respectively. In all the plaintiff claimed to have paid the sum of $1,461.30 on these contracts, which sum he seeks to recover in the said fourth count.

It is further alleged in said amended complaint that one H. C. Farnum was the agent of plaintiff for conducting and carrying on negotiations for the purchase by plaintiff of the said land; that said Farnum entered into an agreement with and received from H. R. Burns, the agent of the defendant, certain commissions on the sale of said land, which arrangement plaintiff knew nothing of until on or about the 10th day of February, 1917. On the 15th day of February, 1917, the plaintiff, upon discovering this arrangement between Farnum and Burns, notified the defendant that he had rescinded said contracts, offered to reconvey the lands to the defendant, and demanded the return of all moneys which he had paid to the defendant on said contract. The defendant, in its answer, denied that said H. R. Burns was ever its agent for conducting or carrying on negotiations for the said executory contracts (A, B, and C) mentioned in the plaintiff's amended complaint, and also denied that prior to the execution of said executory contracts, or any of them, that Burns, acting as its agent, agreed with Farnum to pay the latter any commissions or compensation, if Farnum should induce the plaintiff to become the purchaser of said land.

The defendant avers that upon the date set forth in the amended complaint, when the plaintiff notified the defendant that he had rescinded said contracts, there was no contractual relation existing between the plaintiff and the defendant; but that plaintiff's rights under said contracts A, B, and C had long prior thereto been wholly forfeited, because of the nonpayment of the several installments, mentioned in said contracts, when they became due and payable, as time was made expressly of the essence of said agreements.

The defendant further denied that it was indebted to the plaintiff in the sum of $1,461.30, or in any other sum whatsoever.

The evidence produced at the trial of this action established the following facts: H. R. Burns was the agent for the defendant in the sale of the land referred to in the amended complaint. Civ. Code, §§ 2300, 2307. A year or so before the said contracts were executed, Burns had several conversations with Farnum, relative to any sales the latter might make of said land. Before the plaintiff entered into said contracts, or was known as a prospective purchaser of any portion of said land, Burns had promised to pay Farnum 1¼ per cent. commission on all sales of land the latter might make for the former. Subsequently the plaintiff and Farnum talked about buying the land involved herein. This resulted in the plaintiff requesting or asking Farnum to attend to and negotiate for the purchase of said land by the plaintiff from the defendant. Farnum consented to do this, rendered such service for the plaintiff, and succeeded in getting Burns to make the sales of the land upon the terms and conditions set out in said contracts. For the services Farnum rendered the plaintiff he received no compensation, but it was agreed between the plaintiff and Farnum that in case of the sale of the land thereafter that Farnum was to have one-fourth of the profits resulting therefrom, after deducting certain amounts for expenditures, provided

such resales should be made on or before one year from the date of said contracts. It was further agreed between them that Farnum might acquire a one-fourth interest in the land within the year by paying therefor one-fourth of all the money expended by the plaintiff for it.

Pursuant to the agreement made by and between Burns and Farnum, the former paid to the latter certain sums of money as commissions on the sales of said land, which had been made to the plaintiff by Burns. The plaintiff was ignorant of the Burns-Farnum agreement and of the payments made thereunder, when he entered into said contracts. He did not discover the same until on or about the 10th day of February, 1917. A few days thereafter he commenced this action.

The plaintiff executed said contracts on the dates they bear. He made the initial payments thereon on the purchase price when he signed the contracts; he also paid interest on the deferred payments, as well as some taxes. The total amount of such payments was $1,461.30. Because of the agreement between Burns and Farnum and the payment of the commissions thereunder, the plaintiff would have said contracts rescinded by a court of equity.

Did the plaintiff make out a prima facie case and was the court warranted in granting the defendant's motion for a nonsuit?

[1] It has been well established by a long line of decisions that, upon a motion for nonsuit being made, every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if any contradictory evidence has been given it must be disregarded. Estate of Arnold, 147 Cal. 583, 586, 82 Pac. 252; Christensen Lbr. Co. v. Buckley, 17 Cal. App. 37, 44, 118 Pac. 466.

[2] The evidence shows that Farnum was a gratuitous agent of the plaintiff in negotiating the sales of the land described in the contracts and in procuring the execution of said contracts. Such agency having been thus established, Farnum was obliged to exercise good faith toward his principal. Kevane v. Miller, 4 Cal. App. 598, 602, 88 Pac. 643; 2 Corp. Juris, 433, 694; Samonset v. Mesnager, 108 Cal. 354, 358, 41 Pac. 337; Civ. Code, § 1975.

"If one of the parties to a business transaction does not deal directly with the other party, but with the latter's agent or employé, and enters into a secret and corrupt agreement with the agent by which the agent undertakes, for a reward or commission, given or promised, to induce his principal to contract with the party so binding him, or to sell the property to him, or otherwise to deal with him, according to the case, the transaction is so far tainted with fraud that the principal may rescind and repudiate it, if he acts with due promptness upon discovering the facts." 1 Black on Rescission and Cancellation, 80, § 34.

The court said in Yeiser v. United States Board and Paper Co., 107 Fed. 340, 345, 46 C. C. A. 567, 572 (52 L. R. A. 724):

"We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. Thomson-Houston Electric Co. v. Capitol Electric Co., 12 C. C. A. 643, 65 Fed. 341; Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129, 134; Louisville Trust Co. v. Louisville N. A. & C. R. Co., 22 C. C. A. 378, 75 Fed. 433, 469."

The court said in U. S. Rolling Stock Co. v. Atlantic & Great Western R. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380:

"The rule that an agent or trustee in matters touching his agency, or pertaining to the trust, cannot bind the principal of cestui que trust, without his consent, by a contract in which the former is adversely interested, rests upon a very satisfactory foundation, and is supported by a great weight of authority." Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Morrison v. Thompson, L. R. 9 Q. B. 480; 1 Lead. Cas. in Eq. 192.

In Story on Agency, § 210, the rule is said to be founded "upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefits. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal as far as he carefully may." And in 2 Kent's Com. 618, the same principle is asserted in the following language:

"An agent, acting as such, cannot take upon himself at the same time, an incompatible duty. He cannot have an adverse interest or employment. He cannot be both buyer and seller, for this would expose his fiduciary trust to abuse and fraud. * * * The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases, where without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction, at his election. No question of fairness or unfairness can be raised. The court holds it constructively fraudulent, and voidable at the election of the principal."

In a case entitled Lightcap v. Nicola, found in 34 Pa. Super. Ct. 189, and which was very fully and ably considered by the presiding

judge of said court, the same issues were raised as in the case now under consideration. The facts were stated as follows:

"This was an action of assumpsit upon a contract entered into in the latter part of January, 1902, between Samuel Gilson Lightcap, executor, acting under a power contained in the will of William Walker, deceased, and Frank Nicola, for the sale to the latter of a tract of land known as the Walker Farm. The price stipulated in the contract was $31,000, of which $1,000 were paid when the contract was executed by Nicola and the balance was to be paid not later than June 1, 1902, at which time the deed was to be delivered. The defense set up was that the vendor, without the knowledge of the defendant, entered into a contract with one S. B. Cooley, the defendant's agent or employé, to pay the latter a commission. * * *

"The court having declined the defendant's point for instruction 'that under all the evidence the verdict must be for the defendant,' and the jury having rendered a verdict for the plaintiffs for $36,150.50, the balance of the purchase money, the defendant moved to have all the evidence certified and filed as part of the record, and for judgment non obstante veredicto upon said record. The court sustained the motion and entered judgment in favor of the defendant in the sum of $1,240, the amount, with interest, paid by the defendant at the execution of the contract."

After reviewing the testimony taken at the trial of the action, the learned judge, who wrote the opinion, said:

"The court would have been warranted in instructing the jury that Cooley was the defendant's employé and agent in the purchase of lands, and acted as such in the negotiations which culminated in the contract of sale upon which this action was brought. * * *

"It was not proved that Lightcap knew that Cooley was the defendant's employé or agent; nor was it shown affirmatively that he was ignorant of that fact."

We may determine, however, from the opinion that the court found that Cooley's actions and conversations were doubtless sufficient to warrant the conclusion by Lightcap that he (Cooley) was the employé or agent of the defendant.

"The two legal questions which arise upon the foregoing facts, are: First, whether the defendant had a right to rescind the contract of sale, and recover the $1,000 he had paid upon its execution by him; second, whether he exercised the right within a reasonable time. By whatever name it may be called, whether that of principal and agent or of employer and employé, the relation which existed between Cooley and the defendant imposed on Cooley the duty to act with fidelity and the utmost good faith toward the defendant in purchasing or assisting to purchase this land. When one under such obligation to the purchaser enters into such relation with the seller as is evidenced by the commission agreement in this case, without the knowledge and consent of the purchaser, he puts himself in the position of attempting to serve two masters whose interests are opposed. This is against the policy of the law, and that, too, irrespective of the mode of compensation. A fortiori is it so, if the amount of the commission to be received from the seller depends upon the price the purchaser can be induced to pay for the land. 'The ground for the disqualification,' said Chief Justice Thompson, quoting from 8 Tomlin's Brown, 72, 'is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interests of others cannot be allowed to make the business an object of interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted. The danger of temptation from the facility and advantage for doing wrong which a particular situation affords, does, out of the mere necessity, work a disqualification.' Everhart v. Searle, 71 Pa. 256. In the same case, speaking of the argument that as the seller was not injured by the arrangement which his agent made with the purchaser, there was nothing wrong in making that arrangement, he said: 'This is specious, but not sound. The transaction is to be regarded as against the policy of the law, and not binding upon a party who has a right to object to it. "It matters not," it is said, page 210 of Hare and Wallace's Notes, 1 Lead. Cases in Eq., "that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." This was said of any one who acts representatively, or whose office is to advise or operate not for himself but for others.' * * * Where the seller of land, or his agent in the transaction, has knowledge that there exists between the purchaser and another such a relation that it would be a breach of duty on the part of that other person to enter into a similar relation with the seller, the same principle of law which forbids him to do so while still acting for the purchaser, must, if it is worthy to be called a rule, or policy or principle of law, forbid the seller to enter into that relation with the purchaser's agent or employé without the knowledge and consent of his principal or employer. To hold that the seller, without any risk to himself, can thus be a party to the agent's or employé's breach of duty, and have the benefit of his active service, great or small, in selling the land, or the benefit of the diminution of the diligence he owes to the purchaser, would be contrary to sound principle; it would open the door to fraud of the most mischievous character, and as difficult to detect and prove as it is mischievous. The rule being, not merely remedial of actual wrong, but preventive of the possibility of it, it may be invoked not only against the unfaithful agent or employé in an action involving his commission or other form of compensation, but also against the seller; and under such a state of facts as we have set forth above it must be regarded as the foundation of a right in the purchaser to rescind the contract of sale upon discovery of the constructive fraud."

[3] The actions of Farnum, in the instant case, were very similar to the actions and conduct of Cooley in the case from which we

have so fully quoted. Such conduct, however, would not render the contract between Wilson and the defendant void, but only voidable at the election of Wilson, who should act within a reasonable time after he discovered the fraudulent acts and conduct of Farnum. This he did.

We are satisfied the plaintiff made out a prima facie case. The motion for nonsuit was therefore improperly granted.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 19

BERRY v. COHN et al. (Civ. 3267.)

(District Court of Appeal, First District, Division 2, California. April 7, 1920. Hearing Denied by Supreme Court June 3, 1920.)

1. Adverse possession ⟸22—Exclusive use of uninclosed land during grazing season may be sufficient.

The exclusive use of uninclosed land for grazing during the grazing season may constitute adverse possession.

2. Adverse possession ⟸27—Persons having possession during grazing season only must negative possession of others.

Persons claiming title to uninclosed land by adverse possession by reason of its use for grazing during the grazing season have the burden of proving that the land was not occupied by any one else during the part of each year it was not in use by them.

3. Adverse possession ⟸33, 38—Evidence sufficient to support finding of exclusive and open possession.

Where defendants claimed title to land by adverse possession by reason of its use for grazing during the grazing season for many years, evidence *held* sufficient to support a finding of its exclusive and open possession.

4. Adverse possession ⟸27—Evidence sufficient to support finding of adverse possession through agent.

Evidence showing that land was purchased by C. at a void tax sale in the name and on behalf of his brother, that he was his brother's general agent to transact all kinds of business in the county, and that as such agent he rented the property for his brother and paid taxes on it until his brother conveyed the property to him, was sufficient to support a finding that he was authorized to represent his brother to the extent that adverse possession might be acquired through such agency.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Ethel D. Berry, formerly Ethel D. Bush, against L. Cohn and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Everts & Ewing, M. G. Gallaher, and W. E. Simpson, all of Fresno, for appellant.

Kaye & Siemon, of Bakersfield, for respondents.

NOURSE, J. Plaintiff appeals from a judgment rendered against her in an action to quiet title to real property in Kern county. The defenses relied upon by defendants were that title had been acquired: First, by tax deed to L. Cohn in August, 1904; and, second, by adverse possession under color of title. On the trial it was stipulated that plaintiff was the owner and in possession of the property at the time of the tax sale, and that she had not divested herself of her interest or title therein by any conveyance executed since that date. The trial court found that the tax deed under which defendants claimed title was void for the reason that the property was sold to the state and thereafter by the state to L. Cohn for a less amount in each instance than provided by law. The judgment quieting title in C. Cohn was based upon the second defense, which is the only one to be considered upon this appeal.

On August 13, 1904, the tax collector of Kern county executed a deed of the property involved in this action to defendant L. Cohn. In May, 1914, L. Cohn, by quitclaim deed, conveyed to defendant C. Cohn. The affairs of L. Cohn with relation to the purchase and occupation of this land were conducted by C. Cohn, the latter claiming to have acted as agent for the former.

Appellant contends that the judgment based upon the conclusion of the trial court that title to the land in question is vested in C. Cohn by reason of adverse possession is erroneous because: First, the evidence does not sustain the finding that the possession of C. Cohn was hostile, exclusive, continuous, and uninterrupted; and, second, there is no showing that the acts of C. Cohn claimed to have been done by him as the agent of L. Cohn, and so relied upon as constituting adverse possession by L. Cohn, were done with the knowledge or consent of L. Cohn or under any authority to perform those acts.

All taxes were paid by C. Cohn from the date of the tax deed to L. Cohn to the commencement of this action on October 5, 1917. The land was not personally occupied by either of the Cohns, but was rented to other parties by C. Cohn on behalf of L. Cohn prior to the conveyance of 1914 and thereafter by C. Cohn in his own behalf. C. Cohn testified that prior to 1907 or 1908 he rented the land to one John Maio, who did not himself occupy it, he being in the business of renting to others for sheep-grazing purposes. There is no evidence to indicate the date it was so rented to him, the length of the lease, or the use to which it was put during that

period. Maio's tenancy need be given no further consideration, as there can be no doubt that the evidence offered with regard to it failed to meet the requirements for adverse possession. In 1908 C. Cohn rented the land to J. B. Raymond. From that time until the trial, to which time his tenancy continued, the adverse possession of the land by defendants is founded solely upon its occupancy by Raymond. Occupation of the land by Raymond consisted in its use for sheep-grazing purposes only. The land was uninclosed and formed part of a large open tract. Raymond testified that he rented the land from C. Cohn and went there the 1st of January, 1908, remaining until April, that some years he took sheep there in the summer for dry feed which he had stored upon the land—"maybe a couple of times every five or six years"—but in the ordinary years he pastured his sheep upon the land as soon as the fall rains started the green feed, and used all the feed that grew on the land (pasturing 1,500 or 2,000 sheep there for two or three months each year), and that he then took his sheep and left the place entirely. He also testified that he had five or six sections of land, including the half section involved herein, upon which his sheep grazed, that they were not impounded by a fence or in any other way, and that two or three months covered the time spent upon the entire tract and not the time spent upon the Cohn half section alone. The evidence shows that each year he had a sheep corral on this particular half section, sometimes a tent for the herders, and that on some occasions he left a man on it to guard the dry feed when he took his sheep to other pastures. Raymond knew the boundaries of the land in question and testified that during the time he was on the land each year no other sheep grazed on it and it was not used by any one else for any purpose. The witness Reynolds was produced by respondents, and testified that, so far as he was aware, no one else used the land during Raymond's absence. His testimony developed the fact that he lived with his family on a tract of land adjoining the half section from 1910 to the date of the trial, and that, though he was away from that vicinity during a portion of the period referred to, he returned to his home two or three times each week and often remained for two weeks at a time.

[1, 2] The foregoing are the facts relied upon by respondents for the purpose of showing adverse possession. The exclusive use of uninclosed land for grazing during the grazing season may constitute adverse possession. Webber v. Clarke, 74 Cal. 11, 18, 15 Pac. 431. There is no conflict in the evidence as to the use made by respondents. But the additional burden was on them to prove that the land was not occupied by any one else during the nine or 10 months each year it was admittedly not in use by them. Cory v. Hotchkiss, 31 Cal. App. 443, 447, 160 Pac. 841; Saecker v. Cohn (Sup.) 179 Pac. 890.

[3] In this respect respondents were required to prove a negative. No evidence of any character was offered by appellant even suggesting possession or user during any portion of the period of 20 years she had failed to pay any taxes upon the property. The witness Raymond did testify that during the period of his lease, 1908–1918, no one else used or occupied the land during the pasturing season except his sublessee during the season of 1917. The witness Reynolds testified that, with the exception of the same sublessee, the land had not been occupied or used by any one other than respondents' lessee for any other purpose since 1910. This witness lived on the land adjoining that in controversy, and was apparently the one having the best knowledge of the occupancy of the land.

The evidence of adverse possession differs materially from that considered in Cory v. Hotchkiss, supra, and Saecker v. Cohn, supra, and brings the case squarely within the rule of Webber v. Clarke, supra. The evidence, though meager, is sufficient to support the finding of the trial court that respondent had maintained an exclusive and open possession for the statutory period.

[4] Appellant also argues that the evidence is insufficient to support the conclusion that C. Cohn was authorized to represent his brother to the extent that adverse possession might be acquired through such agency. But the evidence is that the land was purchased by C. Cohn in the name and on behalf of his brother; that C. Cohn was a general agent to transact all kinds of business for his brother in Kern county; that as such agent he rented this property for his brother and paid all taxes on it for him since 1904 and until 1914, when the brother by deed conveyed the property to him. This testimony was received in evidence without objection, and, taken with the ratification contained in the deed of the principal and the inferences which could properly be drawn from the entire evidence, was sufficient to support the finding.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 1

DYER v. MINTURN et al. (Civ. 3045.)

(District Court of Appeal, First District, Division 1, California. April 5, 1920.)

1. Limitation of actions ⟸54(2) — Account between joint purchasers of property held a "mutual account."

An account between joint purchasers of real estate, containing on one side payments made by one of the parties to persons performing work and furnishing materials in the improvement and repair of the property and payments on the land and interest on deferred payments, and on the other side similar payments by the other party, and showing a balance in favor of one, one-half of which was charged to the other, possessed all the elements of a "mutual account," under Code Civ. Proc. § 337, subd. 2, and section 344, under which limitation ran only from the date of the last item.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

2. Witnesses ⟸167—Party suing estate competent to testify that rejected claim corresponded with his books.

Code Civ. Proc. § 1880, subd. 3, providing that parties to an action or proceeding against an executor or administrator on a claim against the estate cannot testify as to matters or facts occurring before the death of decedent, was not violated by plaintiff's testimony that his rejected claim, shown him, was a correct statement of the account against decedent, "as shown by his books," as he did not testify that the books were correct, or the claim correct, but only that they corresponded.

3. Witnesses ⟸171—Proof of fact not required to be proved by party suing estate not incompetent.

Code Civ. Proc. § 1880, was not violated in an action on a claim against a decedent's estate by allowing plaintiff to testify that the account had not been paid, as in seeking to establish nonpayment plaintiff was endeavoring to prove something that the law did not require him to prove.

4. Payment ⟸65(6)—Defendant has burden of proving payment.

The allegation of nonpayment of a debt sued on need not be proved, and the burden of proof of payment is on defendant.

5. Witnesses ⟸167 — Testimony that claim agreed with books of deceased was competent.

In an action on a claim against a decedent's estate, the testimony of one of the defendants, as a witness for plaintiff, that the claim sued on corresponded with the books kept by deceased, did not involve or relate to a matter or fact occurring before the death of deceased, and its admission was not error, especially where defendants afterwards called the same witness and proved that the account sued on and the books of deceased were substantially the same, and offered the books in evidence.

6. Executors and administrators ⟸221(4)—Books of account of deceased, with other evidence, held to support finding of balance due claimant.

In an action on a claim against a decedent's estate, the books of the decedent, supplemented by testimony of a witness for defendants that the account sued on was substantially the same as the account shown by such books, supported a finding that there was a balance due plaintiff, in the absence of proof of payment.

7. Appeal and error ⟸907(5)—Books of account omitted from record presumed to sustain finding.

A finding supported by oral testimony and books of account will be presumed correct, where books were not in the record on appeal.

8. Appeal and error ⟸1152—Error in form of judgment may be corrected by modification.

An error in a personal judgment against executors, in that it does not direct that payment be made by them in the due course of administration, as required by Code Civ. Proc. § 1504, may be corrected by a modification of the judgment on appeal.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by A. B. Dyer against Rozene M. Minturn, executrix, and W. B. Minturn, executor, of the estate of James W. Minturn, deceased. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

K. Van Zante, of Hanford, and L. L. Cory, of Fresno, for appellants.

Short & Sutherland, of Fresno, for respondent.

KNIGHT, Judge pro tem. This is an appeal by defendants from a judgment rendered in plaintiff's favor for the sum of $892.01, in an action instituted by plaintiff against the representatives of the estate of James W. Minturn, deceased, for the purpose of establishing the validity of a rejected claim presented against said estate by plaintiff for a balance claimed to be due upon a mutual, open and current account. Minturn died on May 27, 1917. Defendants deny the indebtedness, aver payment, and plead the statute of limitations.

[1] The question of the application of the statute of limitations depends upon the character of the account sued upon. If, as plaintiff avers, a "mutual, open, and current account" has been shown, the action is not barred by the statute, for the reason that suit was commenced within four years from the date of the last item of the account. Subdivision 2, §§ 337 and 344, Code Civ. Proc. Appellants claim that no mutual, open, and current account has been shown. In this respect it is contended that the account sued upon lacks mutuality and reciprocal demands, and is merely a statement showing payments

advanced by plaintiff to third persons for and on behalf of plaintiff and said Minturn, for which suit should have been brought within two years from the date of the last item stated therein. Subdivision 1, § 339, Code Civ. Proc.

From the evidence it is made to appear that plaintiff and the deceased, Minturn, purchased jointly and paid for in installments certain residence property in Fresno, which they remodeled and afterwards used as their home. Both plaintiff and the deceased advanced money to pay for labor and materials in the renovation of the dwelling, and each kept a book of account, in which entries of such payments were made. The account sued upon, which is set forth in the rejected claim, was taken by plaintiff from plaintiff's books. Upon its face it shows the various entries of debit and credit in separate columns. The debit column represents the payments made by plaintiff to persons who performed work and furnished materials in the improvement and repair of said residence and covers a period from September 30, 1912, to January 4, 1914, and also represents the payments made by plaintiff on the land, and the interest on deferred payments, from October 7, 1914, to and including November 13, 1916. The credit column shows the payments made by Minturn to persons performing work and furnishing materials for said residence, and also the payments by him on the land, and the interest on deferred payments. Upon its face the account appears to have been balanced, and shows that plaintiff expended $10,866.51 more than Minturn, and that one-half thereof, to wit, $5,433.25, was charged to Minturn, of which Minturn had paid $4,500, leaving a balance due in favor of plaintiff of $933.26. In other words, on the one side of the account are shown the different items furnished and amounts paid by plaintiff for the joint benefit of himself and Minturn, and on the other side are shown the different items furnished and amounts paid by Minturn for like purposes, and a balance is shown in favor of plaintiff. From the face of the account it appears that the items constitute mutual credits founded on an implied agreement for the set-off of mutual debts; that the parties dealt with each other in the same relation, and the items of the account are capable of being set off against each other. The credit items do not consist of money payments from one to the other, but are made up of demands of a reciprocal character, and the account was permitted to run with a view of ultimate adjustment by the settlement and the payment by one to the other of the balance. Such an account possesses all the elements necessary to constitute a "mutual" account, and it must be so held. Millet v. Bradbury, 109 Cal. 170, 41 Pac. 865; Fraylor v. Sonora Min. Co., 17 Cal. 594; Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263. Suit was commenced on the account within four years from the date of the last item thereof, and therefore plaintiff's action was not barred by the statute.

[2] Appellants' second point is that the court erred in admitting evidence in violation of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, which provides that parties or assignors of parties to an action or proceeding, the persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against an estate of a deceased person, cannot testify as to any matter or fact occurring before the death of such deceased person. The instance first complained of is where plaintiff, having been called as a witness in his own behalf, was handed the rejected claim, which had been admitted in evidence without objection, and testified that, with the exception of one item thereof, amounting to $41.25, the rejected claim was a correct statement of the account as shown by his books. It is claimed by appellants that this testimony was admitted contrary to the rule stated in Colburn v. Parrett, 27 Cal. App. 541, 150 Pac. 786, and the authorities therein cited, which hold that, while a plaintiff himself may by his own testimony establish the fact that he kept books of account at a stated time, and that the books produced were the ones kept by him, he may not testify as to the correctness of said books, nor that the entries therein made are true and correct, for the reason that the giving of such testimony by a plaintiff would, in effect, be allowing the plaintiff to testify that he rendered to the deceased the services, or furnished the materials, or delivered the goods, etc., as the case may be, which the entries represent. But the testimony of plaintiff in the instant case did not extend that far. Plaintiff did not testify as to the correctness of his books of account, nor to the correctness of the account embodied in the rejected claim. He merely testified that the account embodied in the rejected claim was correct as shown by his books of account. In other words, he testified in effect that the account embodied in the rejected claim was a correct reproduction of the account shown by his books; that it did not vary or differ from the account shown by his books. That the trial court so understood the testimony, and was guarding carefully against a violation of the provisions of said section 1880, is clearly shown by the court's ruling, made immediately following the admission of this evidence, wherein the court ordered stricken out the affirmative answer given by plaintiff in response to a question asked by plaintiff's counsel, to wit, "And is a true account of your dealings with Mr. Minturn?" and by the court's effort to

clarify the record by asking the question, "The question was simply whether your books show that [claim] to be correct, and you have stated in regard to one item that you waive that. Now, otherwise, your answer would be that the books do show it?" To which the plaintiff replied, "Yes, sir." It may be conceded that, if plaintiff had been allowed to testify that his books or the account as set forth in the rejected claim were correct, it probably would have constituted error. Such testimony was held to be admissible in Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539, but that case was criticized in the later cases of Colburn v. Parrett, supra, and Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. The cases last cited both hold, however, that the plaintiff may testify that he kept such books of account, and that the books produced were his books. Plaintiff's testimony in the instant case did not go even that far. He merely testified in effect that the account embodied in the rejected claim corresponded with the account in his books. It may be, as stated by the learned trial court in passing upon defendants' objection to the testimony, that such testimony might have been excluded upon the ground that the books were the best evidence. But defendant declined to urge that objection. The testimony, therefore, was properly admitted, and the court's ruling was free from error.

[3-5] Appellants next claim that said section 1880 was violated in allowing plaintiff to testify that the account had not been paid. There was no error committed. By seeking to establish nonpayment, plaintiff was endeavoring to prove something that the law did not require him to prove. In Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127, it is held that the allegation of nonpayment of a debt sued upon, though necessary to make the complaint perfect, need not be proved; but the burden of proof of payment is upon the defendant. Such is the established rule in this state. Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 300, 111 Pac. 760; Miller & Lux v. Dunlap, 28 Cal. App. 313, 152 Pac. 309; Stuart v. Lord, supra. Neither was it error for plaintiff to call as a witness Ward Minturn, one of the executors defendant, to prove by him that the claim sued upon corresponded with the books kept by deceased. Such evidence did not involve or relate to a "matter or fact occurring before the death of the deceased," and the point becomes entirely lacking in force, in view of the fact that defendants afterwards, as a part of their own case, called the same witness and proved by him that the account sued upon and the books of the deceased were "substantially the same." Thereupon defendants offered the books of the deceased in evidence.

[6, 7] There is no merit in the point that the evidence is insufficient to support the findings. There were but three disputed issues: The character of the account sued upon, the payment of the balance due, and the statute of limitations. The first and third issues have been discussed and disposed of. That there was a balance due plaintiff was proved by the introduction in evidence by defendant of the books of the deceased, supplemented by the testimony of defendants' witness Ward Minturn that the account sued upon was "substantially the same" as the account shown by the books of the deceased. It is true that the contents of those books were not read into the record or copied into the transcript on appeal, but all intendments are in favor of the judgment of the lower court, and if, as testified to by the defendant Ward Minturn, the books of deceased and the account sued upon were "substantially the same," those books must have shown a similar balance due. The proof of payment of the balance due was, as we have seen, a matter resting upon the defendants, and they offered no proof on that point. In Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221, it was held that books of account kept by a deceased person, if not containing proof of payment of plaintiff's claim, may be looked to for evidence of the negative fact of nonpayment by deceased during his lifetime, and the foundation for the introduction of said books may be made even by plaintiff, if the books were kept by him.

[8] Appellants' final point is that the judgment is erroneous, because it is a personal judgment against the defendants, without directing, as required by section 1504 of the Code of Civil Procedure, that the payment thereof be made by defendants in the due course of administration. Respondent concedes this point. The error may be corrected by a modification of the judgment. Drake v. Foster, 52 Cal. 225; Vance v. Smith, 124 Cal. 219, 56 Pac. 1031; Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, 166 Pac. 371.

The judgment is therefore modified, by adding thereto the words, "and it is further ordered, adjudged, and decreed that said executrix and executor of said last will and testament pay in due course of administration the amount of this judgment," and, as thus modified, the judgment will stand affirmed. Respondent will recover his costs.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 16

MILLIKEN v. VALENCIA et al. (Civ. 3180.)

(District Court of Appeal, First District, Division 1, California. April 6, 1920.)

1. Quieting title ⊂⊃43—Evidence that plaintiff held title in trust for brother held inadmissible as not within pleading.

In an action to quiet title against a judgment creditor and the sheriff who levied execution, testimony that plaintiff held an undivided half interest in the property in trust for his brother, the judgment debtor, *held* inadmissible on the ground defendants had not pleaded a trust or other equitable interest.

2. Appeal and error ⊂⊃959(3)—Pleading ⊂⊃236(3)—Allowance of amendments during trial in discretion of court.

The allowance of amendment to answer during trial under Code Civ. Proc. § 473, is largely in the discretion of the trial court, whose ruling will not be disturbed unless abuse is clearly shown.

3. Pleading ⊂⊃236(7) — Amendments to answers properly denied as injecting new issue and failing to state facts showing claimed relation.

In action to quiet title against a judgment creditor and the sheriff who levied execution, allowance of amendments to defendants' answers to set forth a trust relation in which plaintiff stood to his brother, the judgment debtor, in relation to an undivided half interest in the land, *held* properly denied because adding an entirely new issue to the case, and because failing to state any facts showing the trust relation.

4. Quieting title ⊂⊃44(4) — Denial of plaintiff's ownership and assertion of title not established by proof of equity.

In action to quiet title, where defense consists merely of denial of plaintiff's ownership, and assertion of title in a defendant, it is not established by proof that plaintiff is the owner of the legal title subject to an equity in defendant through plaintiff's holding in trust for his brother against whom defendant holds a judgment.

Appeal from Superior Court, Riverside County; W. H. Thomas, Judge.

Action by Henry Milliken against Alvina Valencia and Frank P. Wilson, Sheriff of Riverside County. From judgment for plaintiff, defendants appeal. Affirmed.

Edwin A. Meserve and Meserve & Meserve, all of Los Angeles, and Richard L. North, of Riverside, for appellants.

M. Estudillo and Sarau & Thompson, all of Riverside, for respondent.

KNIGHT, Judge pro tem. [1] This is an appeal by defendants from a judgment quieting title in plaintiff in and to certain tracts of land situate in Riverside county. The complaint alleges ownership in plaintiff, and further alleges that the defendant Frank P. Wilson, as sheriff of Riverside county, levied an execution on said property, issued in an action wherein Alvina Valencia, one of the defendants herein, obtained a money judgment against Phillip Milliken, a brother of plaintiff herein. The answers of the defendants, Wilson and Valencia, on information and belief denied plaintiff's title, and on information and belief alleged that said Phillip Milliken was the owner of an undivided one-half interest in said property. In support of his complaint plaintiff offered proof showing beyond question that he was the owner of the legal title to said property. Defendants then attempted to prove a state of circumstances which they claimed would show that plaintiff, Henry Milliken, held an undivided one-half interest in said property in trust for his brother, Phillip Milliken. Plaintiff objected to this character of testimony upon the ground that defendants had not pleaded a trust or any other equitable interest, and that they were therefore precluded from offering such proof. The court properly sustained the objection. Robinson v. Muir, 151 Cal. 118, 90 Pac. 521. Thereupon defendants asked leave to amend their respective answers so as to set forth such trust relation, but their application was denied by the court upon the ground that the allowance of such amendments would be adding an entirely new issue to the case. Notwithstanding the ruling of the court, much conflicting testimony of an asserted trust relation was injected into the record.

Appellants now contend that the court erred in disallowing defendants' proposed amendments, and that—

> It "erroneously found that Henry and not Phillip was the owner of the properties in question, and in holding that Phillip had no interest therein subject to execution levy when the levy here in question was made."

[2, 3] The allowance of amendments during trial is a matter largely in the discretion of the trial court (section 473, Code Civ. Proc.), and it has been repeatedly held that the ruling of the trial court will not be disturbed unless an abuse of discretion is clearly shown. Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 31; Brittan v. Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; In re Redfield's Estate, 116 Cal. 637, 48 Pac. 794. We are satisfied that the reason assigned by the trial court for its ruling in denying leave to amend is sound; and furthermore that the amendments themselves as proposed were wholly insufficient to raise the question of the trust relation, because they utterly failed to state any facts showing that relation, merely alleging on information and belief the conclusion:

"That Henry Milliken, plaintiff herein, holds an undivided one-half interest in all of said real property in trust for said Phillip Milliken."

The pleadings, then, as they stood during the trial and at the time of the entry of judgment, consisted merely of an allegation of ownership by plaintiff, and a denial of such ownership by defendants, accompanied by an allegation that Phillip Milliken was the owner of an undivided one-half of said property. In that state of the pleadings the evidence of a trust relation or of an equity in Phillip Milliken was properly ignored by the court in its findings, and even if proved would not have permitted a judgment in defendants' favor to that effect.

[4] The situation here is similar to the one presented in Reilly v. Wright, 117 Cal. 77, 48 Pac. 970, wherein the court said:

"The other questions presented all grow out of an attempt on the part of the defendants to show an equitable title in defendant Wright, which was not pleaded. The whole matter was entirely without the issues raised by the pleadings, and, while the court admitted evidence upon the question, it eventually, and we think properly, entirely ignored such evidence in making its findings, and confined itself to the issues made by the pleadings."

In the later case of Robinson v. Muir, supra, it is held:

"Where the defense consists merely of a denial of plaintiff's ownership and the assertion of title in defendant, such defense is not established by proof that the plaintiff is the owner of the legal title, subject to an equity in favor of defendant."

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

46 Cal. App. 656

Ex parte DEES. (Cr. 887.)

(District Court of Appeal, First District, Division 2, California. March 19, 1920.)

1. Licenses ⟸16(16)—Seller of tickets at a fixed place of business not a ticket "peddler"; "engaged in business of peddling theater tickets."

One who was selling tickets for his employer at a fixed place of business of his employer was not "engaged in the business of peddling theater tickets" within San Francisco City and County Ordinances, New Series, No. 3361, § 58, requiring person so engaged to exhibit a ticket peddler's license; the term "peddler" involving the idea of itinerancy or of going from house to house or from place to place (citing 6 Words and Phrases, First and Second Series, Engage; Peddler).

2. Statutes ⟸181(2)—Statutes not to be given an absurd construction.

A criminal statute is not to be given an absurd construction.

3. Constitutional law ⟸83(1)—One cannot be deprived of right to do a lawful act.

A person may not be deprived of his liberty of doing an act which is not and cannot be made unlawful.

4. Licenses ⟸7(3)—City cannot require license of one to sell an article which others are permitted to sell without license.

Though a city may provide either for a license tax for revenue to be laid upon a business, or in the exercise of its police power for a regulatory license for such business, it cannot, under either the power to tax or the power to regulate a business, make unlawful, without a license, a single sale of an article which is lawfully sold by others without a license.

5. Statutes ⟸245—Reasonable doubt to be resolved in favor of citizen.

In the exercise of the prerogative power either of taxation or of regulation of callings, every reasonable doubt must be resolved in favor of the citizen.

6. Licenses ⟸7(9)—Ordinance for ticket peddler's license is regulatory, and not a revenue, measure.

San Francisco City and County Ordinances, No. 3361, § 58, providing for a ticket peddler's license costing $300 per month, *held* a prohibitive or a regulatory measure, and not a revenue measure, though it purports to be a revenue measure.

7. Theaters and shows ⟸3—Ordinance providing for ticket peddler's license held void.

San Francisco City and County Ordinances, No. 3361, § 58, requiring a ticket peddler's license for selling theater or other amusement tickets at places other than at the place of entertainment, *held* void, being objectionable as a revenue measure, in that, if it provides for a tax, it is one upon single sales, and not upon a business, and in that it is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted, and being objectionable as a police measure in that it is an unwarranted interference with the liberty of citizens not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision.

In the matter of the application of F. A. Dees for a writ of habeas corpus. Petitioner discharged.

Samuel Knight and F. Eldred Boland, both of San Franscisco, for petitioner.

Matthew Brady, Dist. Atty., and I. M. Golden, Asst. Dist. Atty., both of San Francisco, for respondent.

BRITTAIN, J. The petitioner was arrested for violation of section 58 of Ordinance No. 3361, New Series, of the city and county of San Francisco, which is designated as "imposing license taxes on certain businesses, callings, trades or employments," etc. Section 58 is as follows:

"It shall be unlawful for any person to sell in the city and county of San Francisco any theater ticket or opera ticket, or ticket of admission to a place of amusement or entertainment at any place other than the office of the management of said theater, place of amusement or entertainment, without having first taken out and obtained a license to be known as a ticket peddler's license.

"Said license shall be issued by the tax collector at the rate of three hundred (300) dollars per month for each license.

"Every person having a ticket peddler's license, and every person engaged in the business of peddling theater, opera or amusement tickets, shall on the demand of any officer of the tax collector's department, or peace officer, produce and exhibit the same."

At the time of his arrest the petitioner was an employé of the Van Noy Interstate Company, a corporation operating news stands in two of the principal hotels in San Francisco, where theater tickets are sold. The sole question presented is whether or not the section in question can be sustained as a lawful exercise of the taxing power of the municipality. It is not contended by the city that the enactment was in the exercise of the police power, but that since it purports to be a revenue measure based upon a business classification the amount of the tax is a matter of legislative concern with which the judicial branch of the government will not interfere.

The petitioner contends, in substance, that the section is in fact such a regulatory measure as to involve the police power rather than the taxing power, and that it cannot be supported as a proper exercise of either. Under these contentions it becomes necessary, in the first instance, to determine whether or not the section is a revenue measure based upon a reasonable business classification.

The ordinance of which this section is a part defines 57 different callings and segregates many of these in classes based on the amount of business transacted or facilities used. Concerning the persons engaged in the business defined in every one of these classes and subclasses, there is a direct enactment that they shall pay some fixed sum per day, month, quarter, or year. By section 1, the tax is made recoverable, by the municipality as a debt, and the further provision is made that "nothing herein shall bar or prevent a criminal prosecution for each and every violation of any ordinance." The words confining the clause to license ordinances are implied from the context. In the 57 sections dealing with otner callings there is a direct tax laid on the business upon payment of which the license issues as a token showing the tax to have been paid. In section 58 alone is the procurement of the ticket peddler's license the principal thing required. It is to be issued at the rate of $300 per month. It is not required to be renewed monthly, nor is it clearly provided that it may not be issued at the statutory rate for a shorter period than one month. While those engaged in the business of peddling theater tickets are required, on demand, to exhibit the license, there is no statutory definition of the business of ticket peddling.

[1] The term "peddler" in common speech, as well as in law, has a well-understood meaning, involving the idea of itinerancy or of going from house to house, or from place to place. It is so defined in the dictionaries and in countless decisions under all manner of police regulations and license laws. 6 Words and Phrases, pp. 5260–5267; Id., Second Series, vol. 3, pp. 937–941. One who sells at a fixed place is not a peddler. Gould v. City of Atlanta, 55 Ga. 678–687; Delisle v. City of Danville, 36 Ill. App. 659–662; State v. Hodgden, 41 Vt. 139–141; Randolph v. Yellowstone Kit, 83 Ala. 471, 3 South. 706, 707; State v. Bayer, 34 Utah, 257, 97 Pac. 129–131, 19 L. R. A. (N. S.) 297. In terms of law or of ordinary language a ticket peddler is one who, without selling at a fixed place of business, sells singly or in small quantities theater or other tickets along the street, or by going from house to house, or place to place, offering them for sale. It is not contended that the petitioner was so engaged in the business of peddling tickets at the time of or before his arrest. On the other hand it appears that all he did was to sell tickets for, and at the fixed place of business of, his employer. In the absence of a restricted or enlarged meaning being given by statute to the phrase "engaged in the business of peddling theater tickets," on the admitted facts it does not appear that the petitioner was arrested, nor that he can be held under that provision of the section which in terms requires one engaged in the business of ticket peddling to exhibit his license. He must therefore be held, if at all, for selling tickets without having procured a ticket peddler's license.

[2-4] It is a matter of common knowledge that itinerant vendors of tickets go from house to house and from office to office offering for sale tickets for all manner of entertainments. Such vendors are ticket peddlers, but they are not necessarily engaged in the business of peddling tickets. They may be, and usually are, offering tickets for a day or two only in aid of some charitable or amateur entertainment. The section under consideration provides that if any person shall sell any ticket to a place of entertainment, at any place other than the place of business of the management of the place of entertainment, the act shall be unlawful, unless a ticket peddler's license is first procured at the rate of $300 per month. Section 1 of the ordinance makes any violation of its terms punishable as a crime. While a criminal statute is not to be given a construction which leads to absurdity, nothing is better settled than that a man may not be deprived of his liberty for the doing of an act which is not, and cannot be, made unlawful. Although the

municipality may provide either for a license tax for revenue to be laid upon a business, or, in the exercise of its police power, for a regulatory license for such business, it cannot, under either the power to tax or the power to regulate a business, make unlawful without a license a single sale of an article which is lawfully sold by others without a license. There is no difference in principle between the resale of theater tickets and the resale of ready-made clothing. It may be conceded that a special license to sell such clothing may not be required of the first distributor, and that such a license may be required of one engaged in the business of selling cast-off garments, but no one could be held for the commission of a crime under a statute which purported to make unlawful a sale of an old suit of clothing by its owner to the secondhand dealer without first procuring a license.

[5, 6] In the exercise of the prerogative power either of taxation or of regulation of callings every reasonable doubt must be resolved in favor of the citizen. Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853. In considering the particular enactment, the fact that it purports to be a revenue measure is not conclusive. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 297, 31 L. Ed. 205; Ex parte Whitwell, 98 Cal. 78, 79, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. With what greater force does this reasoning apply to a case where the enactment purports to be a revenue measure, while it is in suostance a prohibitive statute, or at least a regulatory one, as this so plainly appears to be.

[7] Considered as a revenue measure, the section under consideration, if it provides for any tax, provides for one upon single sales, and not upon a business. It further is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted. It cannot be upheld as a revenue measure for these reasons. Merced County v. Helm, 102 Cal. 159–166, 36 Pac. 399; Ex parte Richardson, 170 Cal. 68, 148 Pac. 213. As a police measure it is an unwarranted interference with the liberty of citizens of the state and the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; Ex parte Quarg, 149 Cal. 79–81, 84 Pac. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747.

It follows that the petitioner is entitled to be discharged; and it is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

DONLEY v. WEST. (Civ. 3171.)

(District Court of Appeal, Second District, Division 2, California. April 1, 1920.)

1. Public lands ⟸128—Person to whom patent is improperly issued by reason of Land Department's mistaken view of the law may be decreed to hold legal title in trust for person entitled to land.

Where by reason of a mistaken view of the law the Land Department has improperly issued a patent to a person not entitled thereto, the patentee in a court of equity may be decreed to hold the legal title in trust for the person who is entitled to the land.

2. Public lands ⟸47—Withdrawal of public lands from entry for irrigation works precludes settler thereon from acquiring any rights.

Withdrawal from entry of public lands required for irrigation works, under Reclamation Act, § 3 (U. S. Comp. St. § 4702), is absolute, and, until its restoration to entry, land so withdrawn is not subject to entry, and no right thereto can be initiated by any settler thereon.

3. Public lands ⟸29—Order revoking order of withdrawal held to have the effect of an order of restoration.

Secretary of Interior's order revoking previously made order of withdrawal of public lands from entry when noted on the records in the General Land Office had the effect of an order of restoration restoring the land again to settlement as public land subject to entry under the homestead laws of the United States, effective from the date of its record in the General Land Office and the local land office, in view of regulations of the Land Department (40 Land Dec. p. 656).

4. Appeal and error ⟸917(1)—Allegations of cross-complaint accepted as true on demurrer.

Appellate court, in reviewing lower court's order sustaining demurrer to cross-complaint, must accept the allegations of the cross-complaint as true.

5. Public lands ⟸106(1) — Withdrawal of public land for irrigation purposes not reviewable by courts in absence of fraud.

The withdrawal of land for irrigation purposes under Reclamation Act, § 3 (U. S. Comp. St. § 4702), is a matter that was committed

to the Land Department exclusively, and, in the absence of fraud on the part of the officials of that Department, cannot be reviewed by the courts.

6. Public lands ⊜29 — Nature of "vacant land."

"Vacant land" is such as is absolutely free, unclaimed, and unoccupied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacant Land.]

7. Public lands ⊜128—Claimant seeking establishment of trust must allege facts showing himself entitled to patent.

In a suit to quiet land, wherein defendant cross-complained, attacking validity of patent issued to plaintiff on application to make lieu land selection, under Act Cong. of May 2, 1914, and asking that plaintiff be adjudged holder of legal title in trust for defendant, it was not sufficient for defendant, in order to show himself entitled to such affirmative relief, to allege that patent was issued to plaintiff through mistake of law, but was required to allege, in addition, facts showing that a patent should issue to him, but that, in consequence of erroneous rulings of the land officers on a question of law, a patent was denied to him.

8. Public lands ⊜35(5)—Applicant to enter land withdrawn from entry has no preference right upon restoration of land to entry.

Applicant to enter land under the Homestead Law, at a time when the land was withdrawn from entry, was but a naked trespasser; the application giving him no preference right to enter the land if and when it again should be thrown open to settlement and restored to entry.

9. Public lands ⊜35(2) — Occupant of land must apply for entry within three months after restoration to entry.

Occupant in possession of public land at time of restoration to entry *held* not entitled to affirmative relief as against patentee on ground that land was not vacant at time of patentee's lieu selection thereof, under Act Cong. May 2, 1914, in absence of allegation that the land was selected within three months after it had been restored to settlement for entry under Act May 14, 1880 (U. S. Comp. St. §§ 4536–4538), and Rev. St. § 2265.

10. Public lands ⊜114(6)—Burden of proving invalidity of patent upon him who attacks it.

As between private parties, rival claimants to the land, all intendments are in favor of the validity of patent issued to one of the parties by the United States government; the burden being upon him who attacks the patent.

11. Pleading ⊜8(3) — Facts showing that complainant was precluded from exercising the right to have patent issued must be pleaded, and not mere conclusion.

In action involving validity of patent as between patentee and one who claims the right to the land, the latter's allegation that he was prevented from exercising his right to take such steps as would entitle him to a patent is insufficient; it being necessary that he allege the facts from which the court can see that by reason of the error at law complained of he was precluded from exercising such right.

12. Pleading ⊜17—Recital of exhibit incorporated into a pleading cannot take the place of a necessary averment of fact.

A recital in an exhibit or in a document incorporated into a pleading cannot take the place of necessary averment of fact.

13. Pleading ⊜312—Recitals in Secretary of Interior's written opinion attached to complaint held not to negative direct averment as to land being open to entry on certain date.

In action involving validity of patent as against patentee and person claiming to have been entitled to issuance thereof, recitals in Secretary of Interior's written opinion incorporated into pleading from which it might be surmised that land had not been completely restored to entry on certain date were insufficient to negative a direct averment that the land at such time "was public land of the United States and open to homestead settlement and entry."

14. Public lands ⊜31—Occupant held to have acquired no right as against patentee, though patent is voidable at the instance of the United States government.

Occupant of public land under license or permission of the government, but without title or initiation of any inceptive right to the title, was without avail as to the holder of legal title under patent from the United States, even though holder's title was voidable at the instance of the grantor, the United States, since mere occupancy of public land and improvements thereon gives no vested right therein as against the United States, and consequently none against any purchaser from the United States.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Sarah F. Donley against Prescott West. Judgment for plaintiff, and defendant appeals. Affirmed.

B. D. Noel and George H. Banta, both of El Centro, for appellant.

Haines & Haines, of San Diego, for respondent.

FINLAYSON, P. J. This is a suit to quiet title. Judgment passed for plaintiff. Defendant appeals, claiming that the court erred in sustaining a demurrer to his cross-complaint.

Plaintiff, who claims title as patentee under a patent from the United States, avers in her complaint that she is the owner of the land, a quarter section in Imperial county, that defendant unlawfully occupies it, withholding possession from her, and that defendant claims title adversely to her, but that his claim is without right. She prays

for possession, that defendant's claim be declared to be invalid, and that she recover damages. Defendant answered, denying that plaintiff is the owner or entitled to possession, and alleging that he himself is the owner and lawfully entitled to be in possession. In his answer defendant further avers facts intended to establish the invalidity of the patent. In addition to his answer, defendant filed a cross-complaint wherein he set out the nature of his claim and likewise facts intended to show that the patent to plaintiff was issued in consequence of erroneous rulings of the Land Department on questions of law, and praying that he be declared to be the equitable owner, that it be adjudged that plaintiff holds the legal title in trust for him, and that she be directed to convey to him the legal title acquired by her from the United States as patentee. To this cross-complaint plaintiff interposed a general demurrer. The demurrer was sustained. Thereupon a trial was had on the issues tendered by the complaint. Plaintiff adduced evidence in support of her allegations of title and damages. Defendant introduced evidence on the issue of damages only, expressly declining to introduce evidence upon any other issue raised by his answer. Thereupon the court found the fact of title to be as alleged in plaintiff's complaint, and accordingly adjudged her to be the owner of the land and entitled to possession, quieting her title against all adverse claims of defendant.

[1] The question presented is whether the facts alleged in the cross-complaint entitle defendant to a decree declaring plaintiff to be a trustee of the land for his benefit, and adjudging that whatever title she may have received as patentee belongs to defendant, and should be conveyed to him. Defendant, by his cross-complaint, seeks to bring himself within the well-established rule that where, by reason of a mistaken view of the law, the Land Department has improperly issued a patent to a person not entitled thereto, the patentee, in a court of equity, may be decreed to hold the legal title in trust for the person who is entitled to the land.

The case alleged in the cross-complaint is substantially as follows: On April 2, 1909, the Secretary of the Interior, pursuant to authority vested in him by the act of Congress of June 17, 1902 (32 Stats. at L. p. 388 [U. S. Comp. St. §§ 4700–4708]), commonly known as the Reclamation Act, withdrew from entry over 100,000 acres in Imperial county. This withdrawal order was made in connection with the Yuma irrigation project, and included the land in controversy here.

[2] The withdrawal was under the first form provided for by the Reclamation Act, section 3 of which provides for two classes of withdrawals:

(1) "The Secretary of the Interior shall * * * withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act." (2) He is authorized to withdraw from entry "any public lands believed to be susceptible of irrigation from said works."

Those withdrawn under the first form are lands that may be needed in the construction and maintenance of irrigation works; while those included in the second form are lands which may be irrigated from such works. A withdrawal under the first form—that is, a withdrawal of lands required for "irrigation works"—is intended as a permanent reservation for governmental use. It amounts to a legislative withdrawal, and is absolute. United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371. Until its restoration to entry, land withdrawn under the first form of withdrawal is not subject to entry, and no right thereto can be initiated by any settler thereon. By its withdrawal the land is segregated from the public domain, and is excepted from the operation of the public land laws. No right of a private settler attaches to, or hangs over, the land so withdrawn, to interfere with such action as the government may thereafter see fit to take in respect to it. Woodcock's Case, 38 Land Dec. 349; Pratt's Case, 38 Land Dec. 146; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Bullard v. Des Moines & Ft. D. R. R. Co., 122 U. S. 167, 7 Sup. Ct. 1149, 30 L. Ed. 1123; Spencer v. McDougal, 159 U. S. 63, 15 Sup. Ct. 1026, 40 L. Ed. 76; Scott v. Carew, 196 U. S. 100, 25 Sup. Ct. 193, 49 L. Ed. 403; Whitehill v. Victorio L. & C. Co., 18 N. M. 520, 139 Pac. 184, L. R. A. 1918D, 593.

[3] On March 18, 1913, the Secretary of the Interior revoked his order of withdrawal, in so far as it affected the land in controversy here, and directed his order of revocation to be noted on the records in the General Land Office and in the local land office. We can see no reason why this order revoking the previously made order of withdrawal should not, when noted on the records in the General Land Office and in the local land office, as directed by the Secretary's order, have the effect of an order of restoration, restoring the land again to settlement as public land subject to entry under the homestead laws of the United States. At any rate, the cross-complaint does not allege any fact tending to show that this order of revocation should not be operative as a completely effective restoration order when noted on the records of the local land office and the General Land Office, as directed by the Secretary of the Interior. We shall therefore treat it as a restoration order, restoring the land to entry, and effective for that purpose from the date of its record in the General Land Office and in the local land

office. There is a regulation of the Land Department which provides that all orders for the restoration of lands that have been withdrawn from entry shall become effective "on the date they are received in the local land office, unless otherwise specified in the order." 40 Land Dec. p. 656. See, also, Pratt's Case, supra.

[4] It does not appear from the cross-complaint just when the restoration order was received in the local land office, or just when it became effective. Indeed, cross-complainant seems studiously to have avoided alleging any fact that will enable the court to say with certainty just when the land ceased to be withdrawn from entry and again became open to settlement and to entry as public land subject to disposal by the Land Department to qualified purchasers. There is, however, a direct allegation in the cross-complaint that on August 6, 1914—the date when the Land Department finally decided against the validity of cross-complainant's attempted homestead entry—the land "was public land of the United States, and open to homestead settlement and entry." If this allegation be true (and, as against cross-complainant, who is the appellant, we must accept it as true), then appellant, who at all times has been in the exclusive occupancy of the land, could have renewed his application to make entry of the land under the homestead laws at any time after August 6, 1914, and before respondent initiated a right to the land by making her lieu land selection, which, as we presently shall see, she made on May 10, 1915.

On January 19, 1912, while the land was still withdrawn from entry under the Secretary's withdrawal order of April 2, 1909, defendant filed in the local land office an application to make a homestead entry upon the land in controversy. This application was rejected by the register and receiver of the local land office on the day it was filed, upon the ground that the land had theretofore been, and at the time of defendant's attempted entry still continued to be, withdrawn from entry by the Secretary of the Interior's withdrawal order of April 2, 1909. Defendant appealed successively to the Commissioner of the General Land Office and to the Secretary of the Interior, by both of whom his right to make such entry while the land was withdrawn for irrigation works was denied.

[5] Pending defendant's appeal to the Secretary of the Interior the officers of the United States Reclamation Service reported that the lands withdrawn were not necessary to the reclamation project, and recommended the revocation of the withdrawal order. We may pause here long enough to say that it cannot successfully be maintained that the Secretary of the Interior withdrew more land than was necessary, or withdrew land that was not necessary for the contemplated irrigation works, or land that he did not intend for that purpose. The withdrawal of the land is a matter that was committed to the Land Department exclusively, and, in the absence of fraud on the part of the officials of that Department, cannot be reviewed by the courts. There is no allegation of fraud or of fraudulent intent on the part of any officer of the Land Department, and, therefore, the withdrawal order, conceded to have been made under the first form of withdrawal provided by the Reclamation Act of June 17, 1902, is conclusive on the courts, and they may not hold that the Secretary of the Interior did not intend to withraw the lands under the first form of withdrawal, or that their withdrawal was unnecessary. See Spencer v. McDougal, supra.

The decision of the Secretary of the Interior on cross-complainant's appeal, affirming the decision of the Commissioner of the General Land Office, was filed August 6, 1914. The opinion accompanying the Secretary's decision reads, in part, as follows:

"At the date of the proffer of this application the land was withdrawn, and therefore not subject to entry; and while it had been determined to open this tract, with adjoining lands, to disposition, the plan to govern such disposition has not been determined upon. Such plan will not, however, admit of according any preference right under this application. The application having been properly rejected, the decision appealed from must be, and is accordingly, hereby affirmed."

At all times mentioned in his cross-complaint defendant was a citizen of the United States, possessed of all the qualifications essential to qualify one to make a homestead entry on the public lands of the government. At all times since January 15, 1912, the land has been in the exclusive occupancy of defendant, who on that date went upon the land, made settlement thereon with the intention of perfecting title thereto under the homestead laws, and since then has cultivated the whole tract and expended a considerable sum for improvements thereon. All these facts were known to the officers of the Land Department.

On May 10, 1915, or approximately nine months after the Secretary of the Interior had ruled adversely to defendant's attempted homestead entry, and more than two years after that officer had made his order revoking his withdrawal order of April 2, 1909, and had directed the revocation order to be noted on the records in the General Land Office and in the local land office, plaintiff filed in the local land office an application to select the land under the provisions of the act of Congress of May 2, 1914 (38 U. S. Stats. 372). By this act of May 2, 1914, it is provided that—

"The state of California or its grantees may, with the approval of the Secretary of the Interior, reconvey to the United States any of the lands heretofore granted to said state in the townships authorized to be resurveyed by the act of July 1, 1902, * * * and select in lieu thereof an equal amount of vacant, unappropriated, surveyed, unreserved, nonmineral public lands within said state."

It also is provided by the act that "the Secretary of the Interior may make proper rules and regulations" for carrying the act into effect.

It is alleged in the cross-complaint that, prior to the filing of plaintiff's application to make such lieu land selection under the act of May 2, 1914, and during the pendency of defendant's appeal from the decision of the register and receiver of the local land office denying his application to make a homestead entry, the Secretary of the Interior promised plaintiff that he would allow her to make application for the land under the act of May 2, 1914, and would waive the Department regulation requiring an affidavit of nonoccupancy, and that he would notify the register and receiver of the local land office, when her application should be received by them, to forward it immediately to the General Land Office. Plaintiff did not file with her application to select the land any affidavit showing the land to be unoccupied. It further is alleged in the cross-complaint:

That on November 29, 1915, the Secretary of the Interior "rendered a decision in writing, in which, * * * stating and admitting that said land was occupied land and claimed by others than said Sarah F. Donley, * * * he stated and admitted that said land was reserved land, directed the allowance of the said application of said Sarah F. Donley, and directed that she be excused from making any affidavit of nonoccupancy, or from making any affidavit that the said lands were of the kind and character which were subject to entry under said act of Congress; * * * that prior to the making of said decision by the Secretary there was never made any order for the restoration of said land to entry from the withdrawal hereinbefore alleged, other than the revocation hereinbefore mentioned"

—referring to the order of revocation made by the Secretary on March 18, 1913. It then is alleged that thereupon, in accordance with said decision of the Secretary of the Interior, plaintiff's lieu land selection was allowed, and that thereafter the patent was issued to her.

Upon these allegations it is claimed that officers of the Land Department, by mistake of law, have given to plaintiff land which, on the undisputed facts, defendant was entitled to acquire from the government; that therefore plaintiff in equity stands as trustee for defendant; and that a court of equity will compel her to make a proper conveyance to him.

The principal ground for the assault upon the patent is that, at the date of plaintiff's lieu land selection, the land was not "vacant," because it was in the exclusive occupancy of defendant; that that fact was well known to the officers of the Land Department; but that, solely by reason of their mistaken view of the law, they decided that defendant's occupancy did not constitute an obstacle to the issuance of a patent to plaintiff. Without doubt, if the allegations of the cross-complaint be true, and as such they must be accepted here, the officers of the Land Department, at the time when plaintiff made application to select the land, and at all times during the proceedings leading up to the issuance of the patent to her, had knowledge of all the facts respecting defendant's exclusive occupancy of the whole tract. There was, therefore, no mistake respecting these facts. Knowing the facts, the Land Department concluded, nevertheless, that, not withstanding the land was at all times exclusively occupied by defendant, plaintiff was entitled to select it under the provisions of the act of May 2, 1914. That act expressly declares that the land selected in lieu of that reconveyed to the United States must be "vacant, unappropriated, surveyed, unreserved, nonmineral, public land."

[6, 7] Vacant land is such as is absolutely free, unclaimed, and unoccupied. Cosmos Exploration Co. v. Gray Eagle, etc., Co., 112 Fed. 4, 13, 50 C. C. A. 79, 61 L. R. A. 230. It is contended, therefore, that since the land was exclusively occupied by defendant at the date of plaintiff's lieu land selection, and also because the Secretary of the Interior, solely for plaintiff's benefit, waived the Department regulation requiring an affidavit of nonoccupancy, the patent to plaintiff was issued in consequence of errors of law on the part of the Land Department officials. But, even if this contention be maintainable, nevertheless, to entitle cross-complainant to the affirmative relief that he prays in his cross-complaint, it is not sufficient merely to show that the Land Department has fallen into error through a mistake of law. It must also be shown that the error was injurious to cross-complainant's vested rights; for:

"To enable one to attack a patent from the government, it is not sufficient for him to show that there may have been error in adjudging the patent to the patentee; he must show that by the law, properly administered, the title should have been awarded to him. This does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; but the claimant against the patent must so far bring himself within the law as to entitle him, if not obstructed or prevented, to complete his claim." 10 Ency. of U. S. Sup. Ct. Repts. p. 261.

The rule is that, to entitle a party to relief against the patentee, he must show a better right to the land. He must show such a right as should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. He must allege facts sufficient to show that a patent should issue to him, but that, in consequence of erroneous rulings of the land officers on questions of law, a patent was denied to him. His pleading, complaint, or cross-complaint must contain allegations showing that, before the patentee's title to the land attached, he himself had performed all the acts required by law to be done and performed by him, up to the time of filing his complaint or cross-complaint, in order to entitle him to the patent, or that he has offered to do all the acts which were required by the law to be done, but that he was prevented from doing them by reason of the errors of law committed by the officers of the Land Department and of which he makes complaint. Pierson v. Loveland, 16 Idaho, 628, 102 Pac. 340. In Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61, the court, having under consideration a case somewhat like the one at bar, said:

"To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law, properly administered, the title should have been awarded to the claimant."

We do not think defendant has brought himself within the rule announced in these cases. We do not think that he has shown that, at the date of plaintiff's lieu land selection, he had initiated any inchoate right which, on compliance with all the requirements of the Homestead Law, would have ripened into a right to a patent.

[8] When, on January 19, 1912, defendant made his application to enter the land under the Homestead Law, it was withdrawn from entry. By the withdrawal order of April 2, 1909, the land had been segregated from the public domain. It was not public land open to settlement or entry; defendant, when he filed his application, was but a naked trespasser. For this reason, his application to make the entry did not, of itself, give him any preference right to enter the land if and when it again should be thrown open to settlement and restored to entry. Pratt's Case, supra; Woodcock's Case, supra.

[9] The only other ground upon which cross-complainant could possibly base a claim to a preference right to make entry under the Homestead Law, if and when the land should again be restored to the status of public land subject to sale and open to entry, is the fact of his occupancy of the land, exclusive and continuous from the day of his settlement thereon—January 15, 1912. But his cross-complaint fails to show that at the date of plaintiff's lieu land selection he, by reason of his occupancy of the land, had any such preference right, since it fails to negative the possibility that the land had been restored to settlement and entry three months or more before plaintiff initiated her inceptive right to the land by her lieu land selection. The Homestead Law gives to an occupant of public land that is open to settlement, and who intends to make a homestead entry, three months after he settles upon the land within which to file his homestead application. Act May 14, 1880, 21 Stat. L. 140 (U. S. Comp. St. §§ 4536–4538), in connection with sections 2265 and 2266, Rev. Stats.; Moss v. Dowman, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526; Rio Grande Western R. Co. v. Stringham, 38 Utah, 113, 110 Pac. 868. It will be seen, therefore, by an examination of the statutes referred to, that a person claiming a legal settlement under the homestead laws, and a right to exclusive occupancy, must base his claim either upon an entry, lawfully made, in the Land Office while the land is open to entry, or upon a lawful settlement made within three months prior to such entry. For if, within the three months afforded the settler by the act of May 14, 1880, the preference right thereby given him is not exercised by him by filing the application that initiates an inchoate right to the land, the offer of the government is not accepted, and no right in the occupant to acquire the title is initiated. The title to the land remains unaffected, subject to the control and disposition of the government, as before the settler's occupancy. Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920; Rio Grande Western R. Co. v. Stringham, supra.

Therefore, in order to show that, at the date when plaintiff made her lieu land selection, cross-complainant possessed a preference right by reason of his occupancy, he must allege and prove that at that date the land had not been completely restored to entry for a period of three months; for, if it had been, and he thereby was afforded all of three months after his settlement became lawful within which to make application to enter the land in the Land Office, he lost his preference right at the expiration of the three months. He has failed utterly to allege facts necessary to show the retention by him of such preference right up to the time when plaintiff made her lieu land selection. As we already have said, he seems studiously to have refrained from attempt-

ing to show the precise date when the land was completely restored to entry. There is, however, the allegation, heretofore adverted to, that on August 6, 1914, the land "was public land of the United States, and open to homestead settlement and entry." This allegation shows, beyond peradventure, that the restoration order of March 18, 1913, became effective as a complete restoration of the land to entry much more than three months before plaintiff made her lieu land selection on May 10, 1915. If the land was open "to homestead settlement and entry" on August 6, 1914, as alleged, then cross-complainant had all of nine months before plaintiff's selection within which to renew his application to enter the land under the Homestead Law.

[10, 11] The rule is that, as between private parties, rival claimants to the land, all intendments are in favor of the validity of a patent issued to one of the parties by the United States government. The burden is upon him who is attacking the patent; for, as we have seen, to entitle a party to relief against a patent issued by the government, he must show a better right to the land than the patentee, such a right as, in law, should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. From this it follows that the burden is upon defendant to allege in his cross-complaint, and prove at the trial, that he has performed, or at least offered to perform, each and every act required by law to entitle him to a patent, excepting only such acts, if any, as he may have been prevented from performing by reason of the error of law claimed to have been committed by the Land Department; and, as to the latter acts, the burden is upon him to allege and prove every fact necessary to show that he was prevented from exercising his right to take such steps as would entitle him to a patent. It is not sufficient merely to allege, as the bald conclusion of the pleader, that defendant was prevented from exercising his right. He must allege the facts from which the court can see that, by reason of the error of law complained of, he was precluded from exercising his right to have the patent issue to him. To make such a showing, it was incumbent upon defendant to allege in his cross-complaint the facts, if any, which show that the land had not been completely restored to entry until within three months prior to plaintiff's selection.

[12, 13] From recitals in the written opinion handed down by the Secretary of the Interior, when that officer ruled adversely to defendant's attempted homestead entry—an entry attempted to be made while the land was withdrawn for irrigation works—we might surmise that, at the time when the Secretary's opinion was rendered, August 6, 1914, the land had not as yet been completely restored to entry, notwithstanding that the order of March 18, 1913, revoking the withdrawal order of April 2, 1909, had been made more than sixteen months prior to the decision of the Secretary on August 6, 1914. But a recital in an exhibit, or in a document incorporated into a pleading, cannot take the place of a necessary averment of fact. Much less can such recital be treated as negativing the direct averment that on August 6, 1914, or a little more than nine months before plaintiff made her lieu land selection, the land "was public land of the United States, and open to homestead settlement and entry."

[14] It cannot successfully be contended that, after the expiration of the three months next following the date when the land was restored to settlement and entry, cross-complainant's continued occupancy of the land gave him a right that entitles him to attack the patent that has been issued to plaintiff. As against a mere intruder, or one having no higher or better right than the occupant, one in possession of public land is, it is true, to be treated as the owner of the land as against all but the United States; but, as against one connecting himself with the government title, this mere occupancy must yield to the higher right. Therefore defendant's occupancy, under license or permission of the government after the land was restored to entry, but without title or the initiation of any inceptive right to the title, is without avail against plaintiff, as the holder of the legal title, even if it be true, as claimed by defendant, that plaintiff's title is voidable at the instance of the grantor, the United States government. Mere occupancy of public land and improvements thereon give no vested right therein as against the United States, and consequently none against any purchaser from the government. Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; Mott v. Hawthorn, 17 Cal. 58; Doran v. Central Pac. R. R. Co., 24 Cal. 245; So. Pac. R. R. Co. v. Garcia, 64 Cal. 515, 2 Pac. 397; McLaughlin v. Menotti, 89 Cal. 365, 26 Pac. 880; Rio Grande Western R. Co. v. Stringham, supra. In Sparks v. Pierce, supra, Mr. Justice Field, speaking of a somewhat analogous situation, said:

"The case presented, therefore, is that of occupants of the public lands without title, and without any attempt having been made by them, or by any one representing them, to secure that title, resisting the enforcement of the patent of the United States on the ground of such occupation. Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against a patent of the government, he must

show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department. * * * It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied him."

At no time after August 6, 1914, when the land again became subject to lawful settlement and to entry under the homestead laws, did defendant, or any one representing him, make any attempt to take the steps necessary to secure the government's title. At any rate, if any such attempt was made, the cross-complaint fails to show it.

For these reasons we are constrained to hold that cross-complainant has not shown that at the date when plaintiff's inceptive right to the land attached—the date of her application to make a lieu land selection under the act of May 2, 1914—he possessed any preference right to enter the land under the Homestead Law. He has failed to connect himself with the paramount source of title. The demurrer to the cross-complaint was therefore properly sustained.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

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LITTLE v. SMITH et al. (Civ. 3186.)

(District Court of Appeal, First District, Division 1, California. April 6, 1920.)

1. Appeal and error ⊜907(2)—Failure to find on issue alleged raises presumption of want of evidence.

Ordinarily, in the absence of a record of the evidence showing to the contrary, the failure of the court to find on matters affirmatively alleged in the pleadings raises the presumption that no evidence was offered in support of such affirmative matters.

2. Judgment ⊜725(6)—Conclusive as to issue on which evidence was excluded for defective pleading.

A judgment for defendant in an action to cancel a deed for undue influence and fraud is conclusive on the issue of undue influence, though all evidence on that issue was excluded by the court because the complaint did not state facts sufficient to constitute a cause of action on that issue.

3. Judgment ⊜588—Concludes subsequent action to set aside same deed on new ground.

In suing to set aside a deed, plaintiff must allege all grounds which he claims entitled him to the relief; and, after judgment has been rendered against him in a suit to set aside the deed for undue influence and fraud, he cannot bring another suit to cancel it for mental incapacity of grantor.

Appeal from Superior Court, Ventura County; H. T. Dewhirst, Judge.

Action by George J. Little, as special administrator of the estate of William A. Smith, deceased, against S. F. Smith and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Earl E. Moss, of Ventura, and Robert M. Clarke, of Los Angeles, for appellant.

Wiley & Lambert, of Bakersfield, and Argabrite & Drapeau, of Ventura, for respondents.

KNIGHT, Judge pro tem. This is an appeal by plaintiff from a judgment entered in favor of defendants in an action brought by plaintiff as special administrator of the estate of William A. Smith, deceased, to set aside two deeds, executed by deceased to defendants, upon the grounds of undue influence and mental incompetency. The defendants, besides denying the two principal charges, pleaded in bar of plaintiff's recovery a former judgment rendered in a suit previously commenced by plaintiff as such special administrator against these defendants to set aside the same deeds upon the grounds of undue influence and fraud. The court in the action at bar found against the issues of undue influence and mental incompetency, and further found that said former judgment was a bar.

Plaintiff urges three grounds for reversal: First, that the former judgment is not a bar; second, that the court erred in not compelling the defendant S. F. Smith, who was the attending physician of the deceased during his last illness and also one of the grantees named in the deeds, to testify as to the mental and physical condition of the said grantor at or about the time of the execution of the deeds; and, third, that the evidence is insufficient to support the findings to the effect that there was no undue influence or mental incompetency.

The principal question in the case is whether or not said former judgment is res adjudicata. If it shall be determined that it is, the other two questions become immaterial.

It is the contention of appellants that said former judgment cannot be held res adjudicata for two reasons: First, because the issue of undue influence was not determined in the former action, and, secondly, because in the instant case there is set forth an entirely new and separate cause of action, namely, the mental incompetency of the grantor.

The facts are that on October 1, 1914, plaintiff, as special administrator, commenced suit in Ventura county against these defendants to set aside the deeds in question, upon the grounds of undue influence and fraud. On

stipulation that action was transferred to Kern county, and tried by the court sitting with a jury. When plaintiff offered proof in support of the issue of undue influence the court sustained the objection of the defendants upon the ground that the complaint, in so far as that issue was concerned, did not state facts sufficient to constitute a cause of action, and further proof on that issue was excluded. No leave to amend was asked or granted. At the conclusion of the trial the court declined to adopt the special verdicts of the jury, and entered a decree in favor of defendants, upholding the validity of the deeds. No appeal was taken. On October 14, 1916, plaintiff, as special administrator, commenced the present action in Ventura county, against the same defendants, attacking the same deeds, upon the grounds of undue influence and mental incompetency. The action was tried by the court sitting without a jury, with the result already stated, that is, the court found against the issues of undue influence and mental incompetency and held that the judgment in the former action constituted a bar.

[1] The evidence offered and received in the lower court upon the question of res adjudicata consists of the judgment roll in the former action and certain oral testimony given by one of plaintiff's attorneys. The judgment roll discloses that there was an attempt made by plaintiff to plead a cause of action upon the ground of undue influence, but the findings and judgment are silent on that issue. Ordinarily it would be held, in the absence of a record of the evidence showing to the contrary, that the failure to find upon matters affirmatively alleged in the pleadings gives rise to the presumption that no evidence was offered in support of such affirmative matters (Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30), from which it would necessarily follow that the judgment in the action determined all matters presented by the pleadings. Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731. In the present action, however, plaintiff, over the objections of defendants, was allowed to supplement the contents of the judgment roll by the oral testimony of one of plaintiff's attorneys, who testified that when plaintiff offered proof in that action of undue influence the court sustained the objection of the defendants and excluded all such proof, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. Upon this oral testimony appellant predicates the theory that the issue of undue influence was not heard or determined in the former action, and consequently the judgment in that case cannot be held res adjudicata. In support of such theory defendant relies principally upon the cases of Purcell v. Victor Power, etc., Co., 29 Cal. App. 505, 156 Pac. 1009, Bank of Visalia v. Smith, 146 Cal. 398, 81 Pac. 542 and Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 Pac. 597. Those cases do not support appellant's views, however, and are clearly distinguishable from the action at bar. In Purcell v. Victor Power Co. the first action "was one in ejectment, in which alone was involved the question of the right to the possession, not of the whole premises of the Bonanza claim, but of a fractional part thereof; while the present is a suit to quiet title, in which the question of the ownership of the fee in another and different fractional portion of the lands of said claim is involved." It will thus be seen that the two actions did not involve the same subject-matter. In Bank of Visalia v. Smith there was a finding upon an issue which was not tendered by the scope of the pleadings, and the judgment was silent thereon. It was held that the judgment did not operate as an estoppel in a subsequent action brought to determine that issue. In Southern Pacific Co. v. Edmunds it was in substance held that if during trial an issue is withdrawn on stipulation from the scope of the case, the judgment in the case does not constitute res adjudicata on that issue. The rule in the case last cited is in accord with the later case of Miller & Lux v. James et al. (Sup.) 179 Pac. 174, wherein it is said:

> "The rule of res adjudicata is to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy; but, where they expressly agreed to withdraw an issue from the court, the reason for the rule ceases. The issue is not in fact adjudged, and the parties themselves having consented to that method of trial are not entitled to invoke the rule which requires parties to submit their whole case to the court. If they consent to adjudicate their differences piecemeal, there is no reason that the court should extend the rules of law to prevent that which they had expressly agreed might be done."

[2] There can be no question but that such is the law. But the rulings of the two cases last cited are founded squarely upon the fact that the issue upon which no finding was made was withdrawn on stipulation from the consideration of that case. In other words, it was reserved for further consideration between the parties. Here a different state of facts exists. The issue of undue influence was not withdrawn. Plaintiff relied upon it, and offered proof in support of it, but such proof was excluded by the court upon the ground that the complaint failed to state sufficient facts. Plaintiff accepted the ruling of the court, failed to amend, and did not appeal. In that state of the record we are of the opinion that the position of plaintiff in the present action has not been brought within the rules stated in any of the cases above cited, and that he is concluded by the former judgment on the issue of un-

due influence. The fact that the judgment may have been based upon a defective complaint did not render the judgment void (Gillespie v. Fender [Sup.] 180 Pac. 332; Estate of Ross [Sup.] 182 Pac. 752) nor minimize its effectiveness concerning all issues raised by the pleadings.

[3] The other question involved, briefly stated, is this: Can a party who seeks to set aside deeds commence and maintain against the same parties as many consecutive, independent suits to accomplish that purpose as he has grounds upon which to make the attack? In other words, may he under the law attack the deeds first upon the ground of undue influence, and, if not successful, then commence a second suit against the same parties to set aside the same deeds upon the ground of mental incompetency, or must he embody all of his alleged grounds of invalidity in one action? We are of the opinion that he must embody them all in one action. In Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731, it is held:

"Her cause of action was the breach of the agreement under which she alleged that this conveyance had been made, and involved the determination of the rights of the parties flowing from that transaction, and it was incumbent upon her to set out in her complaint all the facts which constituted this cause of action. She is estopped by the judgment therein rendered from thereafter asserting any cause of action depending upon the facts so omitted, as fully as she would be if at the trial she had omitted to introduce evidence in support of her averments or present argument to satisfy the court of the justice of her claim. A party cannot litigate his cause of action by piecemeal, and, after a judgment against him, seek in another action to obtain relief dependent upon the transaction therein adjudged, by bringing forward claims and demands properly belonging to the first action. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action and litigated therein. The rule is stated by Vice Chancellor Wigram in Henderson v. Henderson, 3 Hare, 115: 'Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' See, also, Wharton on Evidence, § 717; 2 Black on Judgments, § 729; Rogers v. Higgins, 57 Ill. 244; Stockton v. Ford, 18 How. 418; Sullivan v. Triunfo M. Co., 39 Cal. 464; Taylor v. Castle, 42 Cal. 367; Parnell v. Hahn, 61 Cal. 131."

In Greer v. Greer, 142 Cal. 519, 77 Pac. 1106, wherein an action was brought by a wife for divorce, for alleged desertion, and for the cancellation of a deed of the husband to his daughter, a former judgment for the defendant in an action by the wife for maintenance grounded upon the same alleged desertion, and seeking the same relief, was held to be res adjudicata. The court there said:

"If the deed made by defendant Greer, having been once attacked by plaintiff and found valid by the judgment of a court of competent jurisdiction, can again be attacked by the same plaintiff against the same parties in a different suit, there would be no end to the litigation. The plaintiff might bring a separate action for a divorce every year on each of the different causes set forth in the Code, and each time claim that she had the right to investigate the validity of the transfer. It is evident that such proceedings might be kept up beyond the lifetime of defendant Greer. It is the rule that when a matter is once fairly before the court and adjudicated between the same parties, involving the same question, it cannot afterwards be litigated, even upon grounds not disclosed in the former case. Wheeler v. Eldred, 137 Cal. 37; Bingham v. Kearney, 136 Cal. 175."

In the Estate of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118, it was held that, where a claim of widowhood of a deceased person was litigated upon issue joined upon the petition of the alleged widow for a homestead, and was then determined against her, she could not afterwards litigate the question of her widowhood upon distribution of the estate. The court there said:

"But where an issue of fact vital to the controversy has been tried between parties litigant, and a judgment depending for its sufficiency upon the finding of fact has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. Otherwise, as has been repeatedly declared by the courts, there could be no end to litigation. 'If a new action could be commenced and a case retried because of the discovery of new facts after the case had been finally disposed of, there would be no end of litigation, and a case be kept in court forever.' Quirk v. Rooney, 130 Cal. 505, 62 Pac. 825. And again: 'If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary.' Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597. And says Freeman on Judgments (4th Ed.) § 260: 'It is sufficient that the status of the action was such that parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and

correctly applied the law. But if either party fails to present all his proofs, or improperly manages his case, or afterwards discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law—in all of these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice.'"

In Black on Judgments, vol. 2, § 754, the rule is stated in the following language:

"A party cannot relitigate matters which he might have interposed but failed to do in a prior action between the same parties or their privies in reference to the same subject-matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity the law will not aid him."

Other authorities to the same effect are Suisun L. Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349; Curtis v. Upton, 175 Cal. 322, 165 Pac. 935; Flynn v. Hite, 107 Cal. 455, 40 Pac. 749; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Estate of Bell, 153 Cal. 331, 95 Pac. 372.

Even the cases cited by appellant adhere to the same rule, for in Southern Pacific Co. v. Edmunds, supra, it is said:

"The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided."

There are several grounds upon which a deed may be set aside under the law. Among them are fraud, undue influence, mental incompetency, duress, menace, etc. If a party is allowed to urge one ground at a time, or even all grounds except one or two, it would result in piecemeal and endless litigation, which, as we have seen from the authorities above cited, the law seeks to avoid.

The sole object of plaintiff's first action was to obtain an adjudication by a court of competent jurisdiction that the deeds were void. In that action he should have urged all the grounds upon which he claimed the invalidity existed, and if he did not do so the law, as we have seen, will not allow him to commence another action against the same parties to litigate the same controversy.

In view of the fact that plaintiff's action is barred by the former judgment, the other questions involved in the appeal are immaterial.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

SLAYDEN v. O'DEA et al. (Civ. 2046.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1919.)

1. Corporations ⟸630(6)—Judgment against defunct corporation absolutely void.

The effect of a forfeiture of the charter of a corporation, whether from nonpayment of its corporation license tax or for other cause, is to terminate its existence as a legal entity, and a judgment against it in a suit thereafter brought is a mere nullity; any attempted appearance for it conferring no jurisdiction.

2. Corporations ⟸617(1)—Title on dissolution passes to stockholders subject to power of directors to administer.

Upon dissolution of a corporation for nonpayment of its license tax, the title to all the property owned by it at the time of its demise passes to the persons who were its stockholders at the time of its death, who hold the property subject to the right vested in the persons who were the directors in office at the time of dissolution to possess the corporate assets under the power to administer the same in the settlement of the affairs of the defunct corporation for the benefit of the creditors and those who were stockholders during the corporate existence.

3. Corporations ⟸630(6)—Judgment against defunct corporation can be impeached by stockholder or any interested person.

Not only is an attempted judgment against a defunct corporation void, but such a judgment can be impeached and its invalidity shown by any one interested, as, for example, one entitled as creditor or stockholder to participate in the assets of the corporation, or one who, as stockholder, may be liable for the debts of the corporation, unless by their acts or omissions they have estopped themselves from denying the validity of the judgment.

4. Estoppel ⟸91(1)—Stockholder of defunct corporation held estopped to deny validity of judgment against it.

Where a stockholder who was president of a corporation knew at the time of the institution of a suit against the corporation that it was defunct by reason of having failed to pay the license tax, and advised with the attorney representing the corporation concerning the suit, and thus adopted a course of action calculated to lead plaintiff and other parties to believe that the corporation was an existing corporate entity, and thereby induced plaintiff to prosecute the action to final judgment against the corporation, and other defendants to litigate their claims in the belief that the corporation still enjoyed corporate life, he estopped himself from moving on behalf of the

corporation for any modification of the judgment based on the theory that the corporation was not an existing entity when the action was commenced, and that the judgment was void.

5. Abatement and revival ⟸39 — Action against corporation becoming defunct continued against directors without substitution.

In view of St. 1907, p. 745, § 2 (10a), and subsequent amendatory acts, when an action is commenced against a corporation which later becomes defunct by reason of failing to pay the necessary license tax, the directors or managers of the corporation may be substituted as parties to the action, but such substitution is not essential; for without any substitution or parties or change of attorney they may control and manage the action and defend in the name of the corporation, notwithstanding the forfeiture of the charter.

6. Appeal and error ⟸413—Directors of defunct corporation deemed to have received notice of appeal.

On forfeiture of a corporate charter for nonpayment of the license tax after the commencement of an action against the corporation, it is the duty of the directors in office to manage and control the action on behalf of the corporation, and, although not substituted as parties defendant, they must be deemed to have received due notice of an appeal taken under the alternative method by filing a notice of appeal with the county clerk as provided by Code Civ. Proc. § 941b.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by H. R. Slayden, doing business under the name of the H. R. Slayden Company, against M. F. O'Dea and others. Judgment for plaintiff, and the named defendant appealed. Motion by O. O. Farmer in behalf of the Imperial Engineering & Construction Company to dismiss the appeal and remand the cause, with directions to lower court to vacate the judgment. Motion denied.

George W. Crouch, Crouch & Crouch, Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for appellant.

A. C. Labrie, of Los Angeles, for defendant Farmer.

J. W. Morin, of Pasadena, and Willoughby Rodman, of Los Angeles, for respondent.

PER CURIAM. O. O. Farmer, a defendant in the action, and who likewise is a stockholder of the Imperial Engineering & Construction Company, also a defendant in the action, has moved this court to dismiss the appeal and to remand the cause, with directions to the lower court to vacate the judgment. The motion is made on behalf of the Imperial Engineering & Construction Company and is based upon affidavits and a certified copy of a proclamation by the governor showing that the Imperial Engineering & Construction Company is, and at the time of the commencement of the action was, a defunct corporation, by reason of nonpayment of the state corporation license tax.

The action was brought by Slayden to recover a judgment against the Imperial Engineering & Construction Company for certain sums alleged to be due for materials furnished by himself and assignors and used by the corporation in the construction of a highway under a contract with the county of Los Angeles, made pursuant to the provisions of the Road District Act of 1907 (St. 1907, p. 806). By his complaint plaintiff asks that the amounts so due be adjudged to be secured by two road bonds issued by the county pursuant to the act; that the bonds be sold to pay such sums as may be adjudged due him; and that he have judgment against the Imperial Engineering & Construction Company for any deficiency remaining after the sale. The complaint further alleges that the Imperial Engineering & Construction Company is a California corporation. Defendant O'Dea, answering, denies practically all of the material allegations of the complaint, pleads the statute of limitations, alleges that he owns the bonds, and prays that he be adjudged to be the owner thereof. The Imperial Engineering & Construction Company and O. O. Farmer, appearing by A. C. Labrie, Esq., as their attorney, filed a disclaimer, disclaiming all right to the bonds. The county, answering, admitted that the bonds were in the possession of the county treasurer, and prayed the court to determine the conflicting claims of plaintiff and the other defendants thereto. In its written findings of fact the court specifically finds that "the Imperial Engineering & Construction Company was and still is a corporation duly organized and existing under and by virtue of the laws of the state of California." By its judgment the court adjudged that plaintiff have and recover of and from the Imperial Engineering & Construction Company certain designated sums; that plaintiff has a lien on the bonds to secure the amounts so adjudged due him; that the bonds be sold; that the balance, if any, after their sale be paid to defendant O'Dea; and that in case of a deficiency plaintiff have judgment therefor against the Imperial Engineering & Construction Company. The only appeal from the judgment is that taken by defendant O'Dea, who has appealed under the new, or alternative, method, by filing his notice of appeal with the county clerk, as provided by section 941b of the Code of Civil Procedure.

The motion now made in this court by Farmer on behalf of the defunct corporation is: (1) A motion to dismiss the appeal; and (2) a motion to remand the case to the lower court with instructions to vacate the judgment.

It appears from the affidavits of Farmer and Labrie that the authorized capital stock of the Imperial Engineering & Construction Company is, or rather during the corporate existence was, divided into 7,500 shares. Of this total of 7,500 shares that might lawfully be issued, 5,605 were issued to and owned by Farmer. It further appears from these affidavits that the corporation did not pay its license tax for the fiscal year 1913, and that, pursuant to the proclamation made by the Governor on September 16, 1913, the Imperial Engineering & Construction Company, on November 30, 1913—which was some time prior to the commencement of the action—forfeited its charter. Labrie, in his affidavit, says that at the time he filed the disclaimer as attorney for the company he was not aware, and had not been informed, that it had forfeited its charter. Farmer, who was president of the corporation at the time of its demise, does not say that he did not know that the corporation had forfeited its charter. It further appears that Farmer consulted with Labrie concerning the filing of the disclaimer. From the certificate of the secretary of state, filed with the motion to dismiss, it appears that the license tax remains unpaid and the corporate charter still remains forfeited to the state. In the discussion that follows it should be remembered that the Imperial Engineering & Construction Company was nonexistent at and prior to the time when this action was commenced. It is this fact that differentiates the case from such cases as Brandon v. Umpqua Lumber Co., 166 Cal. 322, 136 Pac. 62.

[1-3] Except as and when it is otherwise provided by the statute, the effect of the forfeiture of the charter of a corporation, whether for nonpayment of its corporation license tax or for other cause, is to terminate its existence as a legal entity. It is dead. It is incapable of suing or being sued as a corporate body, or in its corporate name. It can no more be proceeded against as a corporation than could a natural person after his death. Being dead, it can confer no authority upon any one to appear for it. Any appearance for it or in its name is unauthorized and void. It is not like the case of an unauthorized appearance for a living man, or for an existing corporation, where, under certain circumstances, not necessary to enumerate, certain presumptions of authority to make the appearance will be indulged. The corporation being dead, there is no one who can give any authority to appear for it. Any attempted appearance confers no jurisdiction and is an absolute nullity. Jurisdiction no more can be obtained by a court over a defunct corporation that over the person of a dead man. The dead corporation cannot be served with process, cannot appear, cannot admit any fact, nor authorize any one to do so for it. Any attempted judgment against it is void—a mere nullity. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1040. Upon the dissolution of the corporation for nonpayment of its license tax, the title to all the property owned by it at the time of its demise passes to the persons who were its stockholders at the time of its death, who hold the property subject to the right vested in the persons who were the directors in office at the time of the dissolution to possess the corporate assets under a power to administer the same in the settlement of the affairs of the defunct corporation for the benefit of the creditors and those who were stockholders during the corporate existence. Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161. Not only is any attempted judgment against a defunct corporation void but such judgment, in a proper proceeding, can be impeached and its invalidity shown by any one interested, as, for example, one entitled as creditor or stockholder to participate in the assets of the corporation, or one who, as stockholder, may be liable for the debts of the corporation. Crossman v. Vivienda Water Co., supra. And those sufficiently interested to be allowed to assail the judgment cannot be held bound by any unauthorized appearance attempted to be made on behalf of the dead corporation, unless by their acts or omissions they have estopped themselves from denying the validity of the judgment. Crossman v. Vivienda Water Co., supra. Though the judgment be void, estoppel may bar the way to a successful assault upon it. For, notwithstanding the nullity of the judgment against the dead corporation, one who otherwise might be entitled to attack it on behalf of the defunct corporation may estop himself by his acts of omission or commission from questioning its validity. Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 Pac. 986.

Appellant, the defendant O'Dea, resisting the motion made by Farmer on behalf of the defunct corporation, contends that the admitted facts show that Farmer is estopped to question the validity of the judgment. We think this contention must be sustained.

To entitle Farmer to move on behalf of the defunct corporation, it must appear that he has some interest to be protected, and that he is not estopped by his conduct. As one who was a stockholder at the date of the dissolution, he has a property right in what were the assets of the corporation at the time of its demise; that is, upon the dissolution of the corporation, the title to the corporate assets vested in him and the other stockholders, whoever they may be. Rossi v. Caire, supra. Also, as a stockholder, he is interested in defeating any claim against the corporation for the payment of which, in whole or in part, he may be liable as a stockholder. As a stockholder, therefore, he has

a sufficient interest to entitle him to assail the judgment against the corporation. But notwithstanding this interest, if, by his conduct, he has estopped himself from questioning the judgment, this court cannot grant that part of the motion whereby we are asked to remand the case with directions to the lower court to vacate the judgment. That Farmer is estopped appears from the affidavits of himself and Mr. Labrie.

[4] From the affidavit of Labrie it appears, inferentially at least, that at the time of the forfeiture of the corporate charter Farmer was president on the now defunct corporation. As such, he must have known that it had forfeited its charter prior to the commencement of the action. At any rate, Farmer is careful not to deny such knowledge in any part of his affidavit. And yet, notwithstanding such knowledge on his part—knowledge which, under the circumstances, should be imputed to him—he advised with Labrie about the disclaimer, and, after so advising with Labrie, the latter, on behalf of Farmer and the defunct corporation, filed the disclaimer whereby both disclaimed any right, title, or interest in or to the bonds. We think it clear that Farmer knowingly concealed from plaintiff and the other parties to the action all knowledge that the corporation had suffered dissolution, and adopted a course of action calculated to lead plaintiff and appellant O'Dea, and all other parties, to believe that the corporation was an existing corporate entity, thereby inducing plaintiff to prosecute his action against the corporation to final judgment, and O'Dea and the other defendants to litigate their claims in the belief that the corporation still enjoyed corporate life and was properly a party to the action for the determination of all conflicting claims and interests. For these reasons we think Farmer is estopped from now moving in this court, on behalf of the corporation, for any modification of the judgment based upon the theory that the corporation was not an existing entity at the time when the action was commenced, and that that part of the motion whereby we are asked to remand the cause to the lower court with directions to vacate the judgment must be denied.

[5] In view of Farmer's estoppel to move in this matter, it is unnecessary to determine to what extent evidence dehors the record on appeal may be considered to refute the express finding of the court that at the time of the trial the corporation was in existence.

Conceding that notice of appeal is essential to appellate jurisdiction, and assuming that such cases as Judson v. Love, 35 Cal. 463, and Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225—wherein it is held that the death of a natural person in whose favor judgment was rendered terminates the authority of his attorney to represent him or to receive notice of appeal—are applicable to appeals under the new, or alternative, method, where the notice is filed with the clerk, still, where a corporation is a defendant in an action, and that corporation is an existing corporate entity at the time when the action is commenced against it, the statute provides that the action shall not abate by reason of the subsequent forfeiture of the corporate charter for nonpayment of the license tax, but that the action "may be prosecuted to final judgment * * * with the same force and effect and in like manner as though no forfeiture had occurred." Section 2 (10a), Acts 1907 (Stats. 1907, p. 745), and the subsequent amendatory acts. By reason of this provision of the statute, the action, if the corporation be in existence when it is commenced, may be continued and prosecuted to final judgment in the name of the corporation, under the control and magagement of the directors or managers in office at the time of the forfeiture. And while doubtless such directors or managers may be substituted as parties to the action, such substitution is not essential; for, without any substitution or parties or change of attorney, they may control and manage the action and defend in the name of the corporation, notwithstanding the forfeiture of the charter. Lowe v. Superior Court, 165 Cal. 714, 134 Pac. 190; Brandon v. Umpqua Lumber Co., supra.

[6] For reasons already stated, the moving party here is estopped to assert the nonexistence of the corporation at the time when the action was commenced. As to him, the situation must be regarded as though there had been no forfeiture of the corporate charter prior to the commencement of the action; and if there were no such forfeiture prior to the commencement of the action, then, even though it be admitted that the corporation is now defunct, still the action may continue in the name of the corporation, without any change of attorney, and this appeal may be prosecuted "with the same force and effect and in like manner as though no forfeiture had occurred," the directors in office at the time of the forfeiture, whom the statute makes "trustees for the corporation and stockholders," being deemed to be in control and management of the action so far as the corporation's interests are concerned, even to the extent of receiving notice of appeal, through the attorney of record for the defunct corporation, by looking to the files to ascertain whether or not an appeal has been taken. Because the mover of the motion is estopped to deny the corporate existence of the Imperial Engineering & Construction Company at the date of the commencement of the action, and because, if it were in existence when the action was commenced, it would be the duty of the directors in office,

in the event of a subsequent forfeiture of the corporate charter for nonpayment of the license tax, to manage and control the action for and on behalf and in the name of the corporation, as much so as if they had been substituted for it as parties defendant, they must be deemed to have received due notice of the appeal; for, as is said in Southern Pacific Co. v. Superior Court, 167 Cal. 255, 139 Pac. 69, it is the design of section 941b of the Code of Civil Procedure, in the event that an appeal is taken under the alternative method as therein provided, "to compel the prevailing party to look to the files to ascertain whether or not an appeal has been taken."

Motion denied.

182 Cal. 500

SLAYDEN v. O'DEA et al. (L. A. 4670.)

(Supreme Court of California. March 26, 1920. Rehearing Denied, April 16, 1920.)

1. Highways ⟸113(1)—Stop notice statute not applicable where work is performed on public highway; "wagon road"; "any other structure."

Code Civ. Proc. § 1184, providing that, in case of property which is not subject to lien, the owner shall withhold sufficient money to pay the claims of persons serving notice, is not applicable to public work on public highways performed under the Road District Improvement Act; the terms "wagon road" and "or any other structure" in Code Civ. Proc. § 1183, not including public highways, in view of St. 1911, p. 1422, and Code Civ. Proc. § 1191.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any Other.]

2. Highways ⟸113(1)—Right to lien and to stop notice limited to persons described.

The right to a lien under Code Civ. Proc. § 1183, relating to furnishers of labor and material, and to a stop notice under section 1184, is limited to those persons described in section 1183, namely, those who perform work on structures therein described at the request of the owner.

3. Highways ⟸113(1) — Contract between contractor and creditor held not to give other creditors any rights in bonds of highway improvement district.

A contract between a contractor and his creditor providing that certain highway improvement district bonds be left in escrow with the county treasurer until the question of the validity of claims of certain other creditors should be settled *held* only a plan by which the legality of the claims of the other creditors should be determined, which gave such other creditors no rights in the bonds which they did not before have, although the contracting creditor withdrew the remainder of the bonds and the other creditors released any claims against county as to the bonds delivered.

Olney, J., Angellotti, C. J., and Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by H. R. Slayden, doing business under the firm name of H. R. Slayden Company, against M. F. O'Dea and others. Judgment for plaintiff, and the named defendant appeals. Judgment reversed in part.

See, also, 189 Pac. 1062.

Crouch & Crouch, of Los Angeles (Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, of counsel), for appellant.

J. W. Morin, of Pasadena, and Willoughby Rodman, of Los Angeles, for respondent.

WILBUR, J. The plaintiff, having furnished certain supplies to a contractor, brought this action to recover on his own and certain similar assigned claims. M. F. O'Dea appeals from that portion of the judgment giving to respondent a lien upon two bonds, Nos. 9 and 10, of improvement district No. 5, of the county of Los Angeles, which bonds are now in the custody of John N. Hunt, treasurer of the county of Los Angeles, and which represent two-tenths of the contract price payable to the contractor for the improvement of certain streets within such district (Stats. 1907, p. 806), under a contract of January 18, 1912, between the board of supervisors of the county of Los Angeles and one S. M. Kerns. S. M. Kerns gave a surety bond of the Maryland Casualty Company in an amount equal to 50 per cent. of the contract price, for the benefit of laborers and materialmen, as required by law. Stats. 1911, p. 1422. On the following day, with the consent of the surety, Kerns assigned his contract to the defendant Imperial Engineering & Construction Company, of which company defendant O. O. Farmer was manager and principal stockholder. On the 18th of March, 1912, this company, for the purpose of securing funds for the carrying on of the work, assigned to M. F. O'Dea the contract and the bonds to be thereafter issued, and notice of the assignment was filed with the board of supervisors. O'Dea advanced over $10,000 to the contractor for the performance of the work, which was completed July 13, 1912. During the months of September and October, 1912, before the issuance of any of said bonds to O'Dea, and while the same were in the custody of the county treasurer, plaintiff and his assignors filed with the board of supervisors of Los Angeles county notices that they had furnished supplies and material for the doing of this work, and therein

claimed a lien upon the bonds to be issued therefor, and demanded that said bonds be withheld from the contractor. Because of the stop notices plaintiff claims a lien against said bonds, upon the theory that section 1184 of the Code of Civil Procedure was applicable. In addition, plaintiff claims that by reason of certain transactions between the various parties interested, in January, 1913, reference to which is hereafter made, whether or not plaintiff was theretofore entitled to any lien upon said bonds, said transactions resulted in an equitable lien thereon in his favor for the amount of such claims.

[1, 2] Before considering the effect of the latter transactions, it is well to dispose of the contention of respondent based upon the stop notices. Is section 1184, Code of Civil Procedure, applicable to public work of this nature performed under the road district improvement act? This section provides:

"* * * In the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim."

This provision for a stop notice is the only remedy provided by sections 1183 and 1184, Code of Civil Procedure, for persons furnishing materials to a contractor for use upon public improvements. This provision for a stop notice was virtually a re-enactment of the rule which had been developed by the courts in the interpretation of section 1184, Code of Civil Procedure, as it stood before the amendment. It had been held that this section as originally enacted provided two remedies for the laborers and materialmen, one a lien upon the structure or improvement created by his labor, and the other a stop notice in the nature of a garnishment, and that the latter was the only remedy to be applied in the case of improvements upon public property, which could not be subject to a lien for reasons of public policy. Bates v. Santa Barbara, 90 Cal. 543, 27 Pac. 438; Miles v. Ryan, 172 Cal. 205, 157 Pac. 5. Section 1183 defines the structures and improvements upon which liens attach under the Mechanic's Lien Law. This section, so far as it relates to the matter here under consideration, is as follows:

"Mechanics, materialmen, * * * furnishing materials to be used or consumed in * * * or furnishing power contributing to the construction * * * of any building, wharf, bridge, ditch, * * * railroad, *wagon road* or other structure, shall have a lien upon the property upon which they have * * * furnished materials, for the value of * * * materials furnished and for the value of the use of such * * * power, whether at the instance of the owner, or of any other person acting by his authority or under him." (Italics ours.)

This statute does not purport to give a lien upon a public street or highway. Such highway does not belong to the county, but to the people of the state of California. People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; People v. County of Marin, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659. At the time the term "wagon road" was introduced into the Mechanic's Lien Law, April 4, 1864 (Hittell, General Laws of California, p. 656, § 4496), the law provided for the incorporation of wagon road companies (Stats. 1853, p. 114) and for the securing of rights of way for such wagon roads. The term "wagon roads" was used for long roads connecting distant cities and towns for the use of which tolls might be charged. Stats. 1851, p. 323; Stats. 1857, p. 272; Stats. 1858, p. 48; Stats. 1859, pp. 228, 323. The supplement to the Mechanic's Lien Law enacted in 1864 provided for liens upon wagon roads and railroads and nothing else. It is apparent, therefore, that in using the expression "wagon road" the Legislature did not intend to include a public road or highway. It is not to be assumed that the Legislature intended to provide for a lien upon or the sale of a public street or highway or wagon road to pay the cost of its improvement. This is clear, not only from the fact that a public highway is not included within the description of improvements made at the request of the owner in section 1183, but also by the fact that the Legislature in the Mechanic's Lien Law has provided a separate and distinct method of enforcing rights of laborers and materialmen in the case of work done upon a public street or highway where such work is done at the instance of the owners of lots abutting upon the street, by providing for a lien, not upon the street, but upon the abutting lots. Section 1191, Code Civ. Proc. This special provision also indicates that the Legislature did not intend by the general language contained in section 1183, "or any other structure," to include streets or highways which were specifically provided for by the same statute in another section. See Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. 109. It is true that this court has held that section 1183, Code of Civil Procedure, applies to the case of contracts for the erection of public buildings and other public improvements therein specifically described, to the extent of authorizing the stop notice. Bates v. Santa Barbara, supra. In other words, where the statute expressly authorizes a lien upon a building constructed by the owner thereof, this court has held that the garnishment provisions of the statute contained in section 1184 apply, notwithstanding the fact that a proper construction of this statute compels the conclusion that the Legislature did not intend to create a

lien upon such public building. Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; Bates v. Santa Barbara, supra. The Mechanic's Lien Law was enacted upon the mandate of the Constitution (section 15, art. 20) for the purpose of securing to mechanics and materialmen the liens therein provided for, but it has been held that this constitutional provision does not provide for liens upon public buildings. Mayrhofer v. Board of Education, supra. It was there said with reference to this constitutional provision:

"The public policy appealed to is laid down in the Constitution itself. It is a constitutional policy. The section under consideration [1183] on its face purports to be a Code provision providing a remedy by individuals against individuals. The constitutional policy referred to but emphasizes the rule of construction, which would have been sufficient of itself."

The claim was there made:

"That public buildings are included both in the word 'property,' used in the Constitution, and in the phrase 'any building,' used in the Code, and therefore it must necessarily follow that mechanics and materialmen are, by these provisions, given a right to a lien upon such buildings. But this ignores the rule of statutory construction, that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

In Bates v. Santa Barbara, supra, it is conceded that a lien could not be acquired against a public building, but the court said:

"It does not follow that the claims of Booty and Holmes are not subordinate and subject to the claims of the plaintiffs. * * * Under section 1184 of the Code of Civil Procedure, the mechanic or materialman may give the owner of the building upon which he has performed labor or for which he has furnished material written notice of his claim, and thereupon it becomes the duty of such owner to retain sufficient funds to answer such claim. * * * Upon receipt of the notice the owner becomes liable as on garnishment or assignment. * * * The equitable garnishment provided for by section 1184 of the Code of Civil Procedure is a cumulative remedy in ordinary cases; but in this instance it is the only remedy provided by the Lien Law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on the grounds of public policy and public necessity, are exempt from execution and forced sale. And this remedy is one which does not contravene any principle of public policy."

But neither these decisions nor the amendment to section 1184 justify the conclusion that there is a lien, or, in the absence thereof, a right to a stop notice in the case of street improvements that are not described in section 1183 and are not covered by the provisions thereof. The right to a lien, under section 1183, and to a stop notice, under section 1184, is limited to those persons described in section 1183, namely, those who perform work on structures therein described at the request of the owner.

Another consideration leads us to the same conclusion. The Legislature of 1911 not only enacted the Mechanic's Lien Law under consideration, but, by a separate and distinct act (Stats. 1911, p. 1422), required the execution of a bond in the amount of 50 per cent. of the contract price in the case of a contract for public improvements, conditioned for the payment of laborers and materialmen working upon such improvements. Section 1183, Code of Civil Procedure, provides for a similar bond, but the giving thereof is optional with the contractor and owner. This statute provided (section 2) that any materialmen, etc., whose claim has not been paid by the contractor shall, within 90 days from the time the contract is completed—

"file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a verified statement of such claims, together with a statement that the same has not been paid. At any time within six months after the filing of such claim, the person, company or corporation filing the same may commence an action against the sureties on the bond, specified and required by section 1 hereof."

This constitutes an ample remedy for the protection of mechanics and others performing labor upon a public highway, and indicates that the Legislature did not consider that sections 1183 and 1184, Code of Civil Procedure, covered every structure and improvement made by public contract, such as streets and highways.

From the foregoing considerations we conclude that neither section 1183 nor section 1184 of the Code of Civil Procedure applies to work on a public street or highway, and that the remedy of materialmen in case of a contract let by the public authorities for street work is upon the personal responsibility of the contractor and his sureties, and in the case of a private contract upon a public highway under section 1191, Code of Civil Procedure. A large part of the work upon public highways is done under the Vrooman Act and its amendments. We have recently held that in such cases the stop notice feature of section 1183 did not apply. That decision was based upon the fact that there was no indebtedness from the owner to the contractor to which the statute could apply. Here there was no owner within the meaning of section 1183. Adamson v. Paonessa, 179 Pac. 880.

In this view of the case it is unnecessary for us to determine whether food, coal, distillate, and gasoline are "power" or materials

"consumed" in said work within the meaning of section 1183, Code of Civil Procedure, as claimed by respondent.

[3] The next question is as to whether or not the transaction of January, 1913, between the parties resulted in an equitable lien upon such bonds in favor of respondent and his assignors. This transaction may thus be summarized:

On January 28th M. F. O'Dea and O. O. Farmer signed a contract concerning said bonds, to wit:

"Agreement.

"This agreement, made and entered into between the Imperial Engineering & Construction Company, a corporation of the state of California, and O. O. Farmer, of the first part, and M. F. O'Dea, of Los Angeles, Cal., of the second part, witnesseth:

"That whereas, M. F. O'Dea at divers times has advanced certain moneys to the Imperial Engineering & Construction Company to the extent of ten thousand three hundred and thirty-six ($10,336.00) dollars, for the purpose of enabling said Imperial Engineering & Construction Company to carry on its contract to a completion for the improvement of an extension of Colorado street in road district No. 5, under road improvement of 1907, in Los Angeles county, Cal.;

"And whereas, said Imperial Engineering & Construction Company finds that certain claims have been filed with the board of supervisors of the county of Los Angeles, Cal., for supplies by R. H. Slayden, Sarah Schweikert, and Globe Grain & Milling Company to the amount of two thousand four hundred ninety-four and $^{62}/_{100}$ ($2,494.62) dollars;

"And whereas, the validity of these liens so filed with the board of supervisors of Los Angeles county is questioned, and for the purpose of settling this liability the parties hereto have consented that the county of Los Angeles shall retain two of the bonds issued against this improvement, to wit, bonds Nos. nine (9) and ten (10), amounting to two thousand six hundred forty and $^{80}/_{100}$ ($2,640.80) dollars, which said two bonds so left in escrow with the county treasurer of said Los Angeles county are to remain with said county treasurer until the question of the validity of these three claims has been settled either in court or out of court;

"And whereas, said M. F. O'Dea has agreed to release all claims against the eight (8) other bonds which have been issued against the aforesaid improvement, provided he is protected against the claim of H. J. Slayden, Sarah Schweikert, and Globe Grain & Milling Company, and said Imperial Engineering & Construction Company will defend all suits that may be brought against the amount of these two bonds so left in escrow, or against any parties having any interest in said bonds, and said Imperial Engineering & Construction Company will enter into a satisfactory bond to the amount of three thousand ($3,000) dollars protecting said M. F. O'Dea against the contingent claim of said H. R. Slayden, Sarah Schweikert, and Globe Grain & Milling Company, and further saving harmless against any suits that may be entered, and in case of any final adverse judgment will pay the same and all costs and attorney's fees in connection therewith:

"Now, therefore, it is hereby agreed between the parties hereto that said M. F. O'Dea, in consideration of his executing the release to the county of Los Angeles of his claim under his assignment of the contract in relation to said Colorado street improvement on eight (8) of the bonds issued therefor (of which he retains six (6) to apply on his account), and in further consideration of two (2) bonds remaining in escrow with the county treasurer of Los Angeles county as above stated, for the purpose as hereinbefore stated, said Imperial Engineering & Construction Company will enter into a bond to the amount of three thousand ($3,000) dollars to save said M. F. O'Dea harmless against any suits that may be entered, and in case of any final adverse judgment pay the same and deliver to said M. F. O'Dea the said two bonds out of which he shall be paid his demand against said Imperial Engineering & Construction Company or pay in cash the balance and interest due said M. F. O'Dea, and said M. F. O'Dea, upon receiving the security [written in ink on margin, "Erased before agreement signed"] bond as aforesaid for $3,000.00 for the purposes herein stated, surrender and return unto the Imperial Engineering & Construction Company and O. O. Farmer all of the notes and stock security which he now holds against either of said parties.

"In witness whereof the parties hereto have hereunto signed this agreement this 28th day of January, A. D. 1913. O. O. Farmer.

"M. F. O'Dea.

"Witnessed by Ben C. Brock.

"Office of the Treasurer of Los Angeles County, Los Angeles, California. John N. Hunt, treasurer.

"Los Angeles, Cal., Jan. 31/13.

"Received of the Imperial Eng. & Const. Co. (6) six bonds of road district improvement No. 5, par value of $1,332.40 each.

"M. F. O'Dea."

In addition to this agreement, the only one in which M. F. O'Dea participated, the several claimants whose rights were subsequently assigned to the plaintiff notified the county treasurer in writing that they released him and the county from all obligation with reference to eight of the ten bonds then on deposit with him, and also executed releases to the Maryland Casualty Company of its obligation upon its surety bond. The Imperial Engineering & Construction Company agreed that bonds numbered 9 and 10 should remain with the county treasurer as security for the payment of the claims of plaintiff and his assignors. This company had no power to create a lien upon these bonds in the hands of the county treasurer superior to the claims of M. F. O'Dea under his prior assignment. The plaintiff and his assignors had no right in or to said bonds, and the agreement of January, 1913, resulted from the refusal of the county authorities to deliver the bonds

without the consent of the plaintiff and his assignors, and not from any legal right on their part to prevent such delivery. It is necessary to consider further the terms of the contract signed by M. F. O'Dea and O. O. Farmer. Plaintiff and his assignors, not being parties to such contract, are only entitled to any benefit therein stipulated to accrue to them by reason of the rule that, where a contract is made between two persons for the benefit of a third, that person can enforce the contract. Section 1559, Civ. Code. There was apparently no dispute as to the amount of the indebtedness due from the construction company to the plaintiff and his assignors. The only dispute was as to whether or not the supplies were furnished to be used and were used upon the improvement for which the bonds were issued, and, if so, whether or not the stop notices of plaintiff and his assignors created a lien on or garnishment of such bonds in their favor. The recitals in this agreement are that the validity of the liens claimed by the plaintiff and his assignors were questioned, and that "for the purpose of settling this liability, the parties hereto have consented that the county of Los Angeles shall retain two of the bonds issued against this improvement, to wit, bonds Nos. 9 and 10, amounting to $2,640.80, which said bonds so left in escrow with the county treasurer of said Los Angeles county are to remain with said treasurer until the question of the validity of these three claims has been settled either in court or out of court." The contracting company agreed that it would defend "all suits that may be brought against the amount of these two bonds so left in escrow or against any party having any interest in said bonds." It is evident that the purpose of the parties was to arrange for a plan by which the legality of the claims of the plaintiff and his assignors in and to the bonds should be determined; M. F. O'Dea and the contractor evidently claiming that these bonds were not subject to such liens. Inasmuch as the plaintiff and his assignors had no right in or to the bonds in question and no lien thereon, this agreement providing for their custody pending the litigation of that question created no right in them in or to said bonds not already existing, and the contract of the construction company with the lien claimants could not create such rights without the consent of M. F. O'Dea, and the mere withdrawal of the other bonds, to which he was already entitled, did not operate as such consent, nor create any estoppel against him.

It follows that so much of the judgment as declared a lien on such bonds superior to the claim of M. F. O'Dea is erroneous. The respondent is entitled to a lien thereon by reason of his contract with the Construction Company, but subject and subordinate to the prior claims of the appellant for reimbursement for the balance due him from the contractor.

The judgment, so far as it affects M. F. O'Dea and the right to the bonds in question, is reversed.

We concur: LENNON, J.; SHAW, J.; KERRIGAN, Judge pro. tem.

OLNEY, J. I dissent. The main opinion holds that the case is not one in which stop notices can be given under the Mechanic's Lien Law. Section 1184, Code of Civil Procedure, provides specifically that upon such notice being given by a workman or materialman "in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim." The essential purpose of this provision is to create, by means of the stop notice, an equitable garnishment in all cases of public work where, if the work were on private property, the workman or materialman would have a lien. This is the established construction of the provision (Bates v. Santa Barbara, 90 Cal. 543, 27 Pac. 438), and one plain on its face. The real question, therefore, is as to whether or not a workman or materialman would have a lien in such a case as the present if the work were done on private property.

This question is not touched on in the main opinion. The main opinion reasons that the word "wagon road" in section 1183, Code of Civil Procedure (the section providing for liens), means a private wagon road, and not public, and that therefore the provision of section 1184 as to stop notices in case of public work does not apply. This is a complete non sequitur and simply begs the whole question. Of course, section 1183 applies only to private wagon roads. It applies only to private property in any case, whether it be a wagon road or a building or what not. But it does not follow that, because section 1183 means private wagon roads only, section 1184 does not apply to public wagon roads. The very purpose of the latter section is to make the stop notice good in the very case of public work where section 1183 does not apply to give a lien because the work is public, and not private. If the reasoning of the main opinion is sound, it means that in no case of public work will a stop notice be effective, since in no case does section 1183 apply to public work and property, but always to private work and property. Yet our decisions are all the other way.

In this connection it should be noted that section 1183 does not apply to public work, not because of any limitation on the power of the Legislature so to provide, but because it has been held that it was intended to ap-

ply only to private work. Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, the leading case in this state on the point.

The main opinion also advances the argument that, because section 1191, Code of Civil Procedure, provides that, where street work is done at the instance of an abutting property owner, workmen and materialmen shall have a lien upon the abutting property, it is to be inferred that they are to have no right under a stop notice where the work is not done at the instance of a private party, but by the public. I do not see any ground for such inference, and no ground is stated. On the contrary, it seems to me the inference is very plainly the other way. Section 1191 is a part of the Mechanic's Lien Law. When it provides for a lien on private property for street work done at the instance of a private property owner, where no lien exists upon the property improved, the street, because it is public property, the inference would seem to be plain that such work, street work, does come within the general operation of the Mechanic's Lien Law so far as that law can be applicable. If this is true, the provision in regard to stop notices applies.

The main opinion also advances the argument that because, by a separate act of the Legislature, a bond in favor of workmen and materialmen is required of a contractor for public work, when, under the Mechanic's Lien Law, the giving of such a bond is optional in the case of private work, it is to be inferred that such bond is the exclusive protection for workmen and materialmen under a contract for street work. But why exclusive as to street work as distinguished from other kinds of public work? If the act mentioned required such a bond in the particular case of street work alone, then, possibly, there might be some ground for inferring that the bond was intended as the sole protection in such a case. But the act does not so provide. It covers all kinds of public work, work as to which there can be no doubt that it is not the exclusive protection. If it were not intended to be exclusive as to public work in general, to which it in terms applies, why is it exclusive as to a particular kind of public work, to wit, street work. There is nothing in the act to indicate such distinction. Street work, in fact, is not mentioned in the act.

It is also intimated, rather than plainly stated, in the main opinion, that the provision of the statute for stop notices in case of public work does not apply to street work for the reason that in such a case the work is not done at the instance of the "owner." Presumably the thought is that streets and highways belong to the public at large, so to speak. But certainly, in the doing of street work, the county or municipality is the instrumentality or agency through whom the public at large acts, and why should not a stop notice to it, the agency, and the paying agency, be effective? Furthermore, the Code section specifically provides that in case of public work the stop notice may be given to either "the owner or person who contracted with the contractor," and certainly the county or municipality is the person who contracts with the contractor. As to the case of Adamson v. Paonessa, 179 Pac. 880, to which the main opinion refers in this connection, suffice it to say that the conclusion there reached was very carefully put wholly upon the ground that, under the particular act involved, there was no fund upon which the stop notices could operate, and they were therefore ineffective. Such is not the case here. The contractor is paid directly by the county, and by the county alone, and there is a fund upon which the notices can operate, and that fund is in the hands of the county, which is, in the language of the statute, "the person who contracted with the contractor," and who is required to recognize the notices.

When we come to the real question in the case, namely, whether or not the improvement here is of such a character that a lien would exist upon it if it were a private improvement upon private property, there can be little doubt as to the correct answer. Section 1183, after enumerating a number of improvements for which a lien may exist, concludes the enumeration by the words "wagon road or other structure." A reasonably fair construction of the word "wagon road" would probably include the improvement in the present case. It would seem fairly certain that "wagon road" is used in contradistinction to the word "railroad," which immediately precedes it in the enumeration, and means a road in the ordinary sense, a way prepared and used for ordinary vehicular traffic. The present improvement is just that, whether it be termed a street, or a highway, or a county road. But, however this may be, it certainly comes within the words "or other structure" when those words are used in immediate connection with a "wagon road." If a wagon road is a structure, certainly the street or road here is an "other structure." In Helm v. Chapman, 66 Cal. 291, 5 Pac. 352, approved in Williams v. Mountaineer, etc., Co., 102 Cal. 142, 34 Pac. 702, 36 Pac. 388, and Hines v. Miller, 122 Cal. 517, 55 Pac. 401, it was held that the word "structure," as used in the Mechanic's Lien Law, included an excavation on the property. If an excavation be a structure, certainly a built road is one. The question may be tested by a practical illustration. Would there be any doubt but that, if private parties upon their own land had built an improvement such as that here (and private parties have done that very thing), a lien would exist in favor of workmen and materialmen contribut-

ing to the work? But, if workmen and material men would have a lien in such a case upon private property, they are entitled here to the equitable garnishment which the statute provides they shall have in case of public work, when, because the work and the property are public, they cannot have a lien.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.

In re CRANE. (Cr. 2307.)

(Supreme Court of California. May 3, 1920.)

Attorney and client ⊜39—Attorney convicted of using mails to defraud disbarred.

Attorney who has been convicted of using mails to defraud, and who on duly served order to show cause why, in view of conviction, his name should not be stricken from the roll of attorneys and counselors and he be precluded from practicing under Code Civ. Proc. §§ 287–289, 299, fails to show sufficient cause why order to such effect should not be made, will be disbarred.

In Bank.

Application for disbarment upon certified copy of record of conviction of felony. Disbarment ordered.

Jeremiah F. Sullivan, of San Francisco, for San Francisco Bar Association.

PER CURIAM. There having been filed herein a certified copy of a judgment of the United States District Court for the Northern District of California in the cause entitled United States of America v. Arthur Crane, No. 6071, wherefrom it appears that said Arthur Crane was convicted of the crime of using the United States mails for a scheme to defraud and by which judgment he was on the 9th day of February, 1918, sentenced to imprisonment in the United States penitentiary at McNeil Island, in the state of Washington, for a period of two years;

And an order to show cause having been made by the court on March 5, 1920, requiring said Arthur Crane to show cause, if any he had, before this court on this day, why, in view of such conviction, his name should not be stricken from the roll of attorneys and counselors of the court and that he be precluded from practicing as such attorney or counselor in all the courts of this state, all in accord with sections 287, 288, 289, and 299 of the Code of Civil Procedure, and said order having been duly served on said Arthur Crane in the manner required thereby, and said Arthur Crane not having shown any good or sufficient cause why such order should not now be made;

It is ordered and adjudged that the name of said Arthur Crane be and the same is hereby stricken from the roll of attorneys and counselors of this court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state.

All concur except SHAW, J., and WILBUR, J., absent.

182 Cal. 707

LUTZ v. BROWN. (L. A. 5336.)

(Supreme Court of California. May 7, 1920.)

1. Action ⊜11—Demand not necessary before action on agreement to pay on demand deficiency after sale of collateral.

Before action can be maintained against one not a surety, but under primary obligation to pay on his agreement, incorporated in note of himself and another, to pay "on demand" any deficiency after sale of collateral security and application of the proceeds, demand is not necessary.

2. Costs ⊜260(4)—Damages ordered for appeal for delay.

A sum ordered added to the costs as damages; conclusion that appeal is frivolous and taken for delay being unavoidable.

Department 1.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by E. May Lutz against Payne Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

E. E. Kirk and E. O. Holley, both of Los Angeles, for appellant.

A. C. Mouser, of San Diego, J. De La Motte, of Los Angeles, and John W. Rummage, of San Diego, for respondent.

OLNEY, J. This is an appeal upon the judgment roll alone from a judgment against the defendant. The action was upon a promissory note, payable 60 days after date, executed by the defendant and another as joint makers in favor of the plaintiff. The trial court specifically found that the defendant was not a surety. The note was secured by the pledge of certain shares of stock under a pledge agreement incorporated in the note, and which, after providing that the holder of the note might sell the security in case of default and apply the proceeds on the debt, further provided:

"And the undersigned [the defendant] agrees to pay the holder thereof any deficiency upon demand."

Default was made in the payment of the note, and the plaintiff sold the security, applied the proceeds on the debt, leaving a deficiency, and then, without demand upon the defendant, brought the present action to recover the deficiency and obtained judgment for it.

[1, 2] The sole point presented on appeal is that, by virtue of the provision quoted from the pledge agreement, whereby defendant agreed to pay any deficiency after sale "upon demand," a demand was necessary before the plaintiff could maintain an action for such deficiency. But the rule is thoroughly well established that in the case of a primary obligation to pay money on demand the institution of an action for the recovery of the money is the only demand necessary. This is almost a matter of common, as distinguished from legal, knowledge in the case of notes or bills payable on demand. It applies equally, however, to money obligations generally, and this has been explicitly decided in this state, and that in a case where, as here, the obligation was for the deficiency existing after the sale of securities. Halleck v. Moss, 22 Cal, 266. Between this decision and the present case there is no possible distinction. Defendant's counsel cite First National Bank v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154, 21 Ann. Cas. 542, in support of their position. But there the action was upon the obligation of a surety, the decision is expressly put upon the distinction between such an action and one upon a primary obligation, and the general rule in regard to an action of the latter character is recognized. Here, as we have said, there is a direct finding that the defendant was not a surety. We cannot avoid the conclusion that the appeal is frivolous and taken for delay.

Judgment affirmed, and let there be added to the costs against the appellant the sum of $250 as damages for an appeal taken for delay.

We concur: SHAW, J.; LAWLOR, J.

(182 Cal. 616)

DOBBINS v. ECONOMIC GAS CO.
(L. A. 6171.)

(Supreme Court of California. April 7, 1920. On Petition for Rehearing May 6, 1920.)

1. Vendor and purchaser ⟸231(4) — Mortgage outside chain of title not constructive notice.

Where plaintiff conveyed land to a company by a deed which was lost without being recorded, and subsequently quitclaimed to another company, of which the first company was a subsidiary, with the understanding that the title conveyed was to be subject to a mortgage executed by the first company to secure bonds issued in payment for the property, the mortgage, being outside the chain of title, was not constructive notice to subsequent purchasers, though recorded.

2. Mortgages ⟸28 — Vendor and purchaser ⟸228(1)—Mortgage outside chain of title held valid as against parties to subsequent agreement and purchasers with notice.

Where plaintiff conveyed land to a company whose deed was lost without being recorded, and which gave a mortgage thereon to secure bonds, and plaintiff subsequently quitclaimed to another company, with the understanding that the title was to be subject to the mortgage, the understanding was effective as between the parties, and the mortgage, though outside the chain of title, was a valid lien as between the parties and against subsequent purchasers with notice.

3. Lis pendens ⟸22(1)—Purchasers pending suit to foreclose mortgage in which their grantor was party held charged with notice.

Where, in a suit to foreclose a mortgage, defendant's grantor was made a defendant on allegations that it claimed an interest subject and subordinate to the mortgage, and a lis pendens was duly recorded, naming it as one against whom relief was sought, defendant, who purchased pending the suit, was charged with constructive notice of the mortgage, and took subject thereto, though the mortgage was executed by a party whose deed was not recorded, and was therefore outside the chain of title.

4. Mortgages ⟸497(1)—Adjudication as to whether title is subject to mortgage binding when question voluntarily litigated.

If the parties to a foreclosure suit voluntarily litigate the question whether the interest of a defendant is subject to the mortgage, and such question is determined by the decree, such determination is a valid adjudication, notwithstanding the general rule that adverse titles may not be litigated in a foreclosure suit.

5. Mortgages ⟸497(1)—Declaration in foreclosure decree held adjudication that interest of defendant was subject to mortgage.

Where plaintiff conveyed land to the S. company, whose deed was not recorded, and subsequently quitclaimed to the P. company, with the understanding that the title conveyed should be subject to a mortgage executed by the S. company, and in a suit to foreclose the mortgage, the P. company by its answer specifically alleged the execution of the quitclaim deed, and claimed title thereunder, and the court on such issue found specifically the facts regarding the making of the deed and the decree declared the interest of the P. company subject to the mortgage, such declaration was a binding adjudication that such interest was subject to the mortgage.

6. Mortgages ⟸497(1)—Decree to be construed in light of pleadings, findings, and conclusions.

A foreclosure decree must be viewed and construed in the light of the pleading on which it is based and the findings and conclusions of law.

7. Lis pendens ⟸21—Purchaser not bound by judgment on new cause of action subsequently introduced by amendment.

Where a new cause of action is injected into a suit by plaintiff by amendment or other-

wise, a previous purchaser pendente lite from a defendant of the subject-matter of the suit is not bound by the judgment upon such new cause of action, unless made a party.

8. Mortgages ⊂459(1)—Question whether defendant's interest is covered by mortgage properly determinable.

In a suit to foreclose a mortgage, the issue as to whether the interest of a defendant is covered by the lien is properly determinable.

9. Lis pendens ⊂21—Purchaser held bound by decree adjudging that grantor's interest was subject to mortgage.

Where, in a suit to foreclose a mortgage, one of the defendants by amendment of its answer raised the issue as to whether its interest was subject to the mortgage, one purchasing pendente lite prior to such amendment was bound by the decree determining such issue.

10. Lis pendens ⊂21—Purchaser bound by result on issues subsequently raised, if material and proper.

A purchaser pendente lite is bound by the result of the suit, though that result may be based upon issues raised subsequent to his purchase, provided the matter adjudicated be the cause of action subject to which he bought, and the issues be material and proper to that cause of action.

11. Adverse possession ⊂58—Possession insufficient to give title unless adverse.

Possession alone, no matter how exclusive and complete, is not sufficient to create a title by prescription unless adverse.

12. Lis pendens ⊂26(2)—Possession of purchaser pendente lite not adverse during litigation.

The possession of land by one purchasing it pending a suit to foreclose a mortgage from a defendant in the suit is not adverse to the mortgage during the pendency of the litigation.

13. Mortgages ⊂143—Possession of purchaser from mortgagor not adverse to mortgagee.

Though no suit is pending to foreclose the mortgage, the possession of one purchasing from the mortgagor is not adverse to the mortgagee, so that he can secure title by prescription.

14. Gas ⊂8—Mesne profits recoverable without recovery of possession by purchaser at mortgage foreclosure sale when property devoted to public use.

A purchaser of property of a gas company required for public service at a foreclosure sale may recover mesne profits accruing subsequent to the sale, conceding that an owner cannot recover possession of property appropriated to a public use which would be interfered with by giving her possession, and that ordinarily mesne profits cannot be recovered except as an incident of the recovery of possession.

15. Trial ⊂404(1)—Findings construed, and held to require judgment for mesne profits.

In a suit by a purchaser at a foreclosure sale against one purchasing pendente lite, for mesne profits, findings *held* to entitle plaintiff to judgment, notwithstanding findings that defendant had been in the exclusive adverse possession ever since he took possession, and that plaintiff was not the owner of the property, and the absence of any findings connecting the interest of the party from whom defendant purchased with the mortgage or the title of the mortgagee.

16. Trial ⊂404(1)—Findings to be considered by themselves.

The findings must be construed by themselves where the decree and judgment roll in a former suit are not a part of the findings.

17. Trial ⊂404(1)—Finding that foreclosure decree "adjudged" superiority of lien construed.

In a finding that a foreclosure decree adjudged that the lien of the mortgage was prior and superior to the interest of the company under whom defendant claimed, "adjudged" was the equivalent of adjudicated, and meant a judicial determination of that fact, and not a mere declaration.

On Petition for Rehearing.

18. Lis pendens ⊂26(2)—One taking possession under deeds from party could not acquire adverse possession, though such party had no title.

Where the P. company was in possession of land at the time of the filing of a cross-complaint upon which a decree of foreclosure was based, and was made a party defendant by the cross-complaint, and a lis pendens was recorded, naming it as such, and the decree adjudged that its interest was subject to the mortgage, and foreclosed it, and pending the suit it conveyed to H.. who conveyed to defendant, and defendant took actual possession under the deed from H., defendant was a purchaser pendente lite and its possession was not adverse to the mortgagee, though the P. company had no title.

19. Gas ⊂8—Purchaser of property at foreclosure sale entitled to recover for use and occupation of everything sold.

Where property of a gas company devoted to a public use was sold on foreclosure of a mortgage, if improvements had been made which were not covered by the mortgage, the remedy was in the foreclosure proceedings, and, though the inclusion in the decree was erroneous, the purchaser was entitled to recover for the use and occupation of everything sold by the foreclosure decree, in an action for mesne profits.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Caroline W. Dobbins against the Economic Gas Company. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Goodwin & Morgrage and Porter & Sutton, all of Los Angeles, for appellant.

John E. Biby, of Los Angeles, Chickering & Gregory, of San Francisco, Ward Chapman, and L. M. Chapman, Gurney Newlin, and Allen W. Ashburn, all of Los Angeles, for respondent.

OLNEY, J. This is an action to recover the mesne profits of certain real property in the possession of the defendant, a public utility gas company, and used by it as a part of its gas plant. The plaintiff had recovered a judgment foreclosing a mortgage upon the property, to which mortgage the defendant was not a party, and had bought in the property at the foreclosure sale, and claims to be the owner by reason of such foreclosure. The profits sought to be recovered are for the period subsequent to the foreclosure sale. The defendant had judgment, and the plaintiff appeals. The ultimate question in the case is, Did the foreclosure decree affect the defendant's interest?

[1, 2] The plaintiff, Mrs. Dobbins, was the original owner of the property. In April, 1903, she conveyed it to a corporation known as the Los Angeles Suburban Gas Company, which for brevity we will call the Suburban Company. In consideration of this conveyance the Suburban Company gave Mrs. Dobbins $50,000 in par value of its bonds, part of an authorized issue of $300,000 secured by mortgage or trust deed previously executed and recorded, and which in anticipation of the conveyance from Mrs. Dobbins described the property involved here as a part of the property mortgaged. It was this mortgage which was subsequently foreclosed and under the decree foreclosing which Mrs. Dobbins purchased and now claims. The deed by Mrs. Dobbins to the Suburban Company was never recorded and was apparently lost. The result was that the Suburban Company was on the record not connected with the title; the mortgage by it, although recorded, did not come into the record chain of title, and constructive notice of it was not given by its record to subsequent purchasers, and Mrs. Dobbins remained as the record owner of the property free of any incumbrance.

In this state of affairs Mrs. Dobbins, in June, 1906, conveyed the property by quitclaim deed to a company known as the People's Gas Company, which, in turn, conveyed the property to the People's Gas & Coke Company. The latter was really nothing but the former under another name, and for the purposes of discussion the two may be treated as one. The effect of the conveyance by Mrs. Dobbins to the People's Company was, of course, so far as the record is concerned, to put the title in the latter free and clear of any incumbrance, and, in particular, of the mortgage by the Suburban Company. In fact, however, the quitclaim deed was not intended by the parties to put the title in the People's Company free of that mortgage. The Suburban Company was merely a subsidiary of the People's Company, all of its stock practically being owned by the latter, and the latter having taken over the Suburban plant. This was represented to Mrs. Dobbins, together with the fact that her original deed to the Suburban Company had been lost without being recorded, and the quitclaim deed was executed by her upon the understanding that it was to confirm to the People's Company the title conveyed by the lost deed to the Suburban Company. According to this understanding the record title which the People's Company obtained by the quitclaim deed was to be subject to the mortgage securing the bonds taken by Mrs. Dobbins in original payment for the property.

This understanding would, of course, be effective as between the parties. The result was that while the quitclaim deed had the effect of putting the record title in the People's Company free and clear of all incumbrances, yet the mortgage by the Suburban Company was as to the record owner a valid and subsisting lien, although not one of which the record would give any one purchasing from the record owner constructive notice. In other words; the case was one where the record title was subject to what was, in effect, an unrecorded mortgage. It follows that any one subsequently purchasing for value from the People's Company would take free of the mortgage if he purchased in good faith and without notice, but otherwise he would not. The People's Company did sell to one Hayes, and Hayes in turn sold to the defendant. Both purchased for value, and if either purchased without notice the record title acquired by such purchaser was at once freed of the latent equity of what was in effect the unrecorded mortgage by the Suburban Company. The question, therefore, which is determinative of the real merits of the case as between Mrs. Dobbins and the defendant is, Did either the defendant or Hayes purchase without notice, actual or constructive, of her mortgage?

[3] The evidence that both Hayes and the defendant had actual notice of Mrs. Dobbins' claim when they purchased is ample and conclusive. It is unnecessary, however, to state the facts showing such notice, for constructive notice was plainly given them by the record. Prior to the purchase by Hayes suit had actually been begun to foreclose the Suburban mortgage. It was originally begun by one Gallagher, who claimed to own some bonds secured by it. Mrs. Dobbins and the People's Company were both made defendants. Mrs. Dobbins appeared and filed a cross-complaint, seeking for herself as the

owner of $50,000 of bonds to secure the foreclosure of the mortgage. The People's Company was made a party defendant to the cross-complaint, which alleged that the People's Company claimed some interest in the property, but that such interest was subject and subordinate to the mortgage. When Mrs. Dobbins' cross-complaint was filed a lis pendens was duly recorded, naming the People's Company as one against whom relief was sought. It was subsequent to the filing of the cross-complaint and the recording of the lis pendens that Hayes purchased from the People's Company, and the defendant, in turn, from Hayes. Hayes and the defendant were therefore notified of Mrs. Dobbins' complaint and of the nature of the cause of action there set up. At the same time they had notice from the record that the People's Company was the holder of the record title by deed from Mrs. Dobbins. But of necessity Mrs. Dobbins could not be maintaining a suit to subject the interest of the People's Company to foreclosure except upon a claim that for some reason not appearing on the face of the record the unincumbered title which she had apparently conveyed to the People's Company was, in fact, incumbered. In other words, the nature of the suit, taken in connection with the record chain of title, was unmistakable notice to Hayes and the defendant of her claim. It follows at once that if her claim was valid, as it was, they took subject to it, and their interests were subordinate to the mortgage. This being the case, the interest of the defendant was foreclosed by the foreclosure and sale, and Mrs. Dobbins is now the owner of the property.

Our discussion so far has been concerned with the underlying facts which go to the real merits of the matter as between the parties. It is also claimed, however, on behalf of Mrs. Dobbins that the very question as to whether or not the interest of the People's Company was subject to the mortgage was litigated in the foreclosure suit itself, and there determined adversely to that company, and that the defendant here is bound by that adjudication as a purchaser pendente lite. The defendant, on the other hand, claims, first, that there was no such adjudication against the People's Company; and, second, that if there were, it was not binding upon the defendant here.

Mrs. Dobbins' cross-complaint contained the averment as to the People's Company usual as to a defendant in a foreclosure complaint other than a party to the mortgage, viz. that the People's Company claimed some interest in the mortgaged property, but such interest was subject to the lien of the mortgage. The answer of the People's Company admitted that it claimed an interest, but denied that it was so subject. This was the state of the pleadings at the time when Hayes and the defendant purchased. The foreclosure decree subsequently rendered declared the interest of the People's Company to be subject to the mortgage. If this were all, the defendant's claim that there was no adjudication that the interest of the People's Company was subject to the mortgage would have to be sustained. The case would come directly within the rule of Beronio v. Ventura Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118, where it was held that just such a declaration in a foreclosure decree upon just such pleadings was not an adjudication of the fact that the interest of the defendant was subject to the mortgage. This decision has been followed in a number of subsequent cases, and as recently as Hartfield v. Howard, 181 Pac. 385.

The ground upon which the decision in Beronio v. Ventura Company is put should, however, be carefully noted. The case was one where the foreclosure defendant whom it was sought to bind by the foreclosure decree had an adverse and, in fact, superior title to the property. The opinion lays down the established rule, repeatedly followed in this state, that a foreclosure suit cannot properly be turned into a suit to quiet title, and that the question of superiority between a mortgage lien, or more accurately between the title upon which it is a lien, and an adverse independent title cannot properly be litigated in such a suit, with the result that even if a judgment of foreclosure be rendered against a defendant other than the mortgagor, the judgment, unless there is some special adjudication in it, will effect only such interest as the defendant may have which is subject to the mortgage, and not any interest he may have which is not subject. The real question in the case was whether or not the particular foreclosure decree under consideration did contain a special adjudication by reason of the averment of the complaint that the defendant's interest was subject to the mortgage, the denial of this by the answer, and the declaration of the decree in accordance with the averment of the complaint. Upon this point, which was the real point of the case, the court held the averment of the complaint was not one of fact, but of a conclusion of law; that it, therefore, tendered no determinable issue, and its denial in the answer raised no issue, and that it followed that the question of superiority of title had not been involved, and had not been adjudicated. The correctness of this ruling is by no means free from doubt, and it would certainly seem to be directly opposed to Elder v. Spinks, 53 Cal. 293, upon which it relies. But it has too long been the rule in this state to warrant us in now reopening the point decided. But it is not necessary to extend it any further, and in that connection two things are to be noted regarding it.

In the first place, while it holds to the rule, and properly so, that adverse titles may

not be litigated in a foreclosure suit, it does not decide that it is not proper in such a suit to determine the question of whether or not the title claimed by the defendant is in fact adverse. That question is not discussed, and is very different from the question of superiority between adverse titles, which is discussed. Our decisions have repeatedly laid down the rule that a person who claims an adverse interest merely is not a proper party defendant in a foreclosure suit, and, if he is made a party, is entitled to be dismissed therefrom. Croghan v. Minor, 53 Cal. 15; Ord v. Bartlett, 83 Cal. 428, 23 Pac. 705; Houghton v. Allen, 75 Cal. 102, 16 Pac. 532; Cody v. Bean, 93 Cal. 578, 29 Pac. 223. But how is it possible to determine whether he is a proper party and entitled to be dismissed without determining whether his claim is adverse or not? An adverse title, whether it be superior or inferior, cannot be foreclosed because it is not subject to the mortgage. But whether the title claimed be adverse or not so that in the one case it cannot be foreclosed and in the other it can be would certainly seem to be a question directly involved in it. It would seem as if it were one of the proper functions of a foreclosure suit to determine what it is which can be and is foreclosed. In Boggs v. Fowler, 16 Cal. 560, 76 Am. Dec. 561, the opinion by Judge Field, speaking of the function of a foreclosure suit under our law, says:

"Here, what is termed a foreclosure suit is only a proceeding for the legal determination of the existence of the lien, *the ascertainment of its extent*, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and *extent* of that lien the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him." (The italics ours.)

The question whether the title of a defendant is adverse or is subject in the strict sense to the mortgage is surely more properly determinable by pleadings and trial before judgment than subsequently upon proceedings after judgment and sale for a writ of assistance to obtain possession. And yet, if the question is not determinable in one or the other of these ways, but must always be left to a separate action, it means that in every case where the mortgagor has transferred possession it is not possible for the foreclosure purchaser to obtain possession against the objection of the mortgagor's transferee except by the slow process of an independent action. So far as we are aware, none of our decisions goes as far as this, or holds that, when by proper averments of fact the question is presented in a foreclosure suit as to whether or not the interest of a defendant is adverse or is subject in the strict sense to the mortgage, such question is not properly determinable there. In actual practice the question is usually so determined, and the point seems to have been presented and decided in Savings & Trust Co. v. Bear Valley Irr. Co. (C. C.) 112 Fed. 693, 703. In Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 Pac. 1036, the court proceeded in a foreclosure suit to consider and determine (176 Cal. p. 467, 168 Pac. 1036) whether or not the interest of a defendant who was a lessee from the mortgagor was subordinate to the lien, and at the same time refused (176 Cal. p. 475, 168 Pac. 1036) to consider a claim of adverse title by the same defendant. While the distinction is not discussed in the case, it is nevertheless observed.

[4] In the second place, it is expressly stated in Beronio v. Ventura Co. that if the parties voluntarily proceed in the foreclosure suit to litigate the question of title, and such question is determined by the decree, such determination will be a binding adjudication. The statement, perhaps, is dictum, but it is manifestly correct, and Johnston v. S. F. Savings Union, 75 Cal. 134, 140, 16 Pac. 753, 7 Am. St. Rep. 129, is directly in point. Much more would it be true where the question determined was not one of titles, but as to whether the defendant's interest was one not adverse but subject to the mortgage.

[5, 6] Coming back to the case at bar, according to Beronio v. Ventura Company, as we have said, the foreclosure decree here, if it rested upon the pleadings as they stood at the time Hayes and the defendant purchased, would not be an adjudication that the interest of the People's Company was subject to the Suburban mortgage, in spite of the declaration it contains to that effect. But the People's Company did by subsequent amendment to its answer specifically allege the execution of the quitclaim deed by Mrs. Dobbins, and that it transferred the title to it. The effect of this amendment was at once to raise the issue as to the character of the title under which the People's Company claimed, and upon this issue the court found specifically the facts as we have previously stated them in regard to the making of the deed, from which it follows at once that the title of the People's Company was subject to the mortgage. Following such a finding, the conclusions of law of the trial court in the foreclosure decree declare that the interest of the People's Company was subject to the mortgage. The foreclosure decree, with its declaration to the same effect, is based upon the pleading as so amended and upon the findings and conclusions of law. It must be viewed and construed in the light of them and, in fact, with them as a part of it. So viewed and construed, the decree is very different from that in Beronio v. Ventura Company. An issue of fact was presented. It was tried and determined. The foreclosure decree in suitable words declares

the result of that determination. Under these circumstances such declaration was an adjudication binding upon the party defendant, the People's Company, against whom it was made. It was an adjudication of an issue properly presentable in the suit, and so presented. It was also an adjudication within the statement of Beronio v. Ventura Company, and the ruling in Johnston v. S. F. Savings Union, supra, that if the parties voluntarily present and litigate an issue not properly involved in the action, they will yet be bound by the resulting determination.

Passing now to the second point in connection with the foreclosure decree, the question as to whether it is binding upon the defendant here, even if it were binding upon the People's Company from whom the defendant purchased pendente lite, the defendant's position is based upon the fact that at the time the People's Company sold its answer had not been amended so as to raise the issue as to the subserviency of its title to the mortgage. The defendant's contention is that as a purchaser pendente lite it is bound only by the determination of those issues which were presented at the time it bought.

[7-10] It is, of course, the rule that where a new cause of action is injected into a suit by the plaintiff by amendment or otherwise, a previous purchaser pendente lite from a defendant of the subject-matter of the suit is not bound by the judgment upon such new cause of action unless he is made party. The simple reason is that the introduction of the new cause of action is in effect the commencement of a new suit, and, since the purchaser bought prior to its commencement, he is not as to it a purchaser pendente lite. Whether the same rule would apply where, as here, it is not the plaintiff, but the defendant, from whom the purchaser buys, who injects the new cause of action into the litigation we need not inquire. It would be necessary to inquire, if the issue raised by the answer of the People's Company had been one as to superiority of title, had been one whereby the foreclosure suit was as to such issue transformed into a suit to quiet title. But that is not the case. The issue raised by the defendant's amendment was as to the subserviency of its interest to the mortgage, that is, not as to whether it was superior to the title or interest upon which the mortgage was a lien, but as to whether it was covered by that lien, whether it was the estate or a part of the estate mortgaged. This issue, as we have just held, was a proper one in the foreclosure suit, and properly determinable there as a part of the action for the foreclosure of the lien. The amendment did not inject a new cause of action, but merely raised a new issue material to the original cause of action presented by the cross-complaint.

There can be no doubt that under these circumstances the defendant here is bound as a purchaser pendente lite by the determination of that issue, although it was raised by subsequent amendment. It may be that the defendant was not required to anticipate the introduction into the action, even by the party from whom it purchased, of a new cause of action, and would not be bound by the course of such party in so doing. But certainly a purchaser pendente lite is bound by the result of the suit, although that result may be based upon issues raised subsequent to his purchase, provided the matter adjudicated be the cause of action subject to which he bought and the issues be material and proper to that cause of action. This is directly decided in Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858, whose language in fact goes further than is necessary for the purposes of this case. It is said (page 163 of 93 U. S., 23 L. Ed. 858):

"There is another objection to the case of the appellees, which must not be overlooked. They are not subsequent attaching creditors, nor creditors at all; they are purchasers lite pendente. The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. Inlowe's Lessee v. Harvey, 11 Md. 524; Salsbury v. Benton, 7 Lans. [N. Y.] 352; Harrington v. Slade, 19 Barb. S. C. [N. Y.] 162; 1 Story's Eq., § 406. The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of everything else, not coram non judice, the court might see fit to do in the case. The attachment might be discharged, or the judgment might be larger than was then anticipated. They took the chances, and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the res, stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

The general rule in regard to amendments is thus stated in 25 Cyc. at page 1473:

"An amendment to the bill or complaint, after a purchase or the acquisition of other rights pendente lite, which does not alter the cause of action, does not affect the lis pendens, since it relates back to the filing of the original bill. On the other hand, if the cause of action is changed by the amendment, or a new cause added, the lis pendens does not re-

late back, but dates from the filing of the amended complaint."

See, also, Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; Miller & Lux v. Rickey (C. C.) 146 Fed. 574; Norris v. Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Brock v. Pearson, 87 Cal. 581, 588, 25 Pac. 963.

Our conclusion is that the adjudication against the People's Company that its interest was subject to the mortgage is binding upon the defendant here as a purchaser pendente lite. It follows that for this reason also the interest of the defendant was foreclosed by the foreclosure decree and sale, and that Mrs. Dobbins, as the purchaser at the sale, is now the owner of the property.

This conclusion, reached both upon the underlying facts and because of the scope of the foreclosure decree, is determinative of the real merits of the case at least, but there are further points which require discussion. Defendant's counsel, in their brief, take the position that the defendant was not a purchaser pendente lite. In fact, a large part of their argument is based upon this assumption. This position is rather puzzling, since the record is plain that the defendant purchased from Hayes and Hayes from the People's Company, and the People's Company at the time of the purchase was a party defendant in the foreclosure suit, and named as such in Mrs. Dobbins' cross-complaint, and had, in fact, appeared and answered. Furthermore, it was under the conveyance from the People's Company that the defendant received possession, and it had no other muniment of title or right of possession. Just why it is said under these circumstances that the defendant was not a purchaser pendente lite is rather difficult to see.

[11-13] Apparently what is meant is that, although the defendant was a purchaser pendente lite, yet it now has, not that it then had, a title by adverse possession, and that such title is not one purchased pendente lite, and as to it the defendant is not a purchaser pendente lite. This, of course, is true, provided the defendant has a title by adverse possession. The question is, has it such a title. Defendant's counsel maintain stoutly that it has, and the lower court so found, and based its judgment for the defendant upon that finding. The finding of adverse possession, however, is specifically only of a possession commencing with the defendant going into possession. The court also finds specifically that the defendant took possession under the purchase through Hayes from the People's Company, then a party defendant to the foreclosure suit. The salient fact, in other words, as shown by the findings themselves as well as by the evidence, is that the possession which it is now claimed has ripened into a title by prescription was possession acquired under a purchase from a party defendant to a foreclosure suit, against whom a foreclosure decree was subsequently rendered. Now there is no doubt that from the time the defendant took possession of the property in June, 1909, until the commencement of the present action the period of five years required to give it a title by adverse possession had more than elapsed, and that during the whole of the period the defendant was in the exclusive and complete possession of the property, and claimed to be the owner of it, as in fact it was up to the time at least of the foreclosure sale. But possession alone, no matter how exclusive and complete, is not sufficient to create a title by prescription. In order to do that the possession must be adverse. The question here is, Was the defendant's possession adverse to the mortgage whose foreclosure it is now sought to defeat? and this question is hardly discussed in the briefs. Upon this point the fact that the defendant was a purchaser pendente lite and acquired possession as such is most material, and, in fact, decisive. The question may be stated thus: During the pendency of a mortgage foreclosure suit, A. purchases the property from a defendant in the suit who holds it subject to the mortgage, and takes possession under and by virtue of such purchase. Is A.'s possession, so acquired and held, one which is adverse to the mortgage, so that the statute begins to run in favor of the purchaser and against the mortgagee? The answer to the question seems to us evident. If such were the rule no mortgage would be safe. If suit were brought to foreclose it, and the mortgagor then conveyed the property to a third person and gave the latter possession, the mortgage could be completely defeated if only it were possible, as too frequently it would be, to toll the foreclosure suit along until 5 years had elapsed. The truth is that, even if no suit were pending at the time of the purchase and acquisition of possession from the mortgagor, the possession of the purchaser would not be adverse to the mortgagee, so that he could secure title by prescription. His possession is but that of the mortgagor whose successor in interest he is, and is no more adverse to the mortgagee than would be that of the mortgagor. It is, in fact, merely the possession of the mortgagor transferred. Much more is this true where, as here, the purchase is made pendente lite. Then the case comes within the elementary principle that the statute does not run during the pendency of litigation against rights involved in the litigation, and which are subsequently reduced to judgment therein. If it be true, as it plainly is, that the People's Company, if it had remained in possession during the pendency of the foreclosure suit, could not have acquired by such possession a title superior

to the mortgage subject to which it held the property and to the judgment foreclosing the mortgage, the same thing must be true as to the defendant who, as a purchaser pendente lite, merely stands in the shoes of the People's Company. This is not saying that the defendant, if it had an independent and a superior title not subject to the mortgage, might not assert and rely upon it. It is saying only that a superior title cannot be created by possession acquired during the litigation from a party defendant to that litigation. The claim of the defendant here is just that and nothing more.

The case comes exactly within Pratt v. Pratt, 96 U. S. 704, 24 L. Ed. 805. There the statute of Illinois provided a limitation of 7 years on actions for the recovery of real property. The action was ejectment, and both parties claimed from one Speer. The plaintiff had obtained a judgment against Speer in 1857, which was a lien upon the land. In 1863 the land was sold on execution upon the judgment, and in 1865, pursuant to the sale, was deeded by the marshal to the plaintiff. After the recovery of the judgment and its becoming a lien, but long before the sale, Speer sold the land to another, from whom it came by mesne conveyances to the defendant, the possession of the property passing with such conveyances. Within less than 7 years after the plaintiff received the marshal's deed, but more than 7 years after Speer had parted with the property and the defendant had taken possession, the action before the court was brought. The defendant's claim was that the statute had run in his favor. His possession was, as here, of a character sufficient for that purpose, provided the case were one where his possession prior to the making of the marshal's deed could be adverse. It was held, however, that it was not such a case. The court said:

"The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to everybody else. He admits no better right in any one. He is no man's tenant. The right by which he holds possession is superior to the right of all others. He asserts this, and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land—a lien which does not interfere with his possession, which cannot disturb it, but which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term, his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run."

And again:

"If we are wrong in what we have supposed to be the law, it must follow that, in all cases in which the owner of real estate owes money which is a lien on the land in his hands, the statute of limitation begins to run against that lien as soon as he conveys the land with possession to some one else. It can make no difference in the principle asserted whether the lien be created by a judgment or by a mortgage. Nor can it make any difference whether the debt secured by the lien be due when the conveyance is made, or has 10 or 20 years to run before the lien can be enforced against the land. The principle asserted is applicable in all these cases, namely, that from the day of the conveyance, by the debtor, of the land on which the lien of the debt exists to some third person, accompanied by transfer of possession, the possession of the purchaser is adverse to the lienholder, and the limitation of 7 years begins to run. If this be established to be the law, the owner of real estate may borrow money on 10 years' time, to the value of that estate, and give a mortgage on it to secure payment; and by a sale and conveyance of the land to a third person, with delivery of possession a week afterwards, the lien is utterly defeated. For, according to this doctrine, the statute of limitations begins to run against the mortgagee the moment the title and possession are vested in the purchaser, and the bar of the statute becomes perfect against all the world by 7 years' possession; whereas the mortgagee can take no steps to foreclose his mortgage until his money comes due, 3 years later.

"And this doctrine is asserted in the face of the fact that there is a limitation law specially applicable to the enforcement of the judgment lien by sale under execution, and of the mortgage lien by foreclosure."

See, also, Jefferson v. Wendt, 51 Cal. 573; Leonard v. Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

To close up our discussion of this point of a title acquired by the defendant here by adverse possession, we may say that it resolves itself into the very simple rule which can hardly be gainsaid, that the statute of limitations does not run during the pendency of the litigation in favor of a purchaser pendente lite any more than it does in favor of the party from whom he purchases, and that he will not be regarded as holding the property adversely during the litigation. Christy v. Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110; In re Grider, 81 Cal. 571, 22 Pac. 908. The creation of an independent title by adverse possession during the litigation is very different from the assertion of a superior title existing independently of such possession. The defendant here has no such superior independent title, and asserts none. Its only claims are its right derived from the People's Company, which was foreclosed, and its right by possession during the litigation. But such possession could not be adverse, and the general finding of the lower court that the defendant acquired a title by

adverse possession, and that the plaintiff therefore is not the owner, is not only contrary to the evidence, but is contrary to the facts specifically found with regard to the defendant's possession, and is completely negatived by those facts. The general finding is, in truth, but a conclusion of law erroneously drawn from the particular facts found.

[14] The remaining contention of the defendant which requires consideration is that it is a public utility corporation; that the property involved is an integral part of its plant, and required for adequate service to the public; that the plaintiff cannot be given possession without interfering with such service; that, therefore, even though she be the owner of the property, she cannot have possession of it, and that an action for mesne profits will not lie except as an incident of the recovery of possession. It may be admitted that the plaintiff, although she is the owner of the property, cannot have possession of it because it has been appropriated to a public use which would be interfered with by giving her possession. It may also be admitted that ordinarily mesne profits cannot be recovered except as an incident to the recovery of possession. But it does not follow that the owner of real property in the peculiar situation of the plaintiff here may not maintain an action for mesne profits, although she cannot have possession. She would be entitled to possession, and could recover it except for the public interest which intervenes between her and the defendant and prevents her having the full measure of relief to which otherwise she would be entitled. But the public interest should not be permitted to affect the rights of the parties further than the protection of such interest itself requires. So far as may be done without interfering with the public interest, the position of the plaintiff should be that which she would have except for its intervention. Without its presence she would have the right both to possession and to mesne profits. With it present she cannot have possession, but as to mesne profits, the public interest will in no wise be injuriously affected by permitting their recovery. There is no public interest which intervenes as to them.

The case comes within the principle of Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12. There an action was brought for mesne profits, by a plaintiff out of possession. Pending the action the defendant surrendered possession, and thereafter judgment was given against him for mesne profits without any judgment for possession. The absence of such judgment was relied upon on appeal as a ground for reversal. It was held, however, that there was no occasion for a judgment for possession, since the plaintiff already had possession. It follows that if a plaintiff is entitled to mesne profits without a judgment for possession, he may have judgment for the profits alone. The present case is of that character. The plaintiff cannot have a judgment for possession, if the defendant's contention be correct, but for a reason which does not affect her right to the mesne profits. To them she is entitled, and she should therefore be permitted to have judgment for them without a judgment for possession.

[15] The various conclusions we have stated necessitate a reversal of the judgment against the plaintiff. They go further. They show that the plaintiff was plainly entitled to judgment upon the evidence presented at the trial. It remains to consider whether judgment can be entered for her upon the findings. The findings set forth that the plaintiff was the original owner of the property; that she conveyed it to the Suburban Company, which executed its mortgage; that the mortgage was foreclosed upon the plaintiff's cross-complaint; that the People's Company was made a defendant to the cross-complaint and a lis pendens, naming it as a defendant, was recorded by the plaintiff at the time the cross-complaint was filed; that the foreclosure decree "ordered, adjudged, and decreed * * * that said mortgage was a lien prior and superior to any and all rights, title, and claims and interests of any of the defendants in said action on the property described in the judgment [foreclosure decree]; that the property was sold at foreclosure, and bought in by the plaintiff, and the sheriff's deed to her executed; that the defendant was a purchaser pendente lite from the People's Company, who was at the time in possession; that the defendant entered into possession, claiming title only under such purchase; that it has remained in possession ever since; that the property is part of a public utility plant; and that the reasonable value of the use and occupation of the property was $415 a month. These findings are sufficient to require judgment for the plaintiff except, possibly, in two respects.

In the first place, there is, in addition to the findings stated, the finding that the defendant has been in the exclusive adverse possession ever since it took possession, and that the plaintiff is not the owner of the property. This finding we have already discussed at length. If it stood alone it would, of course, be a finding of an ultimate fact which could not be disregarded. But it does not stand alone. With it are findings as to the particular facts with relation to the defendant's possession. These findings are to the effect that while the defendant's possession ever since it took it has been exclusive and complete under a claim of ownership, yet such possession was acquired from one who was at the time a defendant in the foreclosure action, and against whom the foreclosure decree subsequently rendered operated, and was acquired by way of pur-

chase from such defendant and not otherwise. These particular facts so found completely negative the possibility of the defendant's possession being adverse so as to ripen into a title by prescription good against the final decree in the action subject to the result in which the property was purchased and possession acquired. It appears clearly that the general finding that the defendant had been in the exclusive adverse possession of the property for more than 5 years and the plaintiff was not the owner is but a conclusion from the fact that the defendant had for more than 5 years been in the exclusive possession of the property under a claim of ownership. But the fact also found that such possession was acquired under grant from a party to an action then pending with relation to the property affirmatively shows that the conclusion is erroneous. As such it comes within the principle of such cases as Savings & Loan Society v. Burnett, 106 Cal. 514, 538, 39 Pac. 922, Howeth v. Sullenger, 113 Cal. 547, 550, 45 Pac. 841, and McDonald v. Randall, 139 Cal. 246, 253, 72 Pac. 997, and may be disregarded.

In the second place, there is no finding connecting the interest of the People's Company with the Suburban mortgage or the title of the Suburban Company. The finding, on the contrary, is that the People's Company had no right whatever in the property other than that of possession. If the fact as shown by the findings was merely this, it would not appear that the interest of the People's Company to which the defendant succeeded had been foreclosed and purchased by the plaintiff. The case would come within the rule that in the absence of a special adjudication a foreclosure decree operates only upon such interests as are subject to the mortgage, and it would not appear from the findings that the interest of the People's Company was of that character. But the findings go further. They find not merely the foreclosure of the Suburban mortgage, but they find that the foreclosure decree "ordered, adjudged and decreed" that the Suburban mortgage was a lien prior and superior to the interest of the People's Company. In other words, the findings show that the interest of the People's Company was actually foreclosed upon, so that in this respect as well the findings are sufficient to justify and to require judgment for the plaintiff.

[16, 17] It may perhaps be objected that while the foreclosure decree itself when considered, as we have heretofore considered it, in connection with the judgment roll of which it is a part, shows that the interest of the People's Company was foreclosed upon, yet neither the decree nor the balance of the judgment roll are a part of the findings here; that the findings here must be construed by themselves, and that so construed they amount on this point only to a finding that the foreclosure decree contained the usual declaration as to defendants not parties to the mortgage, a declaration which, under Beronio v. Ventura Company, would not, in the absence of anything more, be an adjudication that the interest of the People's Company was foreclosed. It is true that neither the foreclosure decree nor the judgment roll is a part of the findings, and that the findings must be construed by themselves. But even so, the construction that they find merely that the foreclosure decree contained a possibly inoperative declaration of the character mentioned cannot be sustained. The language of the findings is that the foreclosure decree "adjudged" that the lien of the mortgage was prior and superior to the interest of the People's Company. Adjudged is the equivalent of adjudicated, and means a judicial determination, and not a mere declaration which may be operative or not.

Judgment reversed, with directions to the trial court to enter judgment for the plaintiff in accordance with the findings as to the value of the use and occupation of the property.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.

On Petition for Rehearing.

PER CURIAM. [18] In denying the petition of the defendant for a rehearing we deem it well to discuss two points which are raised by the petition. The first is that the trial court found that the People's Gas & Coke Company never had any title to the mortgaged property, and from this it is argued that the defendant by its purchase through Hayes from the Gas & Coke Company acquired no title, and was therefore not a purchaser pendente lite, and not subject to the rule that the statute of limitations will not run in favor of such a purchaser in possession during the pendency of the litigation. It is true that the trial court found that the People's Gas & Coke Company never had any title to the property, the finding being based upon the supposed invalidity of the deed whereby the Gas & Coke Company purported to acquire the interest of the People's Gas Company. The right of the defendant to question the validity of this deed is open to serious question, but the point need not be determined, for the finding is wholly immaterial in any case. It makes no difference how invalid the title of the People's Gas & Coke Company was. The facts are, and the trial court so finds: That that company was in possession of the property at the time of the filing in the foreclosure suit of the cross-complaint of Mrs. Dobbins upon which the decree of foreclosure was subsequently based; that the Gas & Coke Company was made a party defendant by the cross-complaint, and a lis pen-

dens was recorded, naming it as such; that the foreclosure decree adjudged that its interest, whatever it might be, was subject to the mortgage so that it was foreclosed upon; that pending the foreclosure suit instruments of conveyance purporting to convey the property from the Gas & Coke Company to Hayes were executed; that Hayes, in turn, executed a deed purporting to convey the property to the defendant; and that the defendant "entered into the actual possession of said property, and each and every part thereof, under said deed executed by said Hayes, as aforesaid, claiming and asserting title to said property by reason of said deed to it from said Hayes and under no other written instrument."

In other words, as found by the court, the title or claim of title of the Gas & Coke Company, however invalid it might be, was the only right or title which the defendant had when it took possession, and it took possession as the holder of such title and not otherwise. Such title was plainly acquired by the defendant as a purchaser pendente lite subject to the determination of the foreclosure suit, and of necessity the possession which accompanied such title and which was taken and held only by virtue of it was likewise held by the defendant as a purchaser pendent lite, and was subject to the determination of the foreclosure suit, and could not ripen as against the result in that suit into a title by adverse possession.

Defendant's counsel in support of their position quote from Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878, as follows, the italics, however, being ours:

"Persons not parties to an action of ejectment cannot be put out of possession of the premises involved, *unless they entered under the defendant*, either in good faith or collusively"

—and from Graham's Heirs v. Kitchen, 118 Ky. 18, 80 S. W. 464, as follows, the italics again being ours:

"It is thought, though, that there is something in the doctrine that an entry by a stranger to the suit pendente lite affects him by the judgment as if he were a party to the record, as controlling the case before us. This doctrine can have no application here. It applies only *when the stranger enters under some person who is a party to the suit. In that event he is bound by the record and decree by privity of his relation to him from whom he took title.* He is bound in law to take notice of the records affecting his vendor's title, but he is not bound to take notice of, nor is he bound by, a suit over the property between *strangers to his chain of title and right of entry.*"

We do not question the correctness of these statements, but the present case comes directly within the rule implied in the first quotation and expressly stated in the second that—

"When the stranger enters under some person who is a party to the suit, * * * he is bound by the record and decree, by privity of his relation to him from whom he took title."

The People's Gas & Coke Company was a party defendant to the foreclosure suit. The defendant here entered under that company while it was such a party and not otherwise. That company was not a stranger either to the defendant's chain of title or to its right of entry. The defendant's possession was acquired and held solely by virtue of the privity of relation between it and the People's Company, and such possession cannot be considered as any more adverse to the plaintiff in the foreclosure suit than could the possession of the People's Company, if it had remained in possession. The privity of relation between the defendant and its grantor, the People's Gas & Coke Company, does not depend in any way upon the grantor having a valid title, and is not affected in the slightest by the fact that it had no valid title.

Defendant's counsel also urge that upon the point under discussion the case is governed by Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120. But the facts there, while in some aspects resembling those here, really presented a very different situation. The facts were that the owner of certain land mortgaged it. Suit to foreclose the mortgage was brought, and after decree of foreclosure and sale the interest of the mortgagor was attached in an action against him by a third person. The period of redemption from the foreclosure sale then expired without redemption, as a result of which the foreclosure purchaser became the absolute owner of the property free and clear of the attachment lien, which was, in effect, destroyed. In this situation the mortgagor deeded the property to one Thornton who took possession and thereafter maintained it. Thornton's possession so taken after the expiration of the period of redemption was, of course, hostile and adverse to the foreclosure purchaser, the real owner of the property, and, if allowed by the latter to continue, would ripen into a title by prescription against him. It was allowed so to continue, and thereby Thornton became the real owner of the property. Years later judgment was obtained in the attachment action against the original mortgagor, execution was issued upon it, and the property sold thereunder. The execution purchaser then brought ejectment against Thornton, and upon the foregoing facts the court held that he could not recover. This decision was plainly correct. The plaintiff, the execution purchaser, had no right in the property whatever. In order to have any right he had to depend upon the attachment lien. But the attachment lien had been wiped out by the

foreclosure sale. On the other hand, the defendant Thornton was the real owner of the property. He had acquired a complete title by prescription against the true owner, the foreclosure purchaser. Such title was a wholly independent title so far as the execution purchaser was concerned, and was not acquired by possession hostile to him, but hostile to the foreclosure purchaser whose right was superior to the attachment lien, and therefore to the execution purchaser. The case, in reality, is but one coming within the general rule that a person entering into possession under a party to pending litigation may yet assert an independent title against the result of that litigation. It does not contravene the very necessary rule, applicable in the present case, that the possession of such a person pending the litigation may not be considered as hostile so as to defeat the litigation.

[19] The second point we desire to discuss is the plea that instead of directing judgment for the plaintiff the cause, at most, should be sent back for a new trial. This plea is made on the ground that the defendant has added very substantial improvements to the property while it has been in possession under a claim of right; that the property, the value of whose use and occupation is found by the court, includes these improvements; that the defendant has the right to remove such of the improvements made by it as can be removed without injury to the realty, and should not be held liable for the value of the use and occupation of what may be so removed; and that a new trial is necessary to determine what may be so removed, and the value of the use and occupation of the property after such removal. The answer to this is that the plaintiff is entitled to recover the value of the use and occupation of whatever was sold by the foreclosure decree, and that the property, the value of whose use and occupation is found by the court, is the same as that which is found to have been sold by the foreclosure decree. That the property was improved by the defendant is now immaterial. If such improvements were included in the foreclosure decree and should not have been, the defendant's remedy was in the foreclosure proceedings. If they were not included in the foreclosure decree, the findings show that they were not included in the property, the value of whose use and occupation is found, and for the value of whose use and occupation, as found, we have directed judgment for the plaintiff.

There are other points discussed in the petition but they are all determined by what has been said in the original opinion, and we see no reason for departing from the conclusions there stated.

Rehearing denied.

182 Cal. 649

LOWE v. LOS ANGELES SUBURBAN GAS CO. et al. (L. A. 4840.)

(Supreme Court of California. April 7, 1920.)

1. Gas ⊂⊃8—Writ of assistance not granted as to property of gas company necessary for public service.

A writ of assistance, applied for by the purchaser at foreclosure sale of property of a gas company, was properly denied as to property forming part of its distributing system necessary for service to the public, where the purchaser had no franchise to engage in the gas business.

2. Gas ⊂⊃8 — Writ of assistance improperly granted for recovery of land on which gas company had generating plant.

A writ of assistance, applied for by a purchaser at foreclosure sale of the property of a gas company, was improperly granted as to land on which the company had a generating plant, though the normal supply of the company was natural gas, and the plant was not usually operated, but was held in readiness as an auxiliary plant in case the supply of natural gas should fail or be interrupted.

In Bank.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by L. P. Lowe, substituted for William G. Gallagher, against the Los Angeles Suburban Gas Company and others. From an order granting the application of Caroline W. Dobbins for a writ of assistance, the Economic Gas Company appeals. Reversed.

Oscar A. Trippet and John E. Biby, both of Los Angeles, and Warren Gregory and Chickering & Gregory, all of San Francisco, for appellant.

Porter & Sutton, W. N. Goodwin, H. M. Barstow, Goodwin & Morgrage, Schweitzer & Hutton, and Lynn Helm, all of Los Angeles, and W. H. Chickering, of San Francisco, for respondent.

OLNEY, J. This is a companion case to Dobbins v. Economic Gas Co., 189 Pac. 1073, this day decided. The proceedings here involved are proceedings for a writ of assistance under the forclosure decree and sale discussed at length in that case. For the purposes of this appeal it is sufficient to say that the respondent, Mrs. Dobbins, was the purchaser of certain property sold upon the foreclosure of a mortgage; that no redemption was made, and after the time for redemption had expired Mrs. Dobbins applied for a writ of assistance against the Economic Gas Company to put her in possession of the property purchased; that the application was granted as to part of the property and denied as to part; and from the order granting the application in part the Economic Gas Company appeals.

Many of the questions discussed are the same as those presented in the companion case and there decided. There is but one point which need be considered here. The Economic Gas Company is a public utility company engaged in the business of supplying gas in the city of Los Angeles. The property foreclosed upon and sold to Mrs. Dobbins was a part of its plant. The gas supplied by the company is natural gas, and a portion of the property sold was part of the company's distributing pipe-line system. As to this the writ of assistance was denied. The remainder of the property consisted of certain real estate upon which there was a gas generating plant connected with the distributing system. Since the normal supply of the company was natural gas, this plant was not usually operated, and in fact had not been operated for a year at the time the application for a writ of assistance was heard. It had, however, not been dismantled or discarded, but was held in readiness as an auxiliary or stand-by plant in case the supply of natural gas should fail or be interrupted. As to this property the writ of assistance was granted, and it is the propriety of this action that is in question on this appeal.

[1] The purchaser, Mrs. Dobbins, has no franchise to engage in the gas business, and would be required to have such franchise in order to do so. The writ of assistance was denied as to the property forming part of the gas company's distributing system upon the ground that the company could not be dispossessed of a part of its plant necessary for service to the public in favor of one who could not in turn render that same service. The propriety of this and the general rule upon which the refusal is based are not contested by the respondent, and, in fact, could not well be. The rule is well settled. Gue v. Canal Co., 24 How. 257, 16 L. Ed. 635; Connor v. Tenn., etc., Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; Visalia Gas, etc., Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105.

[2] The order granting the writ as to the real property and the generating plant is attempted to be justified only upon the ground that this portion of the gas company's plant is not necessary for the continuance of its service. This is true in the sense that the service would probably go on without immediate interruption even if the generating plant were disconnected. But the continued maintenance of it as a stand-by plant ready in case of interruption of the normal supply is a proper safeguard, and a necessary one if the public interest is to be fully protected. We have no doubt, for example, that if the company itself should desire to disconnect and dismantle the plant the Railroad Commission would have ample authority to, and would, forbid it, unless some other plant performing a similar function were substituted for it. The public has a direct and immediate interest in its continued maintenance, and while such interest is not as great as it would be if it were the usual source of supply, the difference is but one of degree. The direct and immediate public interest is there, and is substantial, and, this being the case, the possession of the plant and the right to operate it cannot be taken from the company and possession given to one who has not the right to use it for the public.

Order reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.

CALIFORNIA REPORTER

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182 Cal. 752

In re PHELPS' ESTATE. CHIPMAN et al. v. SWASEY et al. SCHROEDER v. SAME. (S. F. 9177, 9210.)

(Supreme Court of California. May 13, 1920. Rehearing Denied June 10, 1920.)

1. Wills ⊜440—Construed according to testator's intent as found in language.

A will must be given effect in accordance with testator's intention as found from the language of the will, where it is clear, and, if it is ambiguous, from the language aided by such extrinsic facts as may be admissible.

2. Wills ⊜448—To be given an interpretation which makes it operative.

A will must be given an interpretation which will make it operative, rather than one which will render it inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy.

3. Conversion ⊜15(1)—Land, directed to be converted into money, deemed personal property from testator's death.

Where will directs that testator's realty be converted into money and directs how proceeds are to be disposed of, the property must be deemed personal property from the time of testator's death under Civ. Code, § 1338.

4. Perpetuities ⊜6(11)—Devise to trustees with directions to sell held not unlawfully to suspend power of alienation.

A devise to trustees, with directions to sell for purpose of converting the estate into money to be applied in carrying out further trusts created in the proceeds and with power to sell immediately, or at a future date with discretion to sell in the meantime, does not unlawfully suspend the power of alienation under Civ. Code, §§ 715, 716, 749; there being persons in being who can convey absolutely.

5. Perpetuities ⊜6(10) — Devise creating trust for payment of specific and residuary legacies held not to suspend power of alienation.

Devise directing trustees to sell land to create fund for payment of specific legacies or residue to specified persons *held* not to unlawfully suspend the power of alienation, the right to the legacies both specific and residuary vesting immediately upon death of testatrix and being subject at any time thereafter to alienation by legatees.

6. Perpetuities ⊜9(1)—Will creating trust in fund to be accumulated held not to suspend power of alienation.

Will providing for accumulation by trustees of certain fund by sale of testator's land, and giving certain person a specified proportion of the income during her life, after accumulation, with the direction that, "upon death of" such person either before or after accumulation, such proportion of the fund should be paid to her children then living, did not unlawfully suspend power of alienation in violation of Civ. Code, §§ 715, 716; the children's interest being vested at time of such person's death and being thereafter subject to alienation, in view of sections 694, 695, 1039, and 1044.

7. Wills ⊜447—Construction causing gifts to vest favored.

In a case of ambiguity or inconsistency, the law favors a construction that will cause the gifts to vest, if the opposite construction will render it void, under Civil Code, §§ 1317, 1326.

8. Perpetuities ⊜6(1)—Question as to separate trusts in certain fund to be considered with reference to each share separately.

Where the several trusts created by will in fund to be accumulated are separable, the question of whether the power of alienation is suspended is to be considered with reference to each share separately.

9. Perpetuities ⊜9(7)—Invalidity of one trust created by will held not to affect validity of another trust.

Where will directed trustees to sell property, accumulate certain fund out of proceeds, and pay specified proportion of income therefrom to certain persons with remainder to her children upon her death either before or after accumulation of fund, the validity of such trust was not affected because of an invalid suspension of power of alienation of trust providing for payment of annuity to such person pending accumulation of such fund, in which such person's children had no vested interest owing to interest therein of other annuitants.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Josephine A. Phelps, deceased. From order on petition for distribution holding trust to be void and that deceased died intestate as to residue, W. F. Chipman and another, and Eugenie H. Schroeder separately appeal. Reversed, with directions.

See, also, 179 Cal. 816, 178 Pac. 849.

W. C. Sharpstein, Emilio Lastreto, and Walter H. Linforth, all of San Francisco, for appellants.

John L. McNab, Byron Coleman, and Henry L. Corson, all of San Francisco, for respondents.

SHAW, J. The fifth clause of the will of the testatrix devised the residue of her property, consisting wholly of real estate and embracing nearly the entire estate, to the executors as trustees in trust for certain purposes specified therein. Upon a former appeal in the matter of this estate this court held that the devise in trust was to be performed by the executors in their capacity as trustees and not in the course of their administration of the estate as executors. Estate of Phelps, 178 Pac. 846. As a consequence, the performance of the trust could not effectually begin until after the distribution of the estate. The present appeals result from the order of the court made upon a petition for such distribution. The court below held

that the trust was void and that the decedent died intestate as to the residue, and thereupon distributed the estate to her legal heirs. From this order the persons named as trustees appeal in case numbered 9177, and Eugenie H. Schroeder, a sister of decedent and a beneficiary of the trust, appeals separately upon the record presented in case numbered 9210.

The general plan of the trust is that the trustees shall sell the property devised to them and pay the proceeds to certain beneficiaries. The first sales are to be applied to create a fund of $240,000, the income of which is to be paid to beneficiaries named, during their lives, and, upon death, to other persons designated. Out of the remainder is to be paid certain sums to designated beneficiaries in the order named, amounting in all to $280,600. Any of the fund remaining after the payment of these sums was to be paid to two sisters and a nephew of the testatrix.

The respondents' claim is that the will creates an unlawful restraint of alienation, a restraint forbidden by sections 715 and 716 of the Civil Code. Section 715 forbids the suspension of the absolute power of alienation by any limitation or condition, for a period longer than the continuation of the lives of persons in being at the creation of the limitation or condition. Section 716 provides that, if any future interest created operates to suspend the power of alienation as provided in section 715, it is void in its creation, and that such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The date of the death of the testatrix is deemed to be the time of the creation of the limitation upon alienation, if any was created. Civ. Code, § 749. The testatrix died in 1916, so the amendment of 1917 (St. 1917, p. 699) to section 715 does not apply. We have stated its effect as it stood before that amendment.

[1, 2] In considering the effect of the will it is necessary to bear in mind certain well-established rules of construction. The will must be given effect in accordance with the intention of the testator, as found from the language of the will, where it is clear, and, if it is ambiguous, from the language of the will aided by such extrinsic facts as may be admissible for that purpose. A will must be given an interpretation which will make it operative, rather than one which will render it inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy. In order to explain the questions presented, it is necessary to set forth at some length the provisions of the trust clause of the will.

The trust clause first directed that the trustees should "lease until sold as hereinafter provided all of my real estate upon such terms as to them may seem best, and until the accumulation of the fund hereinafter provided." The rentals and the income from all other sources were to be used to pay annuities, monthly, as follows: To Mrs. Lord and Mrs. Schroeder, her sisters, each the sum of $300; to Edward T. McLean, a brother, and his wife, jointly, $100; to her sister, Mrs. Swasey, and her brother Alfred, each $100. These annuities were to be continued only until the $240,000 fund should be accumulated from the proceeds of sales. With regard to this accumulation the clause then provides as follows:

"I direct my executors and trustees from time to time as sales of my estate may in their judgment be profitably made, to sell sufficient estate to yield a fund of two hundred and forty thousand dollars, and pending the accumulation of said fund, I direct my said executors and trustees to invest and keep invested such sums as may be derived from such sales, and to use the income in the payment of the above annuities. As soon as a fund of two hundred and forty thousand dollars has been accumulated, the same shall be invested and kept invested, and out of the net income derived therefrom there shall be paid to said annuitants monthly during their respective lives, in lieu of the annuities above provided, portions of said income as follows:

"(1) To my sister Virginia A. Lord three-eighths thereof. (2) To my sister Eugenie H. Schroeder three-eighths thereof. (3) To my brother Edward T. McLean and to his wife Mattie McLean jointly and to the survivor of them one-twelfth thereof. (4) To my sister Amanda A. Swasey one-twelfth thereof. (5) To my brother Alfred A. McLean one-twelfth thereof.

"In the event that any of my said sisters and brothers shall not be living at the time that said fund has been accumulated, or if then living shall afterward die, I direct my executors and trustees to pay out of said fund as follows."

It then directed that upon the death of Mrs. Lord three-eighths of the fund, or $90,000, should be paid to her heirs, and that upon the death of Mrs. Schroeder a like amount should be paid to her heirs. Upon the death of the survivor of Edward T. and Mattie McLean, $20,000 was to go in equal shares to the children then living, of said persons. Upon the death of Mrs. Swasey $20,000 was to go to the children of said sister then living. Upon the death of Alfred A. McLean, $20,000 was to go as follows: Five thousand dollars to Minnie McLean, his wife, if she were living, otherwise to the children of said Alfred A. McLean and his wife, then living, and $15,000 in equal shares to said children then living.

With respect to the excess above $240,000 the clause provided:

"From time to time as sales of my estate may in the judgment of my executors and trustees be profitably made, I direct my executors

and trustees to convert my estate into cash, and after devoting sufficient of the proceeds thereof to the purposes specified in paragraph A of this article, to pay in the order named to the persons hereinafter named or to their heirs, in case of their death, except where otherwise provided, the sums set opposite their respective names."

Then follows a list of the beneficiaries and the amounts of the gifts amounting to the sum of $280,600, above mentioned. With respect to the remainder the provision is as follows:

"The remainder of my estate, exclusive of that described in the sixth and seventh articles hereof, shall be divided into three equal parts. One part thereof shall be paid to my sister Virginia A. Lord, if living, or to her heirs if dead; one part thereof to my sister Eugenie H. Schroeder, if living, or to her heirs if dead, and one part thereof to my nephew W. F. Chipman, if living, or to his heirs if dead."

The final paragraph of the trust clause is as follows:

"Although it is my intention to have all of my estate, with the exceptions already stated, converted into cash, I desire that my executors and trustees shall make sales with the sole object that my two sisters and my nephew above mentioned shall receive substantial sums out of the remainder of my estate. My estate at present valuations is ample for that purpose, and I do not wish it sacrificed to satisfy the importunities of those who, while dear to me, are not the first in my affections."

The part of the fifth clause relating to the annuities and the $240,000 fund is designated therein by the letter "A." The succeeding part is designated by the letter "B."

The fifth clause of the will creates five separate and distinct trusts: (1) The trust to convert the entire estate into money. (2) The provisional trust for the payment of the temporary annuities to the brothers and sisters until such time as the fund of $240,000 shall have been accumulated. (3) The trust in the fund consisting of the first $240,000 received from sales of the property, of which the income is to be divided between the brothers and sisters during their respective lives and upon their deaths, respectively, the remainder is to be given absolutely, in the same proportions, to their respective heirs or children. (4) The trust to pay the specific legacies amounting to $280,600. (5) The trust in the ultimate residue, if any, of the proceeds, which is to go to Mrs. Lord, Mrs. Schroeder, and W. F. Chipman. We will defer the discussion of the trust for the payment of the annuities until after our consideration of the other four trusts.

[3] The direction at the beginning of part B of the fifth clause applies to the whole of the trust property and is a direction for its conversion into money and the application of the proceeds to the three main objects of the testatrix, namely, the disposition of the $240,000 fund, the payment of the specific legacies, and the payment of any residue to the residuary legatees. It includes and provides for the sales to accumulate the first fund as well as the other funds necessary to carry out the desires of the testatrix, as expressed in the succeeding provisions. In such a case the "property and all its proceeds must be deemed personal property from the time of the testator's death." Civ. Code, § 1338.

[4] A devise to trustees, with directions to sell for the purpose of converting the estate into money to be applied in carrying out further trusts created in the proceeds and with power to sell immediately, does not occasion an unlawful suspension of the power of alienation, and "this is equally true where a future date is fixed for the exercise of the power if the donees are permitted to sell in the meantime in their discretion." Chaplin on Suspension, § 287. This was said by the learned author in discussing the effect of "powers in trust" authorized by the New York law on the subject. These provisions, in part at least, were originally carried into our Civil Code as section 860 and as sections 878 to 940, and they were all repealed in 1874. But the rule above stated does not depend on statutory provisions allowing the creation of "powers in trust to convey" and the like, but is founded on the fact stated by the author in the same section that, by the very terms of such a power, "there are persons in being who can convey absolutely." The rule is well settled in New York. Stewart v. Hamilton, 37 Hun, 19; Roberts v. Corning, 89 N. Y. 236; Van Veghten v. Van Veghten, 8 Paige, Ch. 104, 122; Underwood v. Curtiss, 52 Hun, 613, 5 N. Y. Supp. 478. In this state the same rule prevails. Estate of Heberle, 155 Cal. 723, 102 Pac. 735. In Stewart v. Hamilton the trustees were given power to sell, with the proviso:

"I enjoin my executors not to sell any of the real estate under three years, unless sold to advantage; sold on time to advantage."

It was held that, since the power to sell could be exercised at any time and was entirely in the discretion of the trustees, there was no unlawful suspension of the power of alienation. A similar cautionary injunction was given in Estate of Heberle, supra, and the conclusion was the same. See, also, Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724, and note. It is therefore clear that the terms of the directions for the sale of the property are valid and that they do not transgress the sections of the Code on the subject of suspension of the power of alienation.

[5] Concerning the fourth and fifth trusts above enumerated, those relating to the specific legacies and the ultimate residue after payment thereof, little need be said. Neither

the payment of the specific legacies nor of the ultimate residue is dependent upon any event except the making of sales for sums sufficient to realize the necessary amount of money. The right to the legacies, both specific and residuary, vested immediately upon the death of the testatrix and were subject to alienation by the legatees at any time thereafter. They are not different in that respect from any other legacy that is dependent upon the amount of the estate from which they are to come. The terms of the will regarding them do not suspend the power of alienation.

[6] We are also of the opinion that the provisions of part A relating to the third trust do not unlawfully suspend the power. To illustrate this, the share of Mrs. Swasey and her children in the fund may be considered alone. The testatrix died on December 5, 1916. Mrs. Swasey died on December 7, 1918. The $240,000 fund is not yet accumulated. By this part of the trust clause she was to have, during her life, one-twelfth of the income to be derived from said fund after it was accumulated. The direction as to the remainder in said one-twelfth is that if she should die prior to the accumulation, or if then living should afterwards die, then, upon her death, the trustees, "out of said fund," should pay one-twelfth thereof to her children "who are then living," meaning those of her children who should be living at her death. The twelfth was to be paid to them out of the fund to be accumulated. There is no express direction that they should have anything until after the accumulation was complete. If their interest in said shares does not vest until the fund is accumulated and in the meantime they cannot alienate it absolutely, there would then be a suspension of the power of alienation of that share for a period beyond her life, and this is forbidden by section 715. But their interest vested upon her death.

"A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." Civ. Code § 694.

"A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Civ. Code, § 695.

The persons who were to receive the share upon her death became fixed upon that event. They consisted of her children then living. The event upon which they were to take was the accumulation of the fund. As an event, this was certain to take place, but the time of its occurrence remains uncertain. The uncertainty of the time of the occurrence of an event, however, does not make an interest contingent; consequently, their interest is not contingent under section 695, but is vested as provided in section 694.

[7] This is also indicated by the language of the gift of the remainder to the children, in connection with the context. The payment to them, it is true, is to be made "out of the fund," and it might be contended that this indicates an intent that no title to the remainder was to vest until the fund should be on hand. But the terms of the gift also declare that the payment is to be made "upon the death of my sister Amanda A. Swasey," and the provision for the payment of the income from the fund states that the respective shares thereof are to be paid to the recipients named "during their respective lives." These phrases indicate very strongly an intent that the remainder in the respective shares were to vest in the children at the death of their respective parents. In a case of ambiguity or inconsistency the law favors a construction that will cause the gifts to vest, if the opposite construction will render it void. Chaplin on Suspension, §§ 178, 223, 515; Gray on Perpetuities, § 633; Civil Code, §§ 1317, 1326. We think these phrases when taken together show that the testatrix intended the respective sets of children to take a vested interest in the remainder immediately upon the death of the parent.

The effect of this part of the clause is that these children stand in the same position as the persons who are to take the specific legacies and the ultimate residue. They do not receive the interest until sufficient property is sold to accumulate the fund but their interest therein is now a vested interest and may be alienated as in the case of any other property. Civ. Code, §§ 1039, 1044. The enjoyment thereof is, of course, postponed until the fund is accumulated; but the postponement of the time of enjoyment of an interest does not suspend the power of alienation thereof, where no other person has in the meantime any interest in the property. Gray on Perpetuities, § 120; Chaplin on Suspension, § 394. The same conditions will arise upon the death of any of the other beneficiaries of the income of this fund, should they die prior to the accumulation. If they die subsequent thereto, the persons to take become fixed at that time and the power of alienation immediately arises at the end of the period allowed by law; that is, the termination of the life of a person in being at the death of the testatrix. Taking this part of the trust clause alone without qualification from the preceding provisions concerning annuities, it is clear that there is no unlawful suspension of the power of alienation.

[8] It is to be observed that the several trusts in the $240,000 fund are separable, and the question whether the power of alienation is suspended is to be considered with refer-

ence to each share separately. Gray on Perpetuities, §§ 389, 391.

[9] The remaining question is whether or not the provisions disposing of the remainders of the $240,000 fund are affected by the preceding directions for the payment of annuities to the brothers and sisters pending the accumulation of the fund. The preceding direction is that the entire net income of the estate, from whatever source accruing, including interest received on invested proceeds prior to the complete accumulation of the fund, is to be devoted to the payment of these annuities, amounting in all to $900 a month, and that, should the income of any month be insufficient to pay them in full, the annuities to Mrs. Lord and Mrs. Schroeder should be paid in full and the balance prorated among the others, but that, if afterwards the income became more than sufficient, those who had not received the full amount were to have the deficit made up to them out of the surplus. It would seem to follow, therefore, that during the period preceding the accumulation of the fund the other annuitants have an interest in the share of Mrs. Swasey's children, which, under the rules above stated, would prevent the vesting of said children's interest upon the death of their mother. The net income from the entire estate is by these provisions, in effect, sequestered for application to the payment of annuities to the survivors. Having the effect to prevent the vesting of the interests in the remainders, it would involve the suspension of the power of alienation of that share for the period between the death of Mrs. Swasey and the final accumulation of the fund. The two trusts are to that extent inconsistent. It is a typical case for the application of the rule stated in Nellis v. Rickard, 133 Cal. 622, 66 Pac. 32, 85 Am. St. Rep. 227, to the effect that where there are "several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal or invalid trusts." It is an application of rule stated in section 1317 of the Civil Code that where the intention of the testator cannot have effect to its full extent it must have effect as far as possible. The rule is also stated as follows:

"Where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator." Estate of Pichoir, 139 Cal. 685, 73 Pac. 606, quoting from Estate of Fair, 136 Cal. 81, 68 Pac. 306.

See, also, Sacramento Bank v. Montgomery, 146 Cal. 747, 81 Pac. 138.

A perusal of the trust clause shows that the preliminary portion providing for the annuities to the brothers and sisters temporarily until the accumulation of the fund was but a minor part of the main scheme of the testatrix. It is temporary in character, in the nature of a family allowance. It was intended merely to provide an income for them during the period of the settlement of the trust. The principal parts of the plan were to provide the fund of $240,000, to divide the income thereof among the brothers and sisters during their respective lives, and give the remainder to their children or heirs as specified; to pay the specific legacies mentioned in the succeeding clause and to the residuary legatees the ultimate residue. The preliminary scheme is not essential to the main plan, nor so interwoven with it that the two must stand or fall together. In such a case the part of the will which conflicts with the main scheme must give way so far as may be necessary to carry out the main scheme. The result is that the interest of the children of Mrs. Swasey in the sum of $20,000 must be deemed to have vested from her death, that they will be entitled to receive interest on that sum from that time until its final payment, and that the annuities to the surviving brothers and sisters must be paid out of the remaining part of the income after providing for interest on the sum due to the children of Mrs. Swasey. Similar results will follow upon the death of any other of the brothers and sisters prior to the accumulation of the fund.

Our conclusion is that the trusts created by the will are valid and enforceable, except as above stated; that the invalid part does not destroy the devise of the residue to the trustees; and that the court below should have made distribution thereof to said trustees. The trustees will have power after such distribution to make any adjustment rendered necessary to make up to the children of Mrs. Swasey, or to the children or heirs of any other brother or sister who may die before the accumulation of the fund, the amount of interest that may accrue upon their respective vested interests in the fund. The views we have expressed will be sufficient to guide them on this point in the administration of the trust. There is no disputed question of fact involved in the case. More than four years have passed since the death of the testatrix, and further delay is not necessary. It is a proper case for this court to exercise its power to direct the action of the court below.

The order of distribution is reversed, and it is ordered by this court that upon the going down of the remittitur herein the court below shall forthwith enter an order dis-

tributing to the several specific devisees and legatees the specific property devised and bequeathed to them by the will, and distributing the entire residue to the trustees named in the will to be held by them upon the trusts in said will declared.

We concur: LAWLOR, J.; OLNEY, J.

182 Cal. 728

PEOPLE v. WOLFF. (Cr. 2284.)

(Supreme Court of California. May 12, 1920.)

1. Infants ⟸68—Defendant under 18 may be prosecuted under general laws for offense of murder.

Under the Juvenile Court Law (Deering's Gen. Laws 1915, Act 1770a, § 6), providing that magistrates shall suspend proceedings against defendants under 18 years of age, and in view of sections 1, 3, and 13, the juvenile court or the superior court acting as the same may remand such a defendant to the custody of the magistrate, sections 4c, 4d, respectively, providing that if upon the hearing of a petition the court shall determine that the person is not a fit subject to be dealt with according to the provisions of the act, and that no person under 18 shall be prosecuted until the matter has been submitted to the juvenile court seeming to contemplate prosecution of defendants under 18 according to general law, and hence the fact that defendant charged with murder, being under 18, was sent to the juvenile court will not prevent subsequent prosecution under the general laws.

2. Infants ⟸16—Attachment by magistrate of copy of complaint, etc., to certificate defendant is under 18 directory.

Requirement of Juvenile Court Law, § 6, that the committing magistrate, on finding defendant to be under 18, shall attach to the certificate, etc., a certified copy of the original deposition or complaint filed before him is merely directory, and failure to comply is not jurisdictional.

3. Criminal law ⟸1104(4)—Objection that copy of complaint was not attached to magistrate's certificate of defendant's age held not shown by record.

Where the record did not show that the court made any order requiring the phonographic reporter to include in the transcript of his notes the certificate of the magistrate and proceedings remanding defendant, who was under 18, to the juvenile court, and by the juvenile court back to the magistrate, the reporter would not be authorized under Penal Code, § 1246, to include such papers, and the record is insufficient to present the objection that the magistrate did not attach to the certificate a certified copy of the original deposition or complaint when defendant did not make it a part of the record by bill of exceptions or special order of court.

4. Criminal law ⟸1031(5)—Objection that copy of complaint was not attached to magistrate's certificate of defendant's age, not properly raised, will not be considered on appeal.

Objection that the committing magistrate, who certified defendant to the juvenile court as under 18, did not attach certified copy of original complaint can be made only by attack on the information or by motion in juvenile court to suspend proceedings, and, where not so raised, will not be considered on appeal by defendant from a conviction.

5. Jury ⟸103(14) — Juror's opinion from newspaper reports, which will yield to evidence, does not disqualify.

Under Penal Code, § 1076, a challenge for bias under section 1073, subd. 2, on the ground that jurors had formed opinions from newspaper articles, was properly overruled, where the jurors stated that they could disregard their opinions and render a verdict solely on the evidence.

6. Jury ⟸131(15)—Question by district attorney as to whether a juror would follow instructions not objectionable.

Where on voir dire examination, the district attorney asked a juror whether he would follow an instruction that the killing was done in an attempt to perpetrate a felony, there would be no option but to convict of murder in the first degree, was not objectionable as failing to inform the juror that guilt must be shown beyond all reasonable doubt, the purported instruction practically following the definition contained in Penal Code, §§ 187, 189, except for the omission of reasonable doubt, and it appearing that the district attorney repeatedly assured jurors the court would instruct that they could not convict unless satisfied of guilt beyond a reasonable doubt, and that the court did so instruct at considerable length.

7. Witnesses ⟸286(4)—Redirect examination of witness, who saw deceased after he had been assaulted and before death, held warranted.

Where defendant hired an automobile and then struck the driver on the head, robbed him, and appropriated the car, and a witness who testified to seeing the driver on a train after injury, but before death, was cross-examined, as to whether the driver could talk and what was said, redirect examination, wherein the witness' memory as to conversations with the decedent was refreshed by transcript of his testimony at the preliminary hearing, *held* warranted.

8. Criminal law ⟸419, 420(6)—Statements by decedent while on a train after the attack incompetent as hearsay.

In prosecution for homicide, testimony as to statements made by decedent after he had been assaulted and while he was riding on a train, should be excluded, obviously being hearsay and incompetent.

9. Criminal law ⟸1186(4)—Erroneous admission of evidence not prejudicial, where no miscarriage of justice.

In a homicide case, the erroneous admission of hearsay testimony as to statements by de-

ceased concerning the assault was not prejudicial, where the same facts were abundantly established by other evidence, including defendant's own confession, so, as the admission of such evidence did not result in a miscarriage of justice, it did not warrant reversal under Const. art. 6, § 4½.

10. Criminal law ⟸404(4)—Locks of hair found in automobile driven by murdered man properly admitted.

Where defendant engaged deceased's automobile and struck deceased on the head with a hammer, robbed him, and appropriated the car, locks of matted hair, adhering to what appeared to be parts of the human scalp, were properly admitted, where it was testified that they were found in the automobile where defendant had abandoned it, and that they were the same as the color of decedent's hair, without further testimony that they were in the same condition as when taken from the automobile.

11. Criminal law ⟸318—No presumption of change in locks of decedent's hair between time of discovery at scene of murder and trial.

There is no presumption that locks of hair taken from an automobile in which deceased was riding at the time the fatal injuries were inflicted on his head with a hammer were changed between the time they were discovered and the trial.

12. Criminal law ⟸404(4)—Admission of locks of decedent's hair not erroneous, as tending to arouse passion.

Where defendant engaged deceased's automobile, and then struck him on the head with a hammer, robbed him and took the car, the admission of locks of human hair with pieces of scalp found in the car cannot be deemed erroneous, on the ground that it was calculated to arouse the passion and prejudice of the jury; there being nothing to show that such articles were introduced for an improper purpose.

13. Criminal law ⟸822(1)—Instructions construed as whole.

Instructions, and particularly a single instruction, must be construed as a whole.

14. Criminal law ⟸822(4)—Instructions in homicide case as to duty of jury not objectionable when construed as a whole.

Instructions in a homicide case that unless the jury did their duty laws might as well be stricken from the statute books cannot be deemed erroneous as a direction that the jury would be neglectful of their duty if defendant was not convicted, in view of the many statements of the rights of defendant, which were a part of the same instruction.

In Bank.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Roy Wolff was convicted of murder in the first degree, and he appeals. Affirmed.

Jackson Mahon and W. W. Laidley, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan and J. R. Dorsey, Deputy Attys. Gen., for the People.

SHAW, J. Upon a charge by information the defendant was convicted of the crime of murder of the first degree, and thereupon sentence of death was imposed upon him. The appeal is from the judgment of conviction.

In support of his appeal he urges seven grounds. We will consider them in the order in which they are presented.

[1] 1. At the time the defendant was brought before the magistrate for the preliminary examination upon the charge it was suggested in his behalf that he was under the age of 18 years at the time the crime was alleged to have been committed. The magistrate examined into the matter, and determined that he was less than 16 years of age at that time. Thereupon he suspended the proceedings and ordered the constable to take the defendant before the juvenile court of the county for its consideration under the Juvenile Court Law. In the superior court, by direction of the court a petition was filed by the probation officer to bring the defendant within the terms of the probation law. Section 3. Thereupon the court took evidence relating to the character of the defendant and the nature of the crime charged against him, and made an order finding that he was under the age of 21 years, but that he was not a fit subject for further consideration under the terms of the Juvenile Court Law, and adjudged that he be remanded to the justice's court in which the charge of murder was pending for further proceedings on said charge, and that the proceedings under the probation act be dismissed. All these proceedings were taken under the provisions of the Juvenile Court Law. General Laws, p. 750, Act 1770a, § 6. Thereafter the magistrate proceeded with the preliminary examination, the defendant was duly committed, and the information upon which he was tried and convicted was then filed.

The claim is now made that under the provisions of the Juvenile Court Law, after the magistrate had determined that the defendant was less than 18 years of age and the matter then came before the superior court for proceedings under that law, the superior court was without power to remand him to the magistrate for further proceedings on the criminal charge. The claim is, in effect, that a person under 18 years of age cannot be prosecuted or punished for the crime of murder, and that he can be dealt with only as a ward of the juvenile court.

We do not think this proposition is sustained by the law. Section 6 provides that when, upon a charge of crime against a per-

son, it shall appear to the magistrate that the defendant was under 18 years of age at the time the alleged crime was committed, he shall suspend the proceedings upon the charge and inquire into the age of the defendant, and if he finds that the defendant was under 18 he shall thereupon certify to the juvenile court the fact of such finding, and that proceedings have been suspended by reason thereof, and that thereupon all proceedings against the person on the charge shall be suspended until the juvenile court shall issue its mandate directing the magistrate to proceed with the examination or trial. It then provides that in the superior court, acting as a juvenile court, a petition shall be filed to bring the defendant within the provisions of the law, and "that if said judge of the juvenile court shall after such investigation decide that the person was at the time said offense was alleged to have been committed of the age of eighteen years or more, such determination shall be conclusive and he shall immediately issue his mandate directing the court before which such charge is pending to proceed therewith, and upon receipt of such mandate said court shall proceed with the examination or trial of said charge as though no suspension thereof had taken place; except that if said judge of the juvenile court shall find that the person so charged is under the age of twenty-one years, and a fit subject for consideration under the provisions of this act, he may make such order or orders hereunder as he may deem best in relation to such person; but if such judge shall at any time conclude that such person is not a fit subject for further consideration under this act, he may sit as a committing magistrate and hold a preliminary examination if such person is charged with a felony, or he may remand such person to the court in which said person is charged with said offense for further proceedings on said charge, and upon receipt of the mandate of said juvenile court, or the judge thereof, the court before which said charge is then pending shall be vested with full authority to proceed with the examination or trial thereof." The precise claim of the defendant is that under these provisions the magistrate of the juvenile court cannot remand the defendant to the magistrate for examination or trial unless he shall find that the defendant is over 18 years of age, and that it prohibits further proceedings by the magistrate upon the original charge, where the juvenile court shall find that he was under that age. To this we do not agree. The quoted passage must be read in connection with some of the preceding provisions of the act. Section 1 declares that—

"This act shall be known as the 'juvenile court law' and shall apply to any person under the age of twenty-one years."

It then describes 14 classes of persons who shall be subject to the provisions of the act, if under the age of 21 years. Class 13 includes any person "who violates any law of this state or any ordinance of any town, city, county, or city and county of this state defining crime." Section 4c of the act provides that if, upon the hearing of a petition for proceedings under the Juvenile Court Law as provided in section 3, the court shall determine "that any person alleged to come within the provisions of subdivision 13 of section 1 of this act, is not a fit and proper subject to be dealt with under the provisions of this act, said court may dismiss the petition therein, and direct that said person be prosecuted under the general law." Section 4d provides that no person under the age of 18 years at the time of the commission of a crime shall be prosecuted for the crime until the matter has first been submitted to the juvenile court as in the act provided. These provisions clearly imply that a person under the age of 18 years may nevertheless be prosecuted for a crime, notwithstanding the fact that he has invoked the application of the Juvenile Court Law to his case. The provision of section 6, above quoted, taken in connection with the other provisions, can only mean that upon the hearing of a case which had been under examination before a magistrate upon a charge of crime and has been certified to the juvenile court because of the age of the defendant, if the juvenile court shall conclude that such person "is not a fit subject for further consideration under the act," it may remand him to the magistrate for examination or trial, regardless of the question whether he is over or under 18 years of age. This being the case, the magistrate would have jurisdiction as provided in the part of section 6 which we have quoted, to proceed with the examination and upon finding sufficient cause therefor to commit him upon the charge.

[2-4] 2. In certifying the cause to the juvenile court after finding that the defendant was under 18 years of age, the magistrate, it is claimed, failed to attach to the certificate a certified copy of the original deposition or complaint filed before him. Section 6 of the Juvenile Court Act provides that he shall do this. It is contended that this omission deprived the court of jurisdiction. We do not think the requirement was intended to be jurisdictional. The clause requiring such copy to be attached is obviously merely directory in character and effect, the object being to apprise the juvenile court of the nature of the charge. Furthermore, the objection is not properly in the record before us. The defendant should have made it a part of the record, either by a bill of exceptions or by some special order of the court. Section 1246 of the Penal Code enumerates minutely the papers which shall constitute the

transcript on appeal. The certificate of the magistrate and proceedings remanding the defendant to the juvenile court, and by the juvenile court back to the magistrate for further action, are not thereby required or authorized to be made a part thereof. The record does not show that the court made any order requiring the phonographic reporter to include the same in the transcript of his notes. Without such order the phonographic reporter would not be authorized to include these papers in his transcript, and he has not done so. Moreover, there was no foundation upon which the objection can be raised on appeal. This objection would not, at most, constitute a ground of objection, except upon motion in the superior court to set aside the information or in the juvenile court to arrest the proceedings there upon that ground. It does not appear that any such motion was ever made. We do not intend to say that it would, even on such motion, be ground for setting aside the information. As the case stands, the defendant has waived the objection, even if it had any merit.

[5] 3. The defendant claims prejudicial error in rulings of the court overruling his challenges for cause to two of the jurors. The challenges were made on the ground of actual bias as defined in subdivision 2 of section 1073 of the Penal Code. Section 1076 provides that under such a challenge a person shall not be disqualified as a juror by reason of having formed or expressed an opinion upon the guilt or innocence of the defendant founded upon public rumor, statements in public journals, or common notoriety, if it appear to the court, upon his examination that he can and will, notwithstanding such opinion, act impartially and fairly upon the matter. Juror Heimforth, upon his examination, testified that he had read the newspaper accounts of the crime, and had therefrom formed an opinion as to the guilt or innocence of the defendant, which it would take evidence to remove. Upon further examination, however, he stated that his opinion was formed entirely upon what he had read in the newspapers, that he had no other knowledge or information about the matter, and that, notwithstanding that opinion, he could, and would, if sworn as a juror, lay it aside, consider the case entirely upon the evidence produced in court, and act impartially and fairly in the case. Juror Blaisdell testified that he knew nothing of the case except what he had read in the newspapers, that he had formed an opinion therefrom which the evidence might remove, but that, notwithstanding the opinion, he could, and would, act fairly and impartially upon the charge against the defendant, and be guided solely by the evidence produced in court in arriving at a verdict. He further stated that he would retain the opinion until he heard the evidence, that after it had once gotten into his mind he could not put it out until something occurred to change it, but that he could go into the trial of the case presuming the defendant innocent, and depend entirely upon the evidence introduced and the instructions of the court in finding a verdict, and would not in any way permit the matter that he had read in the newspapers to influence his decision. The court, upon this testimony, was justified in holding that the jurors were qualified. A juror who has formed a tentative opinion in that manner will usually say that it will require evidence to change the opinion. That fact is not incompatible with ability to disregard such opinion entirely in weighing the evidence and to render a verdict solely upon that evidence. This psychological fact was recognized by the Legislature, and section 1076 was enacted to avoid the necessity of sustaining challenges for actual bias in such cases. Its effect is that this state of mind does not disqualify the juror, if, notwithstanding such mental condition, he can and will act impartially and fairly in the case.

[6] 4. During the examination of the jurors the district attorney put the following question:

"Well, supposing the court should further instruct you that if you find from the evidence that the killing was done, and that it was done by the defendant in an attempt to perpetrate or in the perpetration and commission of the felonies that I have mentioned, one of which was robbery, that you would have no option in the matter, but that you should find the defendant guilty of murder in the first degree, would you follow that instruction? A. Yes, sir."

Questions of somewhat similar purport were put to 11 other jurors who were examined.

Defendant claims that these questions were unfair because they did not advise the jury that the guilt must be shown to a moral certainty and beyond all reasonable doubt, and that the many repetitions of similar questions would leave the impression with the jury that the court would instruct them that the killing was done by the defendant in the perpetration of a felony. He assigns the putting of the questions as misconduct on the part of the district attorney. A reading of the entire examination shows that there was no misconduct. The district attorney in his questions to the jurors repeatedly stated that the court would instruct them that they could not convict the defendant of the charge unless they should be satisfied of his guilt beyond a reasonable doubt from the evidence produced before them. The court did so instruct them at considerable length, and they must have clearly understood the rule. The question itself was plainly conditional, and did not assert that

the court would so instruct them. The principle embodied in the question, aside from the proposition that the guilt must be proven beyond a reasonable doubt, is but a restatement of the definition of murder contained in the Penal Code. Pen. Code, §§ 187, 189. It is substantially a repetition of the law as laid down in People v. Milton, 145 Cal. 169, 78 Pac. 549, and People v. Witt, 170 Cal. 107, 148 Pac. 928. It was not intended as a complete definition, and we need not say that it may be so considered, but in connection with the other questions put to the jurors we do not think that it constitutes misconduct, or that it could have prejudiced the defendant, especially in view of the fact that the court very fully instructed the jury with regard to the elements of the crime of murder. The question itself merely amounted to an inquiry whether or not the juror would follow the instructions of the court.

[7-9] 5. The defendant was charged with the murder of one Elmer Greer. The evidence showed that Greer was operating an automobile for hire; that on May 26, 1919, the defendant hired Greer and his automobile for a trip, and that while on the trip the defendant stealthily hit Greer on the head three times with a hammer. Each blow made a round indentation in the skull, forcing the bone into the tissue of the interior of the skull. From these wounds Greer died on May 29, 1919. On the trial one Delbert E. Bellus, on behalf of the prosecution, testified on direct examination that on May 26, 1919, he helped Greer aboard a train running from Maricopa to Bakersfield; that Greer then had wounds on the head; that he bathed Greer's head and face several times during the journey to Bakersfield, and there left him at the station. On cross-examination the witness was asked many questions as to the details of the journey to Bakersfield and the condition of Greer. The following is a part of the cross-examination:

"Did you talk with him at that time? A. Oh, some. Q. How was he as to his speech; was he rational or not? A. At first he was so weak he couldn't say much. All he could say was, 'I got an awful beating.' Q. He was able to talk? A. Yes; he could talk. Q. And you talked to him on the way in? A. Oh, some; I was in and out all the time."

In answer to other questions he said that Greer looked better by the time he got to Bakersfield and "talked better." On redirect examination the district attorney showed the witness a transcript of his testimony at the preliminary examination, to refresh his memory of the conversations with Greer, and asked:

"Would your memory be any better than it is now what Mr. Greer said at that time?"

To this the defendant's attorney objected on the ground that it was not proper redirect examination, and that it was cross-examination of the people's own witness. The objection was overruled. Thereupon the district attorney elicited testimony to the effect that Greer said that he had been hit on the head, referring to the beating. The witness was again asked to examine his previous testimony to refresh his recollection on the subject. To this the defendant repeated the previous objection, and added the objection that the testimony was irrelevant, incompetent, and immaterial. The objection was overruled, and thereupon the witness, after reading his previous testimony, stated that Greer had informed him that he was hit on the head with a hammer, and that his money and automobile were taken away from him. On recross-examination he further testified that Greer told him that he did not know who had hit him. No other objection was made to this testimony, and no motion was made to strike it out.

The defendant claims that this was error, and that it was very prejudicial to his case. In view of the testimony on the cross-examination, it cannot be said that it was not within the scope of a fair redirect examination. But the statement of the witness on the cross-examination as to what Greer said was not technically responsive to the question, but was a voluntary statement. This point was not embraced in the objection. The evidence was obviously hearsay and incompetent, however, and the redirect examination should not have been allowed, if the proper objection had been made. But, however this may be, the evidence was not prejudicial. The truth of the statements by Greer to the witness was fully established by other uncontradicted evidence. After his arrest the defendant made a full and voluntary confession to the chief of police at Bakersfield, in which he stated the same facts that were elicited on the redirect examination objected to. They were also clearly proven by other satisfactory evidence circumstantial in nature, but not contradicted. The defendant did not testify in his own behalf and introduced no evidence tending to disprove his guilt. The other evidence of the defendant's guilt leaves it in no reasonable doubt. It is plain from the entire case that it did not result in a miscarriage of justice, and consequently, under section 4½, article 6, of the Constitution, it would not be sufficient cause for reversal.

[10-12] 6. The court admitted in evidence two locks of matted hair adhering to something which appeared to be parts of a human scalp, together with testimony that they were found in Greer's automobile at Livingston Station near Merced, where defendant had abandoned it and had boarded the train for Oakland, the morning after the homicide.

Testimony was given to the effect that this hair was of the same color as the hair of Greer. The witness Corbett testified that he found the hair in the automobile soon after the defendant abandoned it, and that he gave the hair to Officer Pyles. Pyles produced the hair, and testified that Corbett had given it to him, that he had known Greer for a number of years, and that this hair was the same color as that of Greer. The locks of hair were then offered in evidence, and admitted over the defendant's objection that "no proper foundation had been laid." It is now claimed that it was error to admit this evidence without further evidence showing that its condition was the same at the time of its admission as it was when it was taken from the automobile, and that it was introduced in order to arouse the passion and prejudice of the jury. The defendant made no attempt to show that the hair was in a different condition at the time of its introduction in evidence from its condition at the time it was found, and it is not claimed that its natural color had been changed. There is no presumption that these articles had been changed in any way for any purpose, and we find nothing in the record to indicate that the district attorney introduced the evidence for any improper purpose. They were properly admitted.

[13, 14] 7. The court gave the following instruction:

"You are here, gentlemen, for the purpose of trying the issues of fact that are presented by the allegations in the information filed by the district attorney and the defendant's plea thereto. This duty you should perform, uninfluenced by pity for the defendant, or by passion or prejudice on account of the nature of the charge against him. You are to be governed therefore solely by the evidence introduced in this trial and the law as given by the court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion, or prejudice. A verdict founded upon sentiments of pity for the accused, or upon public opinion or public feeling, or upon passion or prejudice, or upon conjectures, would be a false verdict. You will not take counsel of them in deliberating upon your verdict. The importance of your duties requires that you consider the right of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty, laws may as well be stricken from statute books."

The defendant argues that the last sentence of the instruction, in effect, directed the jury that they should find the defendant guilty, and if they did not do so they would have neglected their duty. As a part of the same instruction and immediately following the above extract, the court said:

"You should also ever keep in mind the importance to the accused of the result of your deliberations and be just to him, as well as to the people of the state of California. Both the public and the defendant have a right to demand, and they do so demand, and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be."

The instructions, and particularly a single instruction, must be considered as a whole. We cannot perceive wherein the court in this instruction in any respect misdirected the jury as to their duty, and we do not think that it could have been understood by the jury as a direction that they would have been neglectful of their duty if the defendant was not convicted.

The defendant does not claim that the evidence is not sufficient to support the verdict, and it is therefore unnecessary to consider the same. We have examined it, however, and find that it clearly establishes his guilt of a cold-blooded, mercenary, deliberate, and willful murder.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; OLNEY, J.

182 Cal. 709

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8796.)

(Supreme Court of California. May 12, 1920.)

1. Insurance ⟸130(7)—Counter offer of general agent upon receipt of application called for acceptance or rejection.

Where an employer of labor applied to a local agent of an indemnity company for a renewal of an expiring policy of insurance, covering liability for injury to employés, stating that he wanted the insurance even though the premium might be more than $15, and local agent in the application sent to the general agent inserted the premium as $10 the amount of the premium the preceding year, and the general agent wrote employer that a $15 minimum premium was required, and that employer should advise by return mail if such premium would be satisfactory, there was no contract of insurance until the employer accepted the counter offer of the general agent; there being no meeting of minds.

2. Master and servant ⟸417(7)—Finding of facts in compensation case conclusive.

Findings of the Industrial Accident Commission under Workmen's Compensation Act upon questions of fact are conclusive, where there is any substantial evidence to support the award.

3. Master and servant ⟸405(1)—Evidence insufficient to show contract of insurance prior to accident.

Evidence of employer in a proceeding under Workmen's Compensation Act as to acceptance of counter offer of the indemnity company on receiving employer's application stating a certain minimum premium *held* not sufficiently definite upon which to base a finding that the employer accepted the counter offer prior to the accident.

4. Insurance ⟸130(7)—Acceptance of terms granted by company completes contract before local agent communicates same to principal.

If an employer of labor accepts terms granted by indemnity company, the contract of insurance is complete, although the local agent has not communicated the acceptance to the company.

5. Master and servant ⟸405(1)—Finding of authority of agent to bind indemnity company by parol held not sustained by evidence.

In a compensation proceeding involving liability of an indemnity company to an employer of an injured servant, evidence *held* insufficient to support a finding that a local agent of the indemnity company had authority to bind the company by parol from application.

6. Master and servant ⟸405(1)—Finding of custom that assured was covered from date of application not sustained by evidence.

In a proceeding under Workmen's Compensation Act, a finding that it was the custom and the practice that an employer was covered by insurance from the date of his application, where the terms of the application were not unconditionally accepted by the company, *held* not supported by the evidence.

7. Insurance ⟸129—General agent without authority to issue policy to cover known loss.

The general rule is that whenever the parties have entered into a contract before loss occurs or the policy has been issued, unless the authority of a general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application and is dated accordingly, the policy being thereafter merely evidence of the contract, but such general rule has no application where the parties were not under contract at the time of loss, and the general agent is without special authority to issue a policy to cover the loss.

Wilbur, J., dissenting.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding by Ethel Lamb, under the Workmen's Compensation Act, to obtain compensation for the death of her husband, John Lamb, opposed by M. B. Pond, the employer, and the Western Indemnity Company. There was an award of compensation, and the Indemnity Company brings certiorari. Award annulled.

E. F. Conlin, of San Francisco, for petitioner.

Clarence N. Riggins, of Napa, appearing specially and not otherwise, for respondent Ethel Lamb.

Christopher M. Bradley and A. E. Graupner, both of San Francisco, for respondents.

LAWLOR, J. This is a writ of review issued upon the application of petitioner, the Western Indemnity Company, a corporation. The Industrial Accident Commission, on April 23, 1918, made an award in the sum of $2,596.14 against the petitioner and in favor of Ethel Lamb, for the accidental death of her husband, John Lamb, an employé of Dr. Pond, of Napa county, it having been found by the commission that petitioner was the insurance carrier of Dr. Pond at the time of the injury. It appears that Dr. Pond had been engaged in operating a small farm and fruit orchard some 10 or 12 miles from the city of Napa. John Lamb was employed on the place as a man of all work, and, although that kind of occupation does not fall within the Workmen's Compensation Act, both Dr. Pond and Lamb nevertheless elected to come under its provisions.

On October 2, 1917, Lamb took a team of horses used on the place to a blacksmith shop in the city of Napa to be shod. About noon, as he was taking the horses out of the shop, they became unmanageable and trampled upon him, inflicting injuries from which he died on October 6.

The principal contention of petitioner is that it was not the insurance carrier of Dr. Pond when the accident occurred, and in this connection petitioner makes the claim that the following findings of the commission are without support in the evidence:

"(6) That prior to the said 2d day of October, 1917, and on or about the 24th day of September, 1917, the defendant M. B. Pond had applied to Arthur H. Smith of Napa, the duly accredited and authorized agent of the defendant Western Indemnity Company, for a renewal of a then expiring policy of insurance covering his liability for injury to his employés, and had requested said agent to procure for him such policy, to take effect upon the expiration of his then existing policy, which would expire on September 25, 1917. That at that time it was the custom and the practice that an assured was covered by the insurance subsequently provided in the policy, from the date of his application. That after the application by said defendant Pond, and before the said 2d day of October, 1917, said defendant Pond was notified by said agent Smith that the premium or rate of said insurance had increased, the exact amount of such increase being at that time not known to said agent. That thereupon said defendant Pond stated his willingness and consent to pay the increased rate, and again requested that the policy be issued. That thereafter, and on or about the 10th day of October, 1917, the gen-

eral agents of said Western Indemnity Company duly issued their policy of insurance dated the 25th day of September, 1917, to the said defendant Pond, insuring him against his liability for injuries to his employés, and that on the 10th day of October, 1917, said defendant duly paid to said agent Smith the full premium for said insurance, which premium was duly received and accepted by said agent. (7) That by reason of the facts as set forth in paragraph 6 hereof, the defendant Western Indemnity Company was the insurance carrier of said defendant employer at the time of said injury, and had insured said employer against liability for full compensation for said injury, and said employer is entitled to be relieved from such liability under the provisions of subdivision (e) (2) of section 30 of the Workmen's Compensation, Insurance and Safety Act of 1917."

The evidence will sufficiently appear in the discussion.

Arthur H. Smith, doing business under the name of "Arthur H. Smith & Co." in the city of Napa, was engaged in placing insurance for various companies, including the Western Indemnity Company. Upon the filing by petitioner with the state insurance commissioner of "a duplicate power of attorney" on July 1, 1917, a license was issued to Smith for the term of one year in compliance with the provisions of section 633 of the Political Code. The license gave Smith authority "to solicit applications for insurance or surety bonds or to effect insurance or surety bonds in the name of said company." This power of attorney was not introduced in evidence, but we shall assume that it corresponded with the license.

In September, 1916, Smith secured for Dr. Pond a policy of compensation insurance in "the Massachusetts Company." That policy expired on September 25, 1917. On September 24, 1917, Dr. Pond went to the office of Smith, and "verbally" requested that such policy be "renewed." There is a dispute in the testimony of Dr. Pond and Smith as to whether on this occasion Dr. Pond saw Smith personally or dealt with an employé in Smith's office. Dr. Pond testified that—

"Some time in September, I think after the 15th, I received a letter from Mr. Smith stating that my policy terminated, * * * asking me * * * if I wanted a renewal. I gave the letter to Mr. Smith when I went, and ordered a renewal of insurance. I left it as a reminder. * * * He says, 'The premium will be raised.' I was informed that the last premium would be $10 for farmers, and it would be probably $15. * * * Any discussion we had was simply his statement to me that it would be probably not less than $15, and I told him to go ahead. I wanted to be insured even if it was more. He told me right on the start it would probably be that much, 'possibly more,' is the way he put it."

Smith was asked:

"At the time you took that application from Dr. Pond, was there any question about the issuance of a policy on account of the premium—minimum premium?"

And he answered:

"You will have to ask the young lady in the office. She did that work that day. I was not in. * * *"

Smith also testified that the general agent had informed him in a letter of June 29, 1917, that the premium rate for compensation insurance would be $10 "at least temporarily," and that—

"The first notice I had that the minimum premium on farm labor policies had been raised by petitioner was when this application was referred to in this case as being $15."

Smith stated further that, as the Massachusetts Company had discontinued writing compensation insurance, on September 24 he forwarded to the general agent a written application for coverage for Dr. Pond to begin on September 25, 1917, the application being signed by Smith alone, and in item 14 thereof, opposite the printed words "the minimum premium for this policy," appearing the figures "$10.00." This application was received on September 25 in the office of the general agent, Arthur G. Nason, who conducted the agency as "Arthur G. Nason & Co." In due course Smith received an answer to the application under date of September 26 to the effect that the minimum premium on farm labor policies was $15, and stating:

"We shall hold the application pending receipt of your advices as to whether or not we may write at this rate."

On September 29 Smith wrote to Dr. Pond:

"We are in receipt of a letter from the company stating that the least they can write a compensation policy on farm labor is $15 minimum premium. Kindly advise us by return mail if this is satisfactory to you."

There is a further lack of agreement in the testimony of Dr. Pond and Smith as to what occurred after September 24. Smith testified as follows:

"Q. Did you not see him between September 24 and October 2? A. Me? No. * * * Q. Do you know whether he came to your office during that interval? A. I couldn't say. Q. Was it reported to you that he had been in there? A. No. I don't recall it if it was. * * * Q. Then he didn't answer your letter of September 29 until after the accident on October 2? A. That is right. * * * Q. Did you see him on the afternoon of October 2? A. I did. * * * In my office. * * * He said it would be all right at the $15 premium. * * * Q. When Dr. Pond did call on you on October 2 did you then know that this accident had occurred? A. I did."

Dr. Pond's testimony is less definite as to when, after September 24, he talked with Smith about the matter:

"Q. And did you return afterwards to Mr. Smith's office for your insurance policy, * * * and on what date? A. I can't say as to the first time—the date—but I went and had a talk with Mr. Smith, and he said it was all right. * * * Q. When did you go back to Mr. Smith after requesting that he have the policy renewed? Was it before or after October 2d? A. Well, my memory is this: that I had another talk with Mr. Smith after ordering a renewal, when he told me that it would be at least $15. 'Well, it might be more,' he said. 'Well,' I said, 'I will draw you a check for $15, it doesn't make any difference. If it is more, I will give you more, and if it is less you can refund it.' He said, 'It would not be less.' On October 2d I called again on Mr. Smith and again tendered money which he refused because he did not know exactly what it would be. He had written me a letter, and I think it was dated the 29th of September, that it would be $15. Whether I called between the 29th and the 2d day of October, the date of the accident, I don't remember positively. Q. But on October 2d, was it after the accident that you called at Mr. Smith's office? A. It was. * * * Q. When did you receive that letter, Doctor? A. I can't tell you exactly. I don't know. Q. But after you received that letter, you called on Mr. Smith, did you not? A. Yes, sir. Q. And that was after the accident had occurred? A. I think I called on Mr. Smith before. I am not positive. I called immediately on receiving the letter. * * * Q. Did you get it before or after the accident? A. I am not positive. I went immediately when I did receive it to Mr. Smith, but I can't say positively whether it was before the accident or after. Q. Then, immediately upon receiving the letter—you received it before the accident—you went to Mr. Smith? A. Yes, sir. My impression is that I did. Q. Did what? A. That I did go to Mr. Smith before the accident to tell him it was all right, verbally. My impression is that, but I wouldn't say positively. * * * Q. You are not sure before the accident or after? A. I am not sure. * * * I think so, but I am not positive. Q. You have testified very clearly that you went to Mr. Smith's office after the accident on October 2? A. Yes. Q. But it is not clear in your mind whether you had the conversation at that time with Mr. Smith about the minimum premium of $15 or not? A. No, I am not, but mind you, before that Mr. Smith had told me that would probably be $15 and probably more—before that time."

On the afternoon of October 2, after Dr. Pond had called on Smith and they were both aware of the injury to Lamb, Smith wrote the following letter to the general agent:

"In answer to your favor of the 26th of September in regard to application of Milo B. Pond, would ask that you kindly issue policy at the $15.00 minimum."

No mention of the accident was made in this letter. On October 3 Smith wrote again to the general agent:

"We herewith inclose you report of accident to John Lamb, employed by Dr. M. B. Pond. Kindly give this your attention."

Before the receipt of this letter, and in response to that of October 2, the office of the general agent issued a policy at the $15 rate and dated it October 3. This was received by Smith on October 4. On October 5 he sent the following letter to the general agent:

"We herewith return you policy No. CC-14425, Milo B. Pond, as you have made an error in dating same. Under date of September 24, 1917, we sent you application asking you to issue the policy, and under date of September 26th you wrote us advising us of the increase in the minimum charge and also stating that you would hold the application pending receipt of our advices. Kindly issue this policy from date of application."

No written reply was made to this letter, but Smith testified that the date of the policy was changed from October 3 to September 25, while he was in the office of the general agent on October 8 or 9. From the testimony that follows it would appear that the actual date of this meeting and the alteration of the policy was October 9. A report of the results of the post mortem examination was forwarded from Smith's office to the general agent on the last-mentioned date. On October 10 Dr. Pond paid the $15 premium to Smith, who issued a receipt therefor and delivered the policy to him.

Charles M. Wilson, manager of Nason's office, and head of the indemnity insurance department thereof, testified that Smith himself called at the office in San Francisco about October 9, and claimed that Dr. Pond's policy had been incorrectly dated; that on this last-mentioned occasion the witness examined the records of the office, and found that Russell B. Adams, an "underwriter and clerk" in the office, had changed the date of the original application to October 3; that, "as a matter of custom" he, without consulting the general agent or any of his staff, then changed the date of the policy to conform to the time of the receipt of the application—September 25—and delivered the policy with the altered date to Smith. Wilson then knew that "Dr. Pond had an accident to one of his employés."

Nason himself testified that he did not learn of the accident until "after October 3. * * * The first that came to my attention was that I was informed that the claim adjuster was called upon by Mr. Wilson to go to Napa to attend the coroner's inquest. * * * That was the first that I knew. * * * Q. As a matter of fact, you are not familiar with the details of your office? A. Absolutely not. Q. You left it to your manager, did you not? A. Yes; unless some trouble arose over a matter I wouldn't interfere at all."

The following testimony was given by Russell B. Adams:

"Q. State whether or not on behalf of Arthur G. Nason & Co. you accepted said application

* * * from * * * Dr. Milo B. Pond. A. The application was not accepted. Q. Please state what action you took upon the said application. * * * A. On receipt of the application I noted the premium specified was not up to our charge. A letter was written by me to Smith advising of this, and saying the application would be held pending his advices. Q. In acknowledging the said letter from * * * Smith * * * state whether or not it was your intention as representative of * * * Nason * * * to hold * * * Dr. Pond covered under a policy. A. It was not my intention to cover the risk. Q. Please state what your intentions were as to the said application. A. To hold it until advised by our agent as to whether the insurance was desired at the higher rate. Q. Was it at any time subsequently to the receipt of the application your intention to bind or consider said application of any force or effect, or as constituting any insurance covering Dr. Pond? A. No. * * * No instructions were ever given me to bind this risk or to write a policy. Q. In issuing a binder for such policy * * * what has been your custom while employed by Nason? A. A record of risks bound was kept by Nason. The name, date covered, and nature of covering was always kept. Q. Please state fully what course you would have taken had you intended * * * to hold Dr. Pond covered under a policy. * * * A. A binder would have been issued and recorded as above; in any case there would have been a record of any covering granted."

The respondents in their reply to petitioner's supplemental brief take a different position with regard to the evidence as to when Dr. Pond expressed his willingness to accept the $15 rate from that stated in their first brief. It is insisted in their last position that—

"At the time of the application for a renewal Dr. Pond was told by Mr. Smith that the premium would be raised, and that it would be probably $15 as a minimum. Dr. Pond thereupon informed Mr. Smith that the amount of the premium was immaterial—that he wanted a policy. * * * Respondents contend that this made a complete meeting of minds on the only issue—the premium."

From this it is argued that *the letter of September 29 "was superfluous, and should not in any way be considered* in this cause, for the reason that Smith had already been told by Dr. Pond that he wanted the policy regardless of the amount of the premium." (Italics ours.) In their first brief respondents state that—

"On September 24, 1917, Pond applied to Smith at Napa for a policy. * * * *There may or may not have been some discussion between Smith and Pond * * * concerning the premium * * * at the time the application was made. It is immaterial.* * * The offer of Dr. Pond when it reached the office of the general agent * * * was refused. * * * The petitioner made a new offer to extend coverage to Dr. Pond * * * at an increased price. * * * This offer of petitioner is contained in the letter to Smith * * * under date of September 26 * * * and in the letter from Smith to Dr. Pond under date of September 29. The offer thus made by petitioner was never at any time withdrawn. Indisputably it was accepted by Dr. Pond. * * * *What happened in the interim is of no consequence.*" (Italics ours.)

We do not agree with respondents, as will appear from our discussion, that the letter of September 29 was "superfluous," or that "it is immaterial" what discussion was had on September 24. One reason for setting forth at length the variant positions of respondents is that our interpretation of the findings on this point may appear more clearly. The use of the relative terms "before" and "after" in the sentence relating to the notification to Dr. Pond of the increased rate precludes the idea that the commission meant to find that there was a meeting of minds on September 24. As already shown, Smith's testimony was that he personally had only one interview with Dr. Pond about the rate—after the accident on October 2. We shall assume, for the purposes of this discussion, that the commission found that Smith did discuss the rate with Dr. Pond on September 24. Dr. Pond is less definite as to the number of times he canvassed the premium rate with Smith, but we think his testimony indicates that he meant to convey the impression that he saw Smith three times: (1) on September 24; (2) on a later date before Smith had received the letter of September 26; and (3) after Dr. Pond had received the letter of September 29—but as to this he would not say definitely whether it was before or after the accident. Indeed, Dr. Pond did not testify definitely to any date except October 2, when he called at Smith's office after Lamb was injured. There is further disagreement in the testimony in that Smith stated that he did not know of the increased rate until he received the letter of September 26, while Dr. Pond claims that the higher premium was discussed when he ordered the "renewal."

[1] We have said that the finding cannot be interpreted to mean that the contract was concluded on September 24, nor do we think it can be ascertained therefrom when, according to the commission, Dr. Pond consented to the rate. And, unless the conjunctive "thereupon" connotates an interval between the notification and the consent, it cannot be determined whether the commission found that the rate was agreed upon before or after the injury. Do the findings refer to the second occasion mentioned in Dr. Pond's testimony? The plausible theory is that they do. The word "thereupon" could properly have reference only to an occasion where there was at once a proposal and an acceptance. The term would not describe either of the other occasions. Considered in connection with the statement that he "again" requested that the policy be issued,

"thereupon" indicates that he accepted the rate immediately, and "again" connects up with the original request for a "renewal." And, as further supporting this theory, is the circumstance that, according to the same finding, Smith did not then know what the amount of the premium would be. We think it clear that the finding does not refer either to the first or to the third occasion mentioned in the testimony of Dr. Pond. The word "thereupon" could not allude to the interval—however brief it may have been—between the receipt by Dr. Pond of the letter of September 29 and the interview which folllowed in Smith's office. Moreover, it is shown by the letter of September 29 that when Smith sent it he did know "the exact amount of such increase." It is also to be noted that in the sentence we are discussing the phrase found in the preceding sentence—"and before the 2d day of October"—is significantly missing. In our opinion it was important for the commission to find whether Dr. Pond accepted the rate on the first, the second, or the third of these occasions, for if it was upon the first or second occasion we should be obliged to declare that the findings are not supported by the evidence. Upon the receipt of the application, whatever the scope or extent of Smith's authority may have been—and we shall consider this later—the matter of the rate was taken out of his hands by the letter from the general agent of September 26, which constituted a counter offer. So that, up to the time Dr. Pond accepted the counter offer, there was no meeting of minds on one of the elements of the contract. This would be true even if the testimony of Dr. Pond was accepted by the commission that he stated on the first occasion he wanted the insurance, though the premium might be more than $15, or when he was in Smith's office on the second occasion, for upon the counter offer he was called upon either to accept it or to reject it definitely. We must conclude, therefore, that the commission based its findings on the first or second occasion, or both, and not upon the period following the receipt by Dr. Pond of the letter of September 29, although if the findings did relate to the last occasion we are not to be understood to say that the evidence would be sufficient. We are fortified in this conclusion by the testimony of Dr. Pond himself. He admits that he went to Smith's office *after* the injury. He does not say that he called at any other time on October 2, or that he was in the office more than once after he got the letter. Nor is his testimony definite as to whether he received the letter before or after the accident. We are not losing sight of his testimony that he reported to Smith "immediately" on receipt of the letter; that he thought he received it and saw Smith before Lamb was hurt; that on the second occasion he offered and Smith refused his check; that his purpose in going to Smith's office on October 2 was again to tender the the premium and receive the policy; and that "I did go to Mr. Smith before the accident to tell him it was all right verbally." But, in any event, in our opinion the evidence would not support a finding that Dr. Pond accepted the rate at any time prior to the afternoon of October 2.

[2, 3] It is well settled that the findings of the commission upon questions of fact are conclusive where there is any substantial evidence to support the award. Western Indemnity Co. v. Pillsbury et al., 172 Cal. 807, 159 Pac. 721; Mass. B. & I. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 Pac. 1050. Upon the question of fact we have been discussing, however, taking into account all the pertinent evidence bearing on the point, the apparently consistent and convincing testimony of Smith—supported as it is by the correspondence and the sequence and import of events concerning which there is no dispute, the uncertain testimony of Dr. Pond in most particulars—especially in respect to the time when he acted upon the letter of September 29, and the lack of clearness and definiteness in the findings on the conflict in the evidence—if it can be said that the evidence is really involved in conflict as to the time of his acceptance, we are constrained to declare that, even if the findings are to be interpreted as meaning that Dr. Pond had accepted the counter offer prior to the accident, they are, nevertheless, without support in the evidence. We are not prepared to say, however, that if Dr. Pond had, with some regard for certainty and precision, fixed his acceptance as of a time prior to the casualty we vould set aside the finding. We do not think that his testimony can be said to contradict that of his own witness, Smith, on the point that it was sufficiently definite to raise a conflict, or, if there was a conflict, that the findings in any true sense resolved it.

[4] Having reached the conclusion that a contract was not concluded prior to the injury, we shall now dispose of petitioner's objection to the finding that Smith was the agent of the company in the transaction. It is claimed in the brief of petitioner that—

> "Smith had not been given, and did not have, and never attempted to exercise any power or authority over the policies of the company, except to receive and deliver the same, * * * and at no time did he have or claim that he had the right to fix the rate or to execute, issue, sign, countersign, or modify a policy issued by this company. * * *"

Smith testified that he was the agent of petitioner, and not of Dr. Pond. If this be true it might be held that if Dr. Pond had, prior to the accident, notified Smith of

his acceptance of the counter offer the contract would thereupon have been completed, notwithstanding that Smith did not communicate such acceptance to his principal before the loss occurred. "If the applicant accepts the terms granted by the company the contract is considered complete, without waiting for the local agent to communicate the acceptance to the company." Cooley, Briefs on Insurance, vol. 1, p. 424. See, also, Tayloe v. Merchants', etc., Co., 50 U. S. (9 How.) 390, 13 L. Ed. 187; Carter v. Bankers' L. I. Co., 83 Neb. 810, 120 N. W. 455; Joyce on Insurance, vol. 1, p. 230. But on this question it must be kept in view, as tending to show that in the mind of at least one of the parties the contract was not complete, that Smith waited until he heard from Dr. Pond concerning the counter offer before ordering the policy, and that when he did hear from him he promptly notified the general agent.

[5] It is to be noted, however, that the commission did not in its findings determine the character and scope of Smith's authority as agent for petitioner, and this renders it necessary next to consider whether he could bind petitioner by a parol contract of insurance. Smith testified that "binders" were used in San Francisco, but not in Napa; that he issued none in this instance, but that he had been "advised by Mr. Nason and Mr. Wilson * * * that before the policy is issued the applicant is covered * * * from the date of the application." Smith's own position—erroneously assumed, as we shall see—was that coverage was effected from the date of the application, notwithstanding the contract was not completed before the loss. Wilson, when he was asked whether Smith was "authorized to bind the company from the date of the application, * * *" answered, "I don't know." Nason's position was stated as follows:

"Q. Is it your custom during that interim [between the original application and the final acceptance or rejection thereof] to consider the man or the assured covered? A. Not unless a binder is given."

Dr. Pond testified:

"Q. But on October 2d, was it after the accident you called again at Mr. Smith's office? A. It was. Q. And did Mr. Smith at that time tell you that the policy had been applied for or had been issued? A. He told me it had not only been applied for, but I was perfectly secured. * * * Q. Did he tell you positively that he had made application to the insurance company for you to have a policy issued in your favor? A. Showed me a copy of the application. Read it to me to show that I was secured. * * * Q. Doctor, did Mr. Smith tell you you were wholly covered? A. Yes. Q. And you never considered that you did not have any insurance? A. I never questioned it for a moment."

From this testimony it would appear that Smith did not give assurances of coverage to Dr. Pond until after the accident. This is in accord with the former's testimony, for, as already shown, he said he saw Dr. Pond only once—on the afternoon of October 2. Smith also testified that he had not been in the habit of issuing policies for petitioner, and that the invariable custom was to send the applications to the general agency, where the policies were issued and forwarded to him for delivery. We shall assume that Smith was, for certain purposes at least, petitioner's agent; but neither in the testimony we have just quoted, nor elsewhere in the record, is there a particle of evidence to indicate that he had authority to bind petitioner by parol. Hence, even if the commission had meant so to convey by its finding that Smith was "the duly accredited and authorized agent of * * * Western Indemnity Company," and if Smith had given assurances of coverage to Dr. Pond before the injury—and not afterwards—as the fact seems to be, still such a finding would be without support in the evidence.

[6] We turn now to the question whether the finding "that it was the custom and the practice that an assured was covered by the insurance, subsequently provided in the policy, from the date of his application," may be sustained. We cannot determine from the record whether the commission intended to find that such "custom and practice" was followed as well when the contract of insurance was not concluded before a loss as when it was. If the former, from the conclusion we have already reached as to when the contract was completed, we must hold that the finding is not supported by the evidence. In addition to Smith's testimony that he was advised by the general agent and Wilson that an applicant was covered from the date of his application, he stated that in all the policies he had received from the company the date corresponded with that of the application, but he admitted that he had never, except in this instance, sent in an application to petitioner whose terms were not acceptable. Wilson's testimony corroborates that of Smith on the point that the policies sent to him had always borne the date of the application, so as to provide coverage from the beginning, but he does not state that such custom and practice were observed where the terms of an application were not unconditionally accepted by the company. The testimony of Nason and Adams, which we have quoted, tends to show positively that this custom and practice did not prevail in such circumstances. It seems to us that this finding is without support in the evidence.

It only remains to consider whether, where the loss has occurred before the parties had come to an understanding upon the terms of the contract, the general agent has authority to issue a policy so as to cover the

uncovered loss. The cause was argued before this court and submitted for decision. The submission was subsequently vacated, and the cause set for further argument upon the questions:

"(1) As to the authority of the general agent of a foreign insurance company after a loss not amounting to a total loss has occurred to the knowledge of the agent, to deliver a policy of insurance antedated so as to cover the loss, there being at the time no binding agreement for the insurance between the insured and the company; and (2) as to the authority in the particular case of Wilson, the employé of the general agent, to make such delivery on behalf of the general agent, assuming that the general agent had himself such authority."

After the above order of resubmission the respondent commission filed a supplemental brief in which, among other points, it is urged that "the actions of the employés of Nason Company were the actions of Nason Company," and in support of the contention the following authorities are cited: International Trust Co. v. Insurance Co., 71 Fed. 81, 17 C. C. A. 608; Mound City Ins. Co. v. Huth, 49 Ala. 529; Electric Ins. Co. v. Fahrenkrug, 68 Ill. 463; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Mayer v. Ins. Co., 38 Iowa, 304, 18 Am. Rep. 34; Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. But we do not deem it necessary to discuss this point, and we shall, therefore, proceed on the assumption that the acts of Wilson and Adams stand as the acts of the general agent just as if Smith had dealt directly with him.

The policy was introduced in evidence, and contained the following provisions:

"K. No assignment or change of interest and no change, waiver, or extension of any of the terms or conditions of this policy shall be valid, unless indorsed hereon and signed by an officer of the company, nor shall notice to any agent or any other person be held to effect a waiver or change in any part of the policy. * * * M. The term of this policy shall be twelve months from October 3, 1917, beginning and ending at twelve o'clock noon, standard time, at the assured's business address stated herein."

It is contended by petitioner that as Nason, according to his own testimony, was not an officer of the company, the alteration of the date of the policy was not binding on petitioner, the policy did not cover liability prior to October 3, and therefore petitioner was not the insurance carrier of Dr. Pond at the time of the accident. But, as the decisive question here is whether the general agent had authority to issue a policy covering a known loss, rather than whether he was authorized to alter a policy properly issued in the first place, we are not called upon to discuss the provision in clause K.

[7] The general rule covering this question is thus stated in Cooley's Briefs on Insurance, vol. 1, at page 354:

"It may * * * be regarded as elementary that an agent has no authority to insure goods which he knows to have already been destroyed by fire."

And this rule finds support in the following cases: Mead v. Phenix Ins. Co., 158 Mass. 124 [32 N. E. 945]; Clark v. Ins. Co., 89 Me. 26 [35 Atl. 1008, 35 L. R. A. 276]; Stebbins v. Ins. Co., 60 N. H. 65. And in Waterloo Lumber Co. v. Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539, the court said:

"It has frequently been held that an agent has no authority to insure property already destroyed. * * *"

See, also, Bentley v. Columbia Ins. Co., 17 N. Y. 421; 28 Cent. Dig. p. 703; 11 Dec. Dig. Ins. § 127. The principle laid down in these authorities is equally applicable to compensation insurance.

Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never "issued" until it was delivered to Smith on October 9. Before that time the date of the application had been changed from September 25 to October 3, and the policy from October 3 to September 25.

The following cases are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: New York Ins. Co. v. Russell, 77 Fed. 103, 23 C. C. A. 43; Insurance Co. v. Colt, 87 U. S. (20 Wall.) 560, 567, 22 L. Ed. 423; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Schultz v. Phœnix Ins. Co. (C. C.) 77 Fed. 374, 392; Kennebec v. Insurance Co., 6 Gray (Mass.) 204; Warner v. Insurance Co., 14 Wis. 345; Komula v. Gen. Assurance Co., 165 Wis. 520, 162 N. W. 919. These authorities are distinguishable from the case here in that in each of them, prior to the loss, the insured had signified his acceptance of the terms offered by the insurance company, and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon.

The general rule is that whenever the par-

ties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application, and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not under contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss.

Since it appears, then, that no contract of insurance was concluded prior to the accident, that Smith had no authority to bind petitioner by a parol contract of insurance, that the "custom and the practice" found by the commission to have been followed did not extend to a case where, at the time of the loss, the parties had not agreed upon the terms of the contract, and that the general agent was, in such circumstances without authority to issue a policy it follows that the findings cannot be sustained.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.

WILBUR, J. I dissent. The evidence shows that the Workmen's Compensation Law did not apply to Dr. Pond until, at the solicitation of the agent Smith, he elected to be bound by its terms. The effect of his election was to charge him with responsibility for the injury to his employés under the terms of that law, even if he was wholly without fault, as in this case. Because of such election Dr. Pond evidently intended to keep covered by insurance. Accordingly he notified Smith, petitioner's agent, that he desired an indemnity policy, dating from the expiration of his existing insurance, and that he was willing to pay whatever premium was charged by the company. The petitioner offered its insurance policies for sale to the public generally at a fixed and uniform rate. The terms and provisions of the policy being thus fixed, the question of insurance turned upon the willingness of the prospective policy holder to pay the premium demanded therefor by the company. At the time Dr. Pond applied to Smith for the policy he stated that he was willing to pay the premium, whatever it might be. Instead of communicating this fact to the general agent, Smith inserted in the written application the amount of the premium as $10. This resulted in the complications detailed in the main opinion. The evidence discloses that the company was willing to write the policy, and that Pond was willing to pay the amount of the insurance, and this willingness had been communicated by the one to the other. The whole difficulty arose from the failure of Smith to state in the written application for insurance the fact that Dr. Pond was willing to pay the increased premium. This was not the fault of Dr. Pond. The policy applied for was one dated September 25, 1917, and the policy finally issued and paid for was so dated. Wilson, to all intents and purposes, was the general agent of the company. He conducted the entire business of the general agent, in the name of the general agent, without consultation with him. Upon the insistence of Smith that Dr. Pond was entitled to a policy dated September 25, 1917, in accordance with the custom of the office he issued such a policy so dated, after knowledge of the accident, which policy covered the liability here sought to be enforced. In view of the delay caused by the failure of its agent Smith to communicate to the general agent the facts, namely, the willingness of Dr. Pond to pay the premium asked, which would have resulted in the prompt issuance of the policy, it would seem that common honesty demanded of the defendant that it accept the responsibility due to the delay of its own agent in communicating a correct statement of the actual terms of the application. The finding of the ultimate fact by the commission was that the written policy which by its terms covered the accident was binding by reason of a previous oral negotiation between the parties. I think the evidence is sufficient to justify this finding. Under somewhat similar facts, in Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, it was held under the circumstances there stated that the acceptance of the rate by the insured in a communication to the local agent was sufficient to bind the company where the rate had been previously fixed by the general agent, and that, although no policy was ever issued, the insurance company was bound. The only difference in the two cases in principle is that in the case at bar the information that the applicant was willing to pay the premium demanded was communicated to the local agent before the premium was fixed by the general agent, and in Eames v. Home Ins. Co. it was communicated afterward. In neither case did the information that the applicant was willing to pay the premium demanded reach the general agent in time for the issuance of the policy before the loss, while in Eames v. Home Ins. Co. the policy was never issued, and in the case at bar it was issued with full knowledge of the fact. I think that Dr. Pond had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded.

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YOUNG et al. v. SOUTHERN PAC. CO. et al.
(Sac. 2501.)

(Supreme Court of California. March 9, 1920. On Rehearing, April 7, 1920.)

1. Railroads ⟸348(9)—Evidence held to show contributory negligence of motorcyclist crossing track.

In an action for the death of a motorcycle driver struck after passing standing cars obstructing his view of a track on which a car was being pushed by an engine, evidence *held* to justify a finding of contributory negligence in failing to stop, look, and listen.

2. Railroads ⟸328(1)—Motorcyclist held contributorily negligent as matter of law.

A motorcycle rider who failed to stop and look, though his view was obstructed by standing cars, and attempted to cross, heedless of warning bells and whistle, and gesticulations and cries of bystanders and warning shouted by brakeman a few feet away, *held* contributorily negligent as a matter of law.

3. Trial ⟸193(3)—Instruction as to burden of proving contributory negligence held erroneous as indicating court's opinion as to evidence.

In a negligence action, where plaintiff in opening case put before the jury all the elements that went to disclose contributory negligence so that defendant's evidence did not materially add thereto in establishment of contributory negligence, and where plaintiff's evidence showed contributory negligence as a matter of law, an instruction that contributory negligence is not to be inferred from plaintiff's testimony, and is to be affirmatively shown by defendant, would have been error, in that it would have led jury to believe that in court's opinion such evidence was insufficient to establish contributory negligence.

4. Railroads ⟸351(17) — Instruction as to duty of traveler to look after passing obstruction to view held error.

In action for death of motorcyclist struck at railroad crossing after having passed standing box cars extending into street and obstructing his view of other track, where after passing the standing cars he had an unobstructed view of other track for nearly three miles, instruction that, if box cars excluded view of track "when about to go upon such track, the traveler is excused from looking" *held* error, in leading jury to think that deceased had been under no obligation to look after passing standing cars, whereas he was required to look if by looking after passing standing cars he could have seen car approach on other track.

5. Railroads ⟸328(10) — Motorcyclist approaching obstructed crossing required to stop, look, and listen.

A motorcyclist, approaching a crossing with standing cars obstructing his view of cars approaching on another track while bell is ringing and whistle blowing, is negligent in attempting to cross without looking, listening, and, if necessary, stopping; his obligation to so do being increased by knowledge that a train is approaching.

6. Railroads ⟸351(17)—Instruction as to duty to look after passing obstruction created by defendant held error.

In action for death of motorcyclist struck by cars on main track of crossing after having passed standing cars on passing track obstructing his view of main track, instruction that failure to stop, look, and listen is not negligence where railroad has created conditions causing ordinarily prudent person to refrain from exercising such precautions *held* error, where motorcyclist, after passing standing car, had three-mile view of main track; he being under obligations to look and listen notwithstanding obstruction.

7. Negligence ⟸83—Contributory negligence no bar to recovery under last clear chance doctrine.

Contributory negligence does not preclude recovery under the last clear chance doctrine, which is founded upon the theory that the injured person was guilty of negligence.

8. Trial ⟸252(9)—Instruction on last clear chance doctrine held improper as without support in evidence.

In action for death of motorcyclist at crossing, instruction on last clear chance doctrine, authorizing recovery for plaintiffs on railroad's failure to stop train if circumstances were such as to have led an ordinarily prudent person, situated as the trainmen, to believe that motorcyclist was in the act of crossing the track, and through fear, excitement, or loss of self-control could not stop, *held* improper, where there was no evidence that driver was acting under fear or excitement, or had lost self-control until accident was unavoidable.

9. Railroads ⟸338—Last clear chance doctrine defined.

Under the last clear chance doctrine, the traveler's peril, which calls upon the trainmen to act, must be an actual one from which he cannot escape by the exercise of ordinary care; and, until he has reached the point from which he cannot escape by the exercise of such care, the doctrine does not apply.

10. Trial ⟸219—Instruction requiring "proper warning," without specifying any standard, improper.

In an action for death at crossing, instruction that railroad is required to give "proper warning," without defining any standard as to what constituted proper warning, *held* improper.

11. Trial ⟸251(8)—Instruction as to negligence not pleaded improper.

In an action for death at crossing, instruction that railroad was required to have some one stationed at the crossing to give proper warning *held* improper, where complaint did not allege railroad's failure to have brakeman at crossing as the basis of the claim of negligence.

12. Evidence ⊂⊃588—Credibility of witness for jury.

The jury can disbelieve the testimony of any witness.

13. Appeal and error ⊂⊃1002—Verdict on conflicting evidence not disturbed.

Where evidence was conflicting, verdict supported by substantial evidence will not be disturbed, as the jury is the exclusive judge of the facts.

14. Appeal and error ⊂⊃1170(9)—Erroneous instructions held prejudicial.

In action for death at crossing, erroneous instructions as to contributory negligence and the last clear chance doctrine, *held* ground for reversal on appeal from judgment for plaintiff, notwithstanding Const. art. 6, § 4½, in view of insufficiency of evidence to prove defendants liable under last clear chance doctrine, and verdict against train employés against whom last clear chance doctrine was not available, as well as against those who would have been liable thereunder, indicating that the verdict was not rendered under such doctrine.

Olney and Lawlor, JJ., dissenting.

On Rehearing.

15. Negligence ⊂⊃122(2)—Contributory negligence must be proved by defendants unless shown by plaintiff's evidence.

Unless it may be inferred from the evidence offered by the plaintiff, contributory negligence is a matter of defense, to be proved affirmatively by the defendant.

16. Death ⊂⊃103(3) — Where deceased was contributorily negligent as matter of law case is not for jury.

In action for death, where deceased was clearly guilty of contributory negligence as a matter of law, the question of contributory negligence should not have been submitted to the jury.

In Bank.

Appeal from Superior Court, Yolo County; H. D. Burroughs, Judge.

Action by Roy J. Young, as special administrator of the estate of Jacob Bluhm, deceased, and another against the Southern Pacific Company and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Devlin & Devlin, of Sacramento, Hudson Grant, of Woodland, and A. L. Clark, of San Francisco, for appellants.

Clark, Black & Clark, of Berkeley, for respondents.

WILBUR, J. This action was brought by the father and mother of Fred C. Bluhm to recover damages for the death of their son. The father has died, and the special administrator of his estate has been substituted.

Fred C. Bluhm, while riding a motorcycle along Main street in the city of Woodland across the railway track of the defendant company, was struck by a caboose, which was being pushed by an engine, and killed. Joined with the defendant company were G. E. Waite, conductor, W. H. Jones, engineer, and G. C. Conley and B. C. Neibling, brakemen, of the train. The case was tried by a jury, and a verdict rendered against all of the defendants. As a part of the plaintiffs' case a diagram of the scene of the accident was introduced in evidence. From this it appears that crossing Main street at and near the place of the accident were two tracks of the railway company, one the main line track and another a passing track. In approaching the point of collision the deceased first crossed the passing track and then the main track. At the time of the accident the train involved in the accident was being broken up and a part thereof was standing on the passing track. The engine and caboose were on the main track. The complaint alleges that the defendants were negligent in allowing a portion of the train to stand upon the passing track in such manner that a portion thereof projected into and partially crossed Main street, "so that the northerly end of said train of cars extended from the south side of said Main street into the said Main street a distance of about 15 feet," thereby obscuring the view of a person traveling westerly on Main street and preventing such person from observing the approach of cars "being propelled in front of an engine, in the event an engine shoving cars was being run on said main line track in a northerly direction towards such railroad crossing, and would be misled and deceived into believing that no cars were being propelled by or shoved by said engine." That immediately prior to the collision the engine of the defendant company was pushing a caboose northward along the track, the engine being fronted north and the caboose in front thereof; that the deceased had no knowledge or notice of the fact that the defendants were engaged in running an engine propelling or shoving a caboose in front of it in a northerly direction along said main line track, and that by reason of the location of said portions of said train of cars on said passing track he was misled and deceived into believing that he could go safely over said crossing. Immediately before the trial began plaintiffs amended their complaint to add a count charging negligence under the last clear chance doctrine, in which they alleged the same situation with reference to the cars and tracks. It was alleged:

"That as he passed the northerly end of said portion of said train of cars so placed and allowed so to remain on said passing track, he for the first time discovered that the defendants were engaged in running an engine propelling and shoving a caboose in front of it in a northerly direction along said main line track, towards the point where he was about to pass

over said main line track, and that he then for the first time discovered the peril in which he would be by reason of proceeding across said main line track; that Fred C. Bluhm so discovered said engine and caboose immediately upon his passing the said northerly end of said cars so placed and allowed to remain on said passing track, but that at the time of becoming aware of the approach of said engine and caboose it was then impossible for him to avoid continuing westerly over said main line track, and that he did continue westerly to the said main line track upon his said motorcycle; * * * that the individual defendants herein who were engaged in the management of said engine and caboose * * * knew that the said Fred C. Bluhm was about to go upon said main line track * * * and could not avoid so doing; that they then became aware of the peril in which he was situated, and that if he went upon the said main line track he would be killed or suffer great bodily injury, if the engine or caboose were not stopped or the speed thereof slackened immediately; that the defendants herein negligently and carelessly, after they so became aware of the said danger * * * failed to stop said engine and caboose, or to slacken the speed thereof immediately," and as the result thereof deceased was killed.

The distance between the passing track and the main track at the point of collision was between 13 and 14 feet.

[1, 2] Plaintiffs in their main case called as witnesses the engineer and brakeman riding on the right-hand side of the engine and caboose, respectively, at the time of the accident, a witness who was following immediately behind the deceased and saw the collision, and other witnesses, concerning the various details regarding the circumstances of the accident. These witnesses testified, among other things, that the deceased stopped for a moment's conversation at a point about 150 feet east of the main line of the defendant railway company; that at the time he stopped and conversed with one of the witnesses a stationary electric bell at the crossing was ringing continuously because of the fact that the engine and caboose were on the track south of the crossing at a point sufficiently near to cause the automatic electric crossing bell to ring; that during all of this time the automatic bell on the engine was ringing; that the engine stopped at points 500 feet south of the crossing and 200 feet south of the crossing, and that on starting forward each time two blasts of the whistle were blown; that the engine and caboose were approaching the crossing at a speed of from four to eight miles an hour, and that the deceased upon starting his machine to the point of crossing moved slowly to the point of the accident at a speed of from four to six miles an hour; that the view of the main line track upon which the caboose and engine were approaching was obscured by a line of cars on the passing track which projected into the street to a point variously estimated at 8 or 10 feet north of the south curb line of the street to a point within 8 or 10 feet of the Northern Electric track which ran along Main street in an easterly and westerly direction a few feet north of the center line of said Main street; that, although the view of the main track was thus obscured, a witness 50 feet in the rear of the deceased saw the smoke from the approaching locomotive, and shouted twice to the deceased, warning him of his danger, telling him that he would be killed if he did not look out; that in addition to this warning two men standing near the stationary electric bell on the easterly side of the main line track in Main street, and within a few feet of the deceased, waved frantically, and shouted at the deceased to warn him of his danger; that a witness, Conley, a brakeman, riding on the right-hand rear step of the caboose, as soon as he saw the deceased approaching, yelled at him, and waved for him to stop, and immediately gave the emergency signal to the engineer; that at that time the deceased was upon the passing track, which was about 13 feet from the main line track upon which the caboose was approaching; that the engineer was constantly observing the track and the brakeman on the rear of the caboose for the purpose of safeguarding those approaching on the highway; that he saw the frantic gestures of a man near the stationary electric bell, apparently trying to stop some one approaching on the highway, and that immediately, and without waiting for such person to become visible, he applied the emergency brakes; that he saw the signal of the brakeman for the emergency brakes, but had already applied the brakes; that the deceased moved forward along Main street toward the point of collision without looking to the right or the left or in any way indicating that he saw or had knowledge of the approaching train; that when he was upon the track in front of the caboose, apparently in sudden fright, he leaped from his motorcycle in front of the caboose, the motorcycle passed on and cleared the caboose, falling clear of the track, but deceased fell and was run over by the trucks on the left side of the caboose. From this evidence it is justly inferable that the deceased, without the slightest effort to stop or look or listen, approached the crossing, although knowing that the track was there, utterly heedless of the warning bells and whistle and the gesticulations of the bystanders, and the cries of those who sought to warn him, and the warning shouted at him by the brakeman, who must have been only a few feet from him. From this evidence it is not only apparent that the jury would have been justified in finding the deceased guilty of contributory negligence, but that he was guilty of contributory negligence as a matter of law. The court, however, instructed the jury as follows:

"Contributory negligence is such an act or omission on the part of the decedent, amounting to want of ordinary care, as, concurring and co-operating with the negligence of the defendants, was the proximate cause of the injury complained of. Nor is it to be inferred from the evidence offered by the plaintiffs; such negligence is a matter of defense to be proved affirmatively by the defendants; and hence the burden of proof of contributory negligence is on the defendants."

[3, 4] It is difficult to appraise the effect upon the jury of the above instruction, concerning contributory negligence. The plaintiffs in opening their case put before the jury all the elements that went to disclose that the deceased was guilty of contributory negligence, and while the defendants did introduce some evidence in addition to that offered by the plaintiffs, it may be said in general that such evidence did not add materially to the situation as disclosed by the plaintiff's evidence so far as contributory negligence is concerned. The jury might well have believed from this instruction that in the opinion of the court either the plaintiff's evidence did not show contributory negligence, or that they must wholly disregard this chain of circumstances in determining whether or not there was contributory negligence. Of course, there are other instructions upon the question of negligence and contributory negligence and upon the doctrine of the last clear chance. But before considering them it should be observed that the verdict returned by the jury was against all the defendants. The defendants not only included the brakeman and engineer, who saw the deceased approaching the track, but also the conductor and another brakeman who did not observe and did not see the deceased at any time before he was run over and killed. If the jury based its verdict upon the last clear chance doctrine, it could not justly have found a verdict against those employés who knew nothing of the peril of the deceased. It would therefore appear that the jury's verdict was upon the theory that the deceased was not guilty of contributory negligence. The jury were further instructed:

"If you believe from the evidence that the defendants at the crossing where the accident is alleged to have occurred suffered to remain on their tracks box cars so as to exclude to a traveler a view of its track when about to go upon such track, the traveler is excused from looking, and the failure to look cannot be imputed to him as negligence, although it throws upon him additional care in listening and to take such other precautions for his safety as may be reasonably necessary."

Now, with this instruction it should be observed that it is unquestioned that during a part of the time when the deceased was approaching the main line track his view was obscured so that he could not see the approaching engine and caboose. It is also true that as he approached the main line track his view of that track to the south constantly increased. The extent of that view depended upon his location with reference to the end of the standing box car. If, however, we assume that he crossed the passing track as near to the standing car as he could, he had an opportunity the moment that he passed the corner of this car to look down the track toward the approaching engine and caboose, with an unrestricted view for nearly three miles. The phrase used in the instruction, "when about to go upon such track," in view of the conceded location of the tracks and the opportunity to observe, after passing the standing car, might well have been construed by the jury as altogether excusing the deceased from looking, while the law required the deceased to look if after passing the obstruction he could by looking have seen the approaching train, and the court elsewhere so instructed the jury as follows:

"If you find from the evidence that, when the deceased passed the north end of the box car going toward the main line track upon which he was killed, there was a space between the passing track and the main line track, from which he could, under the evidence in the case, in safety have seen the approaching engine and caboose it was his duty to look and listen from this point of safety, and if he failed to do so, but passed on to his death, he was guilty of contributory negligence."

As was said by the District Court of Appeal in its first decision herein:

"There can be no possible doubt under the evidence that there was such a space as is therein indicated. The virtual effect of the instruction was therefore that if the jury believed Bluhm failed to look for the train, he was guilty of contributory negligence."

Again, the jury were instructed as follows:

"If you believe from the evidence that the deceased, Fred Bluhm, while approaching the crossing to a point that was reasonably suitable and proper for ascertaining whether cars were approaching, and while he was yet in a position of safety there was an engine moving upon the main line, but under the facts in the case he then had reasonable grounds for believing the engine was not approaching, or, if approaching, it was not near to the crossing, and was not shoving the caboose near to the crossing, then it is a question for you to determine whether he was negligent in passing the crossing track without stopping."

[5] This instruction simply means, under the facts in the case, that if the deceased saw the smoke of the approaching engine and believed that the smoke was at the front end of the approaching train instead of in the middle, as it appears in fact it was, the jury was to determine whether it was negligence for him to continue without stopping to make further observation. There is no justification

for this instruction. If, in addition to the warning given by the track itself, by the ringing of the bell and the blowing of the whistle, he actually saw a train approaching, it was negligence for him to proceed and attempt to cross in front of the approaching train, even if he believed that the smoke was in the front of it. He was bound to look and listen, and, if necessary, to stop, upon approaching the track without knowing that a train was approaching, and that obligation was increased rather than diminished by his knowledge that in fact a train was approaching.

[6] The jury was further instructed:

"You are instructed that the rule which requires a person on a highway to stop, look, and listen for an approaching train, where the view of the track is obstructed, is not an unvarying one applicable to every set of circumstances. Contributory negligence cannot be imputed to one on account of his failure to stop, look, and listen for a train, or a portion of a train approaching the crossing, if, by the acts of those managing the train, or parts of the train at the crossing, appearances are produced which would cause an ordinarily prudent person to refrain from exercising the precaution to stop, look, and listen."

This could only mean, under the circumstances, that the deceased was not required to stop, look, and listen if in the opinion of the jury the appearance of the box car upon the passing track was sufficient in their judgment to excuse him from the burden of the rule. This is not the law. The deceased was under the obligation to look and listen, and if by reason of the obstruction caused by the box car he could not see or hear without stopping in a place of safety so to do, it was his duty to do so.

We have so far discussed the case from the standpoint of the plaintiff's testimony for the purpose of determining whether or not the instruction to the effect that contributory negligence could not be inferred from the plaintiff's testimony prejudiced the appellants. It is apparent from what has been said that the above-quoted instructions upon the subject of contributory negligence were erroneous and require a reversal of the case.

[7] The respondents contend, however, that the defendants were liable on the last clear chance doctrine. It is true that under this doctrine the contributory negligence of the deceased would cease to be a factor as soon as the situation demanded the application of the rule, which is founded upon the theory that the injured person is guilty of negligence. For the purpose of this appeal it is sufficient to say that it is impossible to determine whether the jury awarded the verdict on the theory that the deceased was not guilty of contributory negligence, or upon the theory that the last clear chance doctrine applied, but that the fact that some of the defendants against whom the verdict was found were not liable, in any event, under that doctrine, would indicate that the former was the basis of the jury's verdict. Notwithstanding the necessity of a new trial, we deem it unnecessary to critically examine the instruction of the court on the last clear chance doctrine, for the reason that the doctrine is well settled, and that instructions applicable to the facts of this case may readily be given. The instruction is criticized by the appellants "because it permitted the jury to find the defendants' negligence under the rule, if on the facts the trainmen could have seen Bluhm in time to save him, whereas the law is that they must have actually seen him or known he was there, and have been guilty of an independent and a new negligence thereafter." It is doubtful whether the instruction is susceptible of the interpretation placed upon it by the appellants. Without quoting the entire instruction, it provides:

"That if * * * those in charge of the engine and caboose discovered the plaintiff's presence on the highway * * * and the circumstances were such as to lead an ordinarily prudent person situated as those were in charge of the engine and caboose to believe that the deceased was in the act of crossing the track in front of the caboose, and through fear, excitement, or loss of self-control could not stop and would come in collision with the caboose, if it proceeded, and that those in charge of the engine and caboose, after seeing and realizing such a situation of the deceased, failed to stop the engine and caboose, although they could by the exercise of ordinary care have stopped the same, * * * then in that event the jury will find for the plaintiffs, notwithstanding they believe that the deceased was originally wanting in ordinary care in failing to ascertain that the engine and caboose were coming, and in attempting to cross the main line track."

[8, 9] This instruction is misleading for the reason that there is no evidence to justify the conclusion that the deceased was acting under fear or excitement or had lost self-control until the moment that he leaped from his motorcycle or was knocked therefrom, at which time the accident was unavoidable. The only evidence observable by the train employés was that the deceased was proceeding heedlessly forward. The last clear chance doctrine was not applicable until he arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care. Until he reached that point the train employés had a right to rely upon his continuing obligation to observe the approach of the train. The evidence does not clearly indicate this point, for the reason that it does not show within what distance the motorcycle, under the circumstances, could have been stopped. It is important that this should be made clear to the jury for the reason that, in one sense, every person approaching a crossing at a speed which would bring

him in collision with a moving train at the crossing is in danger and certain to be injured unless he accelerates his speed, slows down or stops, or the engineer does so. Under the last clear chance doctrine the peril which calls upon the train employés to act must be an actual one from which the imperiled party cannot escape by the exercise of ordinary care. Until the deceased reached the point from which he could not escape injury by the exercise of ordinary care, either by stopping or accelerating his pace, the doctrine of the last clear chance does not apply. The rule is well stated in the following quotation from French v. Grand Trunk Ry., 76 Vt. 441, 58 Atl. 722:

"It is true that, when a traveler has reached a point where he cannot help himself—cannot extricate himself, and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true, that, if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears and physical strength to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case, the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision and contributes to it, there can be no recovery."

We have recently had before us in Basham v. Southern Pacific Co., 176 Cal. 320, 168 Pac. 359, the doctrine of the last clear chance as applied to a crossing case, where the injured party was approaching the track at right angles. It was there said:

"The 'last clear chance' doctrine can have no possible application, unless there was evidence tending to show that the fireman neglected to take steps which due care would have required, when he saw the team and wagon in a position which would have indicated to a reasonable man that Coffey was already in danger, or was immediately about to enter the danger zone."

[10, 11] The court gave the following instruction:

"The jury is instructed that if under the circumstances existing at a crossing proper warning of the danger of the approach of trains cannot be given unless some one is stationed thereat to give warnings, it is the duty of a railroad company making use of the crossing to have some one stationed at the crossing to give such warnings, or to approach such crossing with the engine under such control that it can be stopped in time to avoid injury."

Aside from the proposition that this instruction submitted to the jury, without any standard for the determination of the same, the question of what constituted "proper warning" of the danger of the approaching train, the instruction was objectionable because the complaint did not allege the failure to have a flagman at the crossing as a basis of the claim of negligence. The instruction should not have been given.

We do not deem it necessary to discuss the other instructions complained of by appellants, nor to set out other portions of the evidence, for the reason that the rules applying to accidents at railway crossings are so well settled that on a new trial the court should have no difficulty in correctly instructing the jury. We do not wish to be considered as either approving or disapproving of the instructions that are not herein mentioned.

[12, 13] We have not overlooked the fact that the jury is the exclusive judge of the facts, and can disbelieve the testimony of any witness, and that, if substantial evidence supports the verdict, where the evidence is conflicting, the verdict of the jury must stand. Our discussion of the evidence is for the purpose of making manifest the prejudicial character of the erroneous instructions given by the court.

As to the objection that the complaint does not state that the deceased was an adult son, the evidence clearly shows that fact, and the complaint can be amended in the lower court. We, therefore, deem it unnecessary to give further consideration to that question.

[14] In view of the suggestion that under section 4½ of article 6 of the Constitution the judgment might be affirmed on the theory that an examination of the entire record leads to the conclusion that the errors complained of have not resulted in a miscarriage of justice, we deem it proper to state that we are entirely satisfied from such examination that this court cannot say that there has been no miscarriage of justice. For instance, defendant Conley testified that as soon as he saw the deceased he gave the emergency signal. Defendant Jones, the engineer, testified that he applied the emergency brakes before he received the signal or saw the deceased. Defendant Neibling testified that he saw nothing of the accident until the motorcycle appeared on the far side of the train, and that the emergency brake had been applied before that time. Defendant Waite, the conductor, testified that he was not on the engine or caboose at the time of the accident.

If this testimony is true no verdict should have been rendered against any of these defendants on the last clear chance doctrine, or on the theory that they were guilty of negligence; nor should a verdict have been rendered against the defendant company. The question of whether or not this evidence was true, and, where there was contradictory circumstantial evidence, which should be accepted by the jury, was entirely a matter for the trial court and jury; nor is it a matter for consideration that another jury upon a

new trial might, upon such conflicting evidence and proper instructions, render a verdict based on the last clear chance doctrine favorable to the plaintiffs. Furthermore, the fact that a verdict was returned against defendants Waite and Neibling, who neither saw the peril of the deceased nor had anything to do with the instrumentalities by which the train was or could be stopped, is a clear indication that the present verdict was not rendered upon the last clear chance doctrine. If it be conceded that there is sufficient evidence upon which the jury might have based a verdict against some of the defendants on that doctrine, it is equally apparent that as to others such a verdict could not properly be rendered. It cannot therefore be said from the record that this doctrine was the basis of the jury's verdict against all the defendants, and, if not, it cannot be said by this court to be the basis of their verdict against any one of the defendants. Such a conclusion would be in direct conflict with the verdict of the jury, which includes all, and hence implies a sort of negligence in which all participated, and therefore, a sort to which contributory negligence is a complete defense.

The judgment is reversed.

We concur: LENNON, J.; SHAW, J.; MELVIN, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and in what is said in the main opinion on the question of contributory negligence, and the instructions given the jury thereon. I am not in entire accord with all that is said in the opinion in regard to the last clear chance doctrine, and believe that the instruction on that question was substantially correct and not rendered prejudicially misleading by the use of the words "through fear, excitement or loss of self-control." I am further of the opinion that there was sufficient evidence to sustain a verdict based on the last clear chance doctrine. To my mind, however, it cannot fairly be held that the evidence was such as to require a verdict for plaintiff on that ground, or, in other words, that the evidence was such that defendants are liable under said doctrine as matter of law. This being so, a reversal cannot be avoided, for it is impossible to know upon what theory the verdict was rendered, or that the jury ever concluded that the facts existed which would have warranted a verdict under the last clear chance doctrine.

OLNEY, J. (dissenting). I dissent on the ground that, while the statement in the first instruction discussed in the main opinion, "Nor is it [contributory negligence] to be inferred from the evidence offered by the plaintiff," is erroneous, so palpably so as to make it probable that it was given wholly by inadvertence, and while, in fact, the decedent was plainly guilty of contributory negligence and the jury should have been so instructed, yet the facts of the case are such as to show unmistakably that the verdict was a just one under the last clear chance rule, and to make it evident that the jury, if there is any presumption that they were reasoning beings and acted as such, reached their verdict because of the liability of the defendants under that rule without being affected by the issue of contributory negligence which was erroneously submitted to them. More than this, I do not see how it is possible upon the facts of this case to say truly that the errors relied upon to justify the reversal, of which those concerning the issue of contributory negligence are alone substantial, "resulted in a miscarriage of justice" as required by section 4½ of article 6 of our Constitution. The verdict certainly cannot be said to be an unjust one. If the facts be not such as to require a verdict for the plaintiff as a matter of law, and in my judgment they at least closely approach so doing, at least they amply justify such a verdict and destroy the possibility of its being properly deemed "a miscarriage of justice."

The salient facts are practically without dispute. The decedent, Bluhm, was coming along the street on his motorcycle approaching the crossing in an utterly heedless and therefore perilous fashion. Under these circumstances no recovery could be had for his death unless three things appeared, viz.: (1) That the train crew observed and realized his peril; (2) that the train crew did not act with the promptness which such a situation reasonably demanded of them; and (3) that if they had so acted, the accident would have been avoided. On the other hand, if these things did appear, the plaintiff was entitled to recover. The evidence both for the plaintiff and the defendants shows unmistakably that they did in fact exist.

First, as to the train crew observing and realizing the decedent's peril. The decedent was killed by being struck by a caboose which was being pushed by a locomotive. As the caboose was being so backed, one of the brakeman, the defendant Conley, was stationed on the steps of the forward platform of the caboose, that is, the platform that was forward as the caboose was then being moved, to direct and control the movement of the train to look out for any danger. Before the decedent came in sight, and before the train reached the street, both Conley and the engineer, the defendant Jones, observed a bystander on the sidewalk, who, in Conley's language, was "making all kinds of demonstration. It seemed as though he was motioning to a fellow going across the track, you know—stopping him that way, and then he grabbed his hat and motioned and waved it." By the actions of this bystander Conley

and the engineer must both have realized the possibility of an impending danger, and must have been mentally prepared for the peril which immediately after developed within their observation when Bluhm came into view. So forewarned, their natural and almost inevitable mental reaction when Bluhm did come into view was to realize this peril. That there was, in fact, such realization appears from Conley's testimony, which is that when he first saw Bluhm he "hollered" and waved at him and gave the emergency stop signal to the engineer. From these actions of Conley's there is but one possible conclusion, and that is that he observed and realized that Bluhm was in peril.

Second, as to the train crew not acting with the promptness which Bluhm's observed and realized peril reasonably demanded of them. It needs no argument to establish the proposition that it was the duty of the train crew upon observing and realizing Bluhm's peril promptly to stop the train. The testimony, however, leaves no doubt that they did not do so. The engineer Jones testified for the defendant that the train could be stopped in 40 feet. It is well-nigh incredible that a freight engine with only a light caboose attached, traveling a little faster than a fast walk, and moving on a slight up grade such as existed at the place of accident, could not be stopped in much less than 40 feet. But however this may be, there can be no disputing the fact that the train was stopped only after it had proceeded 75 or 80 feet from the point where it first struck Bluhm. This distance, of course, is less than the distance through which the train moved after Bluhm's peril was observed by the train crew, since by all the testimony this was observed before Bluhm was struck. The following facts are those which conclusively show the movement of the train through 75 or 80 feet after striking Bluhm. When Bluhm was struck he was 8 or 10 feet south of the tracks of an electric road which runs along the street on which he was riding and crosses the steam railroad tracks. The train was moving north, and, when it was finally stopped, the gangway between the engine and its tender was immediately over the electric tracks. The engine was moving forward so that the whole length of the engine as far as the gangway had crossed the electric tracks. It necessarily follows from these facts that after striking Bluhm the train moved through the distance from the point of contact to the electric tracks, some 8 or 10 feet, plus the length of the caboose, which it was testified by the defendants' witnesses was something over 30 feet, plus the length of the engine without the tender, which was testified by the defendants' witnesses to be about 40 feet. The sum of these distances is 78 or 80 feet, or almost twice that within which, according to the testimony of the engineer, the train could have been stopped. I can see but one reasonable conclusion from these facts, and that is that the train was not in fact stopped with the promptness which the situation of observed peril reasonably demanded.

Third, as to the fact that if the train had been stopped with reasonable promptness the accident would have been avoided. This is shown conclusively by the fact that a very slight checking of the speed of the train woud have avoided the accident. Bluhm was struck by the far side of the platform; that is, he was almost across the track and out of danger. In fact, if he had remained on his motorcycle he probably would not have been struck at all, for the motorcycle was not hit, but went on completely across and was there picked up uninjured. Just as the caboose was almost upon Bluhm he was observed to throw up his hands and fall off his wheel, and it was due to his falling off, probably caused by fright at his observing the caboose so close upon him, that he was struck.

The foregoing facts appear so plainly in the evidence and the conclusion to which they lead is so plain that, as I have said, it seems evident that it was because of these facts, and not because of any erroneous view as to the decedent's contributory negligence, that the jury returned the verdict which they did. That verdict cannot be said to be a miscarriage of justice, and the errors dwelt upon in the main opinion seem to me to come fairly within the remedial amendment mentioned of our Constitution.

What I have said does not apply to the members of the train crew other than the brakeman, Conley, and the engineer. The other members of the crew were not shown to have had any connection with the failure to stop the train promptly on Bluhm's peril being observed, and the judgment as to them is properly reversed.

I concur: LAWLOR, J.

On Rehearing.

PER CURIAM. [15, 16] In a petition for rehearing it is stated that the learned trial judge insists that no such instruction on contributory negligence as the one first discussed in the opinion was ever given; that instead of the words "nor is it to be inferred" the instruction actually given commenced with the words "unless it may be inferred." So changed, the instruction would be a correct statement of the law. The settled record on appeal is, in the light of this statement, incorrect, but even if the record in this behalf could now be corrected to show the truth, it would make no difference in the result. The gist of the opinion in this matter is that the question of contributory negligence should not have been submitted to the jury, the deceased being clearly guilty of contributory

negligence as a matter of law. There were several instructions on the question of contributory negligence, and that question was submitted to the jury.

The application for a rehearing is denied.

ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; KERRIGAN, Judge pro tem. concur.

182 Cal. 748

CITIZENS' SAVINGS BANK OF SAN DIEGO v. BENNETT et al. (L. A. 5281.)

(Supreme Court of California. May 13, 1920.)

1. Partition ⇐116(2)—Effect of partition decree changing boundaries of mortgaged lands stated.

Where decree in partition suit, brought to determine boundaries of lots and blocks in subdivision of city, decreed mortgagors to be owners of the lots mortgaged but located such lots so that buildings constructed on such lots as originally platted by mortgagors with money borrowed from mortgagee were not located thereon, the effect of the decree was to substitute the land within boundaries fixed by such decree as mortgage security, so that mortgage foreclosure purchaser acquired no right in the houses.

2. Mortgages ⇐309(1)—Foreclosure and sale as to only part of property covered held to have released part omitted.

Where holder of mortgage covering certain land and also certain houses not a part of such land obtains a decree foreclosing on the land alone and buys it in for the full amount due, the omission of the houses from foreclosure and sale releases them from the mortgage.

3. Mortgages ⇐538 — Reopening foreclosure decree only remedy where part of property omitted from decree by mistake.

Where mortgage covering certain realty and certain houses not a part of such realty is foreclosed by decree omitting by mistake foreclosure as to the houses, mortgagee purchaser at foreclosure sale. if entitled to relief, could secure such relief only by having the decree reopened or set aside in suitable proceedings.

Department 1.

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the Citizens' Savings Bank of San Diego against Carrie E. Bennett and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Herbert N. Ellis and C. B. Ellis, both of San Diego, for appellants.

Albert J. Lee and William G. Mirow, both of San Diego, for respondent.

OLNEY, J. This is an appeal from a judgment for the plaintiff declaring it to be the owner of two certain dwelling houses, enjoining the defendants from affixing the houses to two certain lots onto which they had just been moved when the action was brought, and giving the plaintiff possession of them. The appeal is on the judgment roll alone. The real parties in interest are the plaintiff and the defendant Carrie E. Bennett.

The findings show that Mrs. Bennett and her husband were formerly the owners of certain unimproved lots designated by number in a block in an outside subdivision of the city of San Diego. While such owner, Mrs. Bennett and her husband mortgaged the property to the plaintiff to secure a loan of $2,000 made by the plaintiff to the Bennetts upon the understanding that the money would be used in building dwellings upon the property. The subdivision had been platted and the lines of its lots and blocks staked on the ground, and at the time of the giving of the mortgage the president of the plaintiff and the Bennetts went to the subdivision and definitely located the lots of the Bennetts as so platted and staked. Upon these lots the Bennetts then built four houses, two of which are those whose ownership is now in question.

Subsequent to the execution of the mortgage, what is termed a "partition" suit was brought to determine the boundaries of the lots and blocks in the subdivision. All the owners of lots in the subdivision were made parties, and the plaintiff here and the Bennetts were among the parties plaintiff. In the partition suit a survey was made of the subdivision with the consent of the parties whereby the boundary lines of the various lots were located differently from the boundaries previously platted and staked and according to which the Bennetts had purchased and then mortgaged to the plaintiff. On July 12, 1915, a decree, agreeable to all the parties, was entered in the partition suit, whereby the boundaries of the various lots were fixed in accordance with the survey made in the suit. By this decree the Bennetts were declared to be the owners of the lots mortgaged subject to the plaintiff's mortgage, but the lots so owned and mortgaged were defined and bounded according to the partition survey and not as originally platted and staked. The result was that two of the houses built by the Bennetts, the two in question here, were not on the property of which they were declared by the decree to be the owner. It is this circumstance which gives rise to the present litigation.

While the partition suit was pending, the plaintiff here brought suit to foreclose its mortgage, and in June, 1915, obtained a decree of foreclosure, under which the mortgaged property was sold and purchased by the plaintiff three days before the entry of the decree in the partition suit. The foreclosure sale was simply of the lots mortgaged designated by number. The lots were bid in by the plaintiff for the full amount found to be due by the foreclosure decree.

Some time subsequently, Mrs. Bennett proceeded to move the two houses in question from the lots on which they were built to two other lots owned by her and in which the plaintiff had no interest and was about to affix the houses to the latter lots when stayed by the commencement of the present action.

It is at once apparent that, if the plaintiff be entitled to recover, it must be upon the theory that the houses in question were subject to the mortgage lien. It is also apparent that, if such lien existed, it was because of one or the other of two alternatives. One is that the property actually owned and mortgaged by the Bennetts was the lots as originally platted and staked and actually located by the parties to the mortgage upon the ground, in which case the houses were built upon the mortgaged land and became a part of the realty and as such were subject to the lien of the mortgage. This is probably the true view of the situation. The other alternative is that by mistake the houses were built on the wrong property, and that because of this mistake and because of the intention and understanding that the houses would be built on the mortgaged lots and thereby become subject to the mortgage lien, the lien of the mortgage would, as between the parties, be extended to include the houses although they were not actually a part of the mortgaged realty. Assuming that there was a lien in plaintiff's favor on one or the other of these theories, what is the effect of the partition and foreclosure decrees upon the rights of the parties?

[1] Assuming that the property mortgaged was the lots as originally platted, staked, and located on the ground, it is apparent that the effect of the partition decree was to substitute other lots as the mortgage security. The effect of the decree was exactly the same as if the parties by proper releases and conveyances had made the substitution. There can be no question but that in such a case the mortgagee must look to the substituted property as his security, and of such substituted property the houses here were not a part. It may be that the parties did not realize the effect of the decree and that it was made under a mistake, so that it could have been reopened or set aside upon a proper showing and its effect in substituting other property for that actually mortgaged corrected. But such relief against the effect of the partition decree was not sought, there is no finding that the parties were not aware of and did not intend the very thing which the partition decree accomplished, that is, that substitution of lots according to the new survey for the lots as originally platted, staked, and located, and full effect must be given to the decree. Giving it effect means, as we have said, that the realty of which the houses were a part, assuming that such realty was subject to the mortgage, has been removed from under the mortgage and other property substituted for it, and the plaintiff has no right in the houses.

[2] On the other hand, assuming that the second alternative stated is the correct view of the original rights of the parties, then the situation was that the plaintiff owned a mortgage, the lien of which covered certain realty and also covered certain houses which were not a part of such realty; the lien of the mortgage extending to the houses nevertheless because of the mistake in their location. In this situation the plaintiff brought suit to foreclose, obtained a decree foreclosing on the mortgaged realty alone, and bought it in for the full amount due. It is at once apparent that by the omission of the houses from foreclosure and sale they were released from the mortgage. There is no difference whatever between such a case and one wherein different pieces of realty are subject to mortgage, and a foreclosure is had which omits one of the pieces. The rule is well established and hardly admits of question that in such a case the omitted parcel is released or, perhaps more accurately, is discharged of the mortgage. Mascarel v. Raffour, 51 Cal. 242; Mitchell v. Canal Co., 75 Cal. 464, 479, 17 Pac. 246; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Stockton, etc., Co. v. Harrold, 127 Cal. 612, 60 Pac. 165.

[3] Here again, if the omission of the houses from the foreclosure was by mistake and by mistake under such circumstances as to entitle the plaintiff to relief, such relief could be had only by reopening or setting aside the foreclosure decree by suitable proceedings. This has not been done, there is no showing here upon which it could be done, and the foreclosure decree must be given its full effect. That effect was to release or discharge the houses from the mortgaged lien, if the fact be that they were not a part of the mortgaged realty. It follows that, upon either alternative upon which the plaintiff could have a lien upon the houses, such lien, and with it every right of the plaintiff in the houses has been lost.

Judgment reversed, with directions to enter judgment for the defendants upon the findings.

We concur: LAWLOR, J.; SHAW, J.

182 Cal. 740

In re MURPHY'S ESTATE. (L. A. 5608.)

(Supreme Court of California. May 12, 1920. Rehearing Denied June 10, 1920.)

1. Taxation ⊜878(2)—Remainder held subject to inheritance tax; "vested remainder."

Where testator reserving life estate in income from certain property had transferred the remainder to his wife and children subject to his right to dispose of the property by power of appointment to be exercised in his will, the remainders were "vested," though defeasible under Civ. Code, §§ 694, 781, and were subject to inheritance tax under Laws 1911, p. 713, § 1, subd. 3, upon his death leaving will directing that the terms of such agreement be carried out, since the power was not exercised by such will, though will contained general devise, such general devise having reference to other property, under Civ. Code, § 1330, and since remaindermen's title dated from time of such agreement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vested Remainder.]

2. Taxation ⊜861 — Liability to inheritance tax determined by law at time of vesting of interest.

It is the vesting in interest which constitutes the succession, and the question of liability to inheritance tax must be determined by the law in force at such time.

3. Taxation ⊜878(1)—Transfer prior to death held without consideration, subjecting it to inheritance tax.

Where beneficiary of trust fund payable to beneficiary's children in case of his death before certain date transferred the property reserving a life estate in the income and the right to otherwise dispose of the property by testamentary appointment in case he died after such date, there was no consideration for the transfer, subjecting it to inheritance tax.

4. Taxation ⊜867(1)—Transfer to be subject to inheritance tax must transfer property within state.

In order that transfer of property of nonresident be subject to inheritance tax, the property must be within the state.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Albert M. Murphy, deceased. From an order fixing amount of inheritance tax, the State Controller appeals. Reversed, with instructions.

Rehearing denied; OLNEY, J., dissenting. SLOANE, J., not voting.

Robert A. Waring, of Sacramento, and John W. Carrigan and Edwin H. Pennock, both of Los Angeles, for appellant.

O'Melveny, Milliken & Tuller, of Los Angeles, and A. L. Rowland, of Pasadena, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice Melvin. It is adopted as the opinion of this court:

This appeal involves the question of the amount due as inheritance tax in the above-entitled matter.

Deceased died testate October 19, 1915, a resident of Los Angeles county, and his personal estate was appraised at over a million dollars, and an inheritance tax amounting to the sum of $24,462.67 was paid thereon. No attack is made upon the order impressing this property with a tax or upon the sum found to be due. The value of that estate was exclusive of an interest which the deceased owned in what is known as the Murphy Family Trusts, and the question presented by this appeal is whether or not that interest is subject to the payment of a transfer tax. Deceased acquired this interest from the estate of his father, Simon Murphy, who died February 1, 1905, leaving a will by the terms of which the bulk of his estate was given to his children and other descendants, impressed, however, with certain trusts. The prescribed term of these various trusts was for the period of 10 years, i. e., until February 1, 1915, or upon the earlier decease of the survivor of the two sons named therein. The trustees were directed upon the termination of these trusts to divide the estate into five equal shares among certain of his children, of whom Albert, the deceased, was one. The interest which the deceased took in his father's estate was to go to his issue in the event that he predeceased them during the life of the trust, and upon failure of issue this interest was to be divided among his brothers and sisters. On December 17, 1912, at which time decedent was not a resident of California, the various members of the Murphy family voluntarily agreed to extend the term of the trust created by their ancestor for a period of some 20 years from its termination. In pursuance of this plan all the persons having any interests, including the deceased and his ten children, joined in conveying all such interests upon trusts, which were described and declared as the Murphy Family Trusts. Deceased, in conveying his interest upon these trusts, retained a life estate in the income, with a power of appointment by will over the remainder if he died after February 1, 1915. He furthur provided that in the event of his death prior to February 1, 1915, this interest should go in equal shares to his ten children, and that if he died after February 1, 1915, without exercising the reserved power of appointment, then and in that event his wife, if surviving, should share with the ten children equally.

The Murphy Family Trusts conveyance is voluminous, and a full review of its recitals and provisions would extend this opinion to an undue length and answer no useful purpose. Respondents claim that the conveyance by the ten children constitutes a valuable and adequate consideration and one sufficient to prevent the succession tax from attaching.

By his will made on February 16, 1915, which was within eight months of his death, decedent disposed of his entire estate; but respecting the agreement of December 17, 1912, which the respondents properly call a trust conveyance, he made the following special provision:

"It is my will and I hereby direct that the terms, condition and purpose of the trust agreement entered into by me with other heirs and devisees of my late father Simon J. Murphy, on the 17th day of December, 1912, and known as the Murphy Family Trusts, as far as the same shall not be inconsistent with the provisions of this my will or render nugatory any of the provisions thereof, shall be carried out."

The trust of 1905 expired on February 1, 1915, and if the deceased had not made the trust conevyance of 1912 he would have been the owner at the time of his death of his original share in the properties of the trust of 1905. On December 17, 1912, however, he conveyed his share of the trust of 1905, upon trusts whereby he reserved a life estate, transferred the remainders to his widow and his ten children, subject, however, to his power to dispose of this property by power of appointment to be exercised in his will. We have already quoted the provision in his will dealing with the matter, and therefore have before us the facts upon which the decision must turn.

(1) Is the transfer of December 17, 1912, in its nature a taxable transfer?

(2) If so, was there an adequate and valuable consideration therefor which would avoid the tax?

(3) As Albert Murphy was a nonresident of California on December 17, 1912, is the transfer taxable only in so far as it was limited to California assets?

We take these questions up in the order stated.

[1] Albert Murphy was alive on February 2, 1915. On that day, therefore, he would have been the absolute and indefeasible owner of his share of his father's estate if he had not made the transfer of December 17, 1912. In that transfer he reserved the income of the property for his life and transferred the estate in remainder to his wife and children subject to his right to dispose of the property by power of appointment to be exercised in his will. The remainders thus created were vested although defeasible. Civ. Code, §§ 694, 781; Estate of Dunphy, 147 Cal. 95, 81 Pac. 315; Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306. Ordinarily, the transfer of a remainder subject to a life estate reserved by the grantor is a taxable transfer (Estate of Felton, 176 Cal. 663, 169 Pac. 392), and therefore the transfer of December 17, 1912, is taxable under the law of 1911, § 1, subd. 3 (Stats. 1911, p. 713), which provides:

"When the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death * * *" unless the reserved power of appointment changes the case.

The remaindermen, consisting of the widow and children, who are respondents on this appeal, argue that the reserved power of appointment contained in the transfer of December 17, 1912, and the provisions of the will of Albert M. Murphy which became effective at his death October 19, 1915, do change the case. The respondents argue that they do not take the property as remaindermen under the transfer of December 17, 1912, but claim that their title comes from a power of appointment exercised under the will. They also claim that the exercise of a power of appointment was not taxable when Albert M. Murphy died in 1915, and hence they take the property free from any transfer or inheritance tax. It appears that the exercise of powers of appointment was taxable from 1905 to 1913, and has been from 1917 to the present time, but was not taxable from 1913 to 1917.

Respondents contend that decedent's will contains a general devise, and that this amounted to an exercise of the power of appointment reserved in the trust conveyance of December 17, 1912 (section 1330, Civ. Code), and argue that by the power of appointment thus exercised the shares in the property covered by the trust conveyance of December 17, 1912, were distributed differently than in said trust conveyance.

We think not. The property conveyed December 17, 1912, is controlled by the special clause of the will, which we have already quoted, and not by the general devise. As already stated, the decedent owned at his death property worth $1,000,000 exclusive of the property covered by the trust conveyance of December 17, 1912. We think the true interpretation of his will is that the dispositions therein made deal with the $1,000,000, and that item 3 of the will confirming the trust conveyance of December 17, 1912, was intended to approve of all of the dispositions therein provided for. The language employed in terms confirmed the trust deed. It is not necessary for us finally to determine whether this confirmatory clause amounted

to the exercise of the power of appointment or is to be treated as a failure to exercise the power. In either event, the result is the same. If it is to be treated as the exercise of the power of appointment, it is controlled by the views expressed in Matter of Lansing, cited below; and, if it is to be treated as a failure to exercise the power of appointment, then the vested defeasible remainders created December 17, 1912, became indefeasible by the decedent's failure to exercise the power of appointment.

Matter of Lansing, 182 N. Y. 238, 74 N. E. 882, involved property in which a mother had a life estate with remainder to her daughter, subject to the right of the mother to dispose of the property by the exercise of a power of appointment in her will. At her death the mother left a will in which she exercised the power of appointment by devising the property to her daughter. The court said that—

"The execution of the power left the title where it was before, and the result is the same as if there had been no power to exercise."

Speaking of the effect of the exercise of the power upon the title which the daughter had during the mother's life, the court said:

"While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder,' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance."

Matter of Lansing has been approved and followed in similar cases. Matter of Haggerty, 128 App. Div. 479, 112 N. Y. Supp. 1017, affirmed 194 N. Y. 550, 87 N. E. 1120; Matter of Hoffman, 161 App. Div. 836, 146 N. Y. Supp. 898, affirmed 212 N. Y. 604, 106 N. E. 1034; Matter of Chapman, 61 Misc. Rep. 593, 115 N. Y. Supp. 981, 133 App. Div. 337, 117 N. Y. Supp. 679, 138 App. Div. 923, 123 N. Y. Supp. 1110, affirmed 196 N. Y. 561, 90 N. E. 1157, 199 N. Y. 562, 93 N. E. 1118.

[2] We therefore hold that the title of the remaindermen dates from December 17, 1912, and that the case is controlled by the statute of 1911, for it is settled law that—

"It is the vesting in interest which constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time." Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402; Nickel v. State, 179 Cal. 126, 175 Pac. 641; In re Brix's Estate, 186 Pac. 135.

In reaching the foregoing conclusions we have not stopped to consider what or to what extent powers may be validly exercised in this state, for, if the power of appointment reserved in the deed had been invalid, then the remaindermen would have taken indefeasible instead of defeasible vested remainders. Estate of Dunphy, 147 Cal. 95, 81 Pac. 315.

We therefore hold that the tax attaches unless the transfer was made upon an adequate and valuable consideration, to which we now address ourselves.

[3] On December 17, 1912, the only interest which the ten children had in their father's share in his father's estate arose from the possibility that he might die before the trust terminated and in that event the ten children would take the share. The trust was certainly to terminate on February 1, 1915, and might terminate earlier. The ten children had nothing to surrender but this possibility of ownership, but they did not even surrender that possibility, for the transfer of December 17, 1912, provided that if Albert M. Murphy died before February 1, 1915, the property should go to the ten children. Hence they gave nothing in the transfer of December 17, 1912. Considering that Albert M. Murphy lived till October 19, 1915, he gave the remainders created in the transfer of December 17, 1912, to his wife and children without any valuable consideration at all.

Counsel for respondents argue, however, that if the father had died before the termination of the trust of 1905 the effect of the trust conveyance of December 17, 1912, upon the children would have been that the property which they were entitled to after the termination of the trust of 1905 would be found to be burdened with another trust, the trust of 1912, to endure. Out of this contingent possibility, which never happened, counsel for respondents seek to work out a valuable and adequate consideration for the vested remainders which were conveyed to the remaindermen by the decedent in the trust conveyance of December 17, 1912. This alleged consideration is very unsubstantial, and we cannot regard it as adequate, and might upon analysis find it to be merely nominal.

[4] We come now to the third question. Albert M. Murphy was a nonresident of California December 17, 1912, so the transfer is taxable only in so far as he conveyed California assets. The record indicates with sufficient clearness that California assets were included amongst those conveyed by the deceased in trust on December 17, 1912, and the order from which this appeal is taken is not being defended on the ground that no California assets were transferred at that time.

The order appealed from is reversed, with instructions to the lower court to impose the tax provided for in the act of 1911 upon the California assets which were included amongst the properties transferred in trust by the decedent December 17, 1912.

One of the ten children died after December 17, 1912, and before the death of his father, Albert M. Murphy, October 19, 1915; but whether the remaindermen taking as a class were reduced to ten, or whether the

heirs at law or devisees of the will of this deceased son of Albert M. Murphy are to pay the tax, is a matter to be adjusted in the court below.

Order reversed.

ANGELLOTTI, C. J., and OLNEY, SHAW, WILBUR, LENNON, and LAWLOR, JJ., concur.

46 Cal. App. 792

SEARCY v. KAY, County Clerk. (Civ. 2178.)

(District Court of Appeal, Third District, California. April 5, 1920.)

1. Venue ⊜79—On order changing place of trial, clerk is required to transmit pleadings and papers despite appeal or subsequent motion.

Where in wife's divorce action she secured order changing place of trial, under Code Civ. Proc. § 399, the clerk was required to transmit the pleadings and papers to the clerk of the court to which the action was transferred, though defendant husband had appealed from the order changing place of trial, and though plaintiff wife had subsequently moved for additional alimony and counsel fees in the original court.

2. Mandamus ⊜44—Writ will issue to compel clerk to transfer papers as required.

Mandamus will issue at the instance of a wife suing for divorce to compel the clerk to transfer the pleadings and papers in the action to the clerk of the court to which it has been transferred on plaintiff's motion, his statutory duty under Code Civ. Proc. § 399.

Application for writ of mandate by Mary Louise Searcy against Fred M. Kay, County Clerk and ex officio Clerk of the Superior Court of the County of Humboldt, to require the transmission of papers. Writ granted.

E. L. Webber, of Napa, for petitioner.
Henry L. Ford, of Eureka, for respondent.

PREWETT, Presiding Judge pro tem. This is an application for a writ of mandate directing the defendant, as said clerk, to transmit to the clerk of the superior court of the city and county of San Francisco the files in an action for divorce commenced by plaintiff against one C. L. Searcy, the material events of which occurred in the following order:

(1) September 19, 1919, action commenced in the superior court of said city and county.

(2) October 10, 1919, place of trial changed to the superior court of the county of Humboldt on motion of the defendant.

(3) After answer and on January 9, 1920, the place of trial was changed back to the superior court of said city and county in order to promote the convenience of witnesses.

(4) On the same day the defendant perfected an appeal to the Supreme Court from the order changing the place of trial to the city and county of San Francisco.

(5) On February 11, 1920, on due notice and affidavit, said superior court of the county of Humboldt made its order allowing to plaintiff certain sums by way of alimony and counsel fees.

(6) On March 16, 1920, this proceeding was commenced.

(7) Subsequent to the commencement of this proceeding the plaintiff procured the issue of process to compel the defendant, Searcy, to comply with said order for the payment of alimony and counsel fees.

The defendant, Kay, refuses to transmit the papers in conformity with said order changing the place of trial. The petition herein contains an allegation that he bases his refusal upon the ground that the appeal from the order changing the place of trial stays all proceedings upon such order. However, in his answer, he expressly disclaims this as a reason. That the appeal does not stay proceedings is placed beyond all question by the language of the Code itself. Section 949, Code Civ. Proc.

The defendant pleads in his answer that it became necessary to retain the papers in order to make out and certify the usual copies to be used on appeal. But if this point ever had any force it has long since ceased to constitute a justification. This proceeding was not commenced until more than two months after the appeal was taken.

Secondly. The clerk insists that the inauguration of the subsequent proceedings with reference to alimony and counsel fees makes it necessary that he retain the papers for use in the determination thereof.

It becomes unnecessary in this proceeding to inquire whether the lower court has jurisdiction to entertain a motion for alimony and counsel fees pending an appeal from an order changing the place of trial, because this application must be decided adversely to the defendant for other reasons. Section 399 of the Code of Civil Procedure requires a clerk, when an order is made transferring the cause to another court, to transmit the pleadings and papers therein to the clerk of the court to which the action is transferred. Commenting upon this section, the court in Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355, says:

"The question in the case is as to when the action was transferred, or, in other words, was the transfer in fact completed by the order made by the court? The Code provides that the court to which the action is transferred 'has and exercises over the same the like jurisdiction as if it had been originally commenced therein.' We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered

in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises."

[1] Proceedings upon the order changing the place of trial are not stayed by the appeal. The duty devolved upon the clerk, at once upon the entry of the order, to transmit the papers to the clerk of the superior court to which the action was transferred.

The act of the defendant in appealing from the order changing the venue could not operate to deprive the plaintiff of the benefit of the order of change. No more does the act of the plaintiff in moving for additional alimony and counsel fees. Conceding that the superior court of Humboldt county retained any power or authority in the premises after the entry of its order changing the place of trial, still there can be no question that the superior court of the city and county of San Francisco acquired jurisdiction at once by means of the order of transfer, and its clerk became the only person lawfully entitled to the custody of the papers. If the plaintiff had requested the clerk to retain the papers in his office, she would not be permitted to come into court and insist upon a writ against him.

On the contrary, however, she does not ask him to retain them, but she insists that her lawful right to proceed under the order of transfer be conserved by the transfer of the papers to the proper court.

[2] Let a peremptory writ issue requiring the clerk to transmit the papers to the clerk of the superior court of the city and county of San Francisco.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 44

PIONEER FRUIT CO. v. SOUTHERN PAC. CO. (Civ. 3297).

(District Court of Appeal, First District, Division 1, California. April 8, 1920.)

1. Limitation of actions ⟸27 — Action for breach of contract of shipment not action on oral contract; "bill of lading"; "written contract."

In view of Civ. Code, § 2126, defining a "bill of lading" as an instrument in writing signed by the carrier or its agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing to deliver the freight to a specified person at a specified place, a bill of lading is a written contract, and an action for breach of a contract of shipment in failing to ice the shipment and in permitting an unreasonable delay was not covered by the statute of limitations (Code Civ. Proc. § 339, subd. 1) as to oral contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading; First Series, Written Contract.]

2. Appeal and error ⟸673(2)—Court cannot know terms of bill of lading when not before it.

The court cannot know on appeal that there was any provision in the bill of lading sued on as to the time within which a claim for damages must be presented, where the parties have not furnished any copy of the bill of lading.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Pioneer Fruit Company against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Fred R. Levee and James E. Kelby, both of Los Angeles, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover from the defendant the sum of $2,576.25, damages alleged to have been sustained by the plaintiff in connection with the shipment of a carload of cherries from San Jose, Cal., to Boston, Mass., during the month of June, 1913, and which were consigned by the plaintiff to a corporation known as California Fruit Distributors through the defendant as shipper, upon a bill of lading issued in compliance with the Interstate Commerce Act. The plaintiff's claim was based upon two alleged breaches of the contract of shipment, in that, first, the defendant allowed the car in which these cherries were transported to be insufficiently iced; second, that the defendant permitted an unreasonable delay to occur in the shipment of the cherries, as a result of both of which alleged breaches of the terms of shipment the cherries arrived in Boston in a damaged condition, to the plaintiff's detriment in the sum for which suit was brought. The defendant denied specifically the averments of the complaint as to any breach of its duty as a carrier in the premises, and also pleaded that the plaintiff's cause of action was barred under the provisions of subdivision 1 of section 339, Code of Civil Procedure, and was also barred under the provisions of section 3 of the bill of lading, requiring claims for damages for loss or injury to goods shipped to be made in writing to the carrier at the point of delivery or of origin within four months after the delivery of the property, which

claim the defendant avers was not so presented. Upon the trial of the issues thus framed the trial court made its findings in favor of the plaintiff, except as to the amount of its said damages, which it fixed at $574. The defendant prosecutes this appeal.

[1] The main point urged by the appellant relates to the bar of the statute of limitations under the section of the Code above quoted. It is argued by it that this is not an action upon a contract, obligation, or liability founded upon an instrument in writing, and hence that the action must have been commenced within two years after the liability arose, and that, not having been so commenced, it is barred under said section of the Code. In order to support this proposition the appellant argues that the bill of lading issued by the defendant to the plaintiff upon the receipt of these goods for shipment was not the contract between the parties, but was only a receipt for the goods orally consigned to the defendant for shipment, and that, such consignment being oral, the action must, under said section of the Code, have been commenced within two years.

We are unable to adopt this view of the appellant as to the place and function of a bill of lading in a shipping consignment. Section 2126 of the Civil Code defines a bill of lading as "an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing" to deliver the freight to "a specified person at a specified place." In the American & Eng. Ency. of Law (2d Ed.) p. 521, the status and function of a bill of lading in relation to a shipment of goods are thus defined:

"Although the primary object and purpose of a bill of lading is to express the terms of a contract between the shipper and the carrier, it partakes of the two-fold character of a receipt and a contract; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified."

In the case of Seaboard Airline Ry. v. Luke, 19 Ga. App. 100, 90 S. E. 1041, it was held in relation to an interstate shipment that the bill of lading was the contract between the parties to the shipment, citing Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; while in the cases of Texas, etc., R. Co. v. Williamson & Co. (Tex. Civ. App.) 187 S. W. 354, and N. Y. C. R. R. Co. v. Mutual Orange Distributors, 251 Fed. 230, 163 C. C. A. 386, it was held that the bill of lading constituted the contract for carriage between the parties, for actions for the breach of the terms of which the period of limitations was that provided for the breach of contracts in writing. We find nothing in the authorities cited by the appellant which militates seriously against these views, and hence are entirely satisfied that this action was commenced in time.

[2] As to the second point urged by the appellant, to the effect that the plaintiff did not present a proper claim for damages against the defendant within the time required by the terms of the bill of lading, we find that the record does not bear out this contention, since it sufficiently appears that written notice of the claim was given by the agent of the consignee to the general freight agent of the delivering carrier at the time of the arrival of the shipment at its destination. Besides, the parties to this appeal have not furnished us with any copy of the bill of lading involved in this case, and hence we cannot know that there is any such provision in it as to the time within which the shipper's claim for damages for the breach of its terms must be presented.

No other points being urged upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 29

SHEEHAN v. BOARD OF POLICE COM'RS, etc., et al. (Civ. 3155.)

(District Court of Appeal, First District, Division 1, California. April 7, 1920. Hearing Denied by Supreme Court June 3, 1920.)

1. Municipal corporations ⟸187—Policeman retired on pension has vested right to pension during disability.

Under San Francisco Charter, c. 10, art. 8, § 3, relative to police pensions, a police officer placed on the retired list and regularly granted a pension on proof of disabilities had a vested right to retain his place on the retired list and to have his pension continued until his disabilities should have ceased.

2. Mandamus ⟸107—Lies to compel retention of policeman on retired list on pension.

A police officer retired on a pension under San Francisco Charter, c. 10, art. 8, § 3, because of disabilities, is entitled to a writ of mandate to compel the board of police commissioners acting as a board of police relief and pension fund commissioners to maintain him in his position as a retired patrolman and to continue to pay his pension.

3. Municipal corporations ⟸187 — Police board's determination that disabilities had ended and dismissal of policeman for failure to report held void.

As the San Francisco Charter confers on the board of police commissioners no power to finally determine any question of fact in con-

nection with a pension, its attempted action, in its capacity as a board of police relief and pension fund commissioners, in declaring that a retired policeman's disabilities had ceased, without any proof or showing on the subject and contrary to the practically undisputed fact, was beyond its charter powers, and its acts in so declaring and in ordering him to report for duty and in dismissing him for insubordination in refusing to report were void.

4. Mandamus ⊂=3(12)—Lies to compel reinstatement and payment of police pension though certiorari would also lie.

Where the San Francisco board of police commissioners acting ex officio as a board of police relief and pension fund commissioners found contrary to the fact that a retired policeman's disabilities had ceased and ordered him to report for duty and dismissed him for insubordination in refusing to report, the policeman was entitled to a writ of mandate to compel his reinstatement and payment of his pension, though he might have applied for a writ of review to test the jurisdiction of the board to make such orders.

5. Mandamus ⊂=14(1)—Presentation of claim for police pension to auditor and treasurer not condition precedent.

As under San Francisco Charter, c. 10, art. 8, § 9, claims against the police pension fund must be passed on by the board of police relief and pension fund commissioners, a policeman without a warrant from that board could not apply to the auditor or treasurer for payment of his claim, and presentation of the claim to them under chapter 4, art. 3, § 1, was not a condition precedent to his application for a writ of mandate to compel such board to pay the pension.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by James F. Sheehan for a writ of mandate directed to the Board of Police Commissioners and others. From a judgment granting the writ, defendants appeal. Affirmed.

Geo. Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for appellants.

Charles J. Heggerty and Knight & Heggerty, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in a proceeding wherein he sought and obtained a writ of mandate requiring the defendants, as the board of police commissioners of the city and county of San Francisco, to restore said plaintiff to the position of a police officer of and in the police department of the said municipality, and also to restore the plaintiff to the pension roll of the police and pension fund of said department, and to pay to said plaintiff his accrued pensions as a retired police officer, amounting to the sum of $4,600.

The facts of the case are embraced in the findings of the court which may be summarized as follows: The plaintiff was appointed a police officer of the police department of the city and county of San Francisco on September 20, 1895, and continued in active service as such police officer until August 1, 1899, when he was injured in the performance of his duty by being thrown from a horse which he was breaking to the saddle under the orders of his superior officer, and which said horse fell upon him, causing severe injuries to his head and side, resulting in a total deafness in his right ear and injuries to his brain, producing recurring epileptic convulsions. Thereafter the plaintiff presented to the said board of police commissioners his verified petition, accompanied by suitable certificates and recommendations, requesting his retirement upon a pension on account of his disabilities, which his examining physician certified to be permanent. The said board on October 6, 1903, made its order granting said petition to the effect that the plaintiff should be retired from further service in the police department until his disabilities should cease, and that he be paid from the police relief and pension fund of said police department a yearly pension of $600, being one-half the amount of salary attached to his rank as a patrolman in said department at the time of his said injuries. On January 11, 1904, the said board of police commissioners, who are also ex officio the board of police relief and pension fund commissioners, caused a subpœna to be issued and served upon the plaintiff requiring him to appear before them on the afternoon of said day, and show cause why he should not be restored to active duty on the ground that his said disabilities had ceased. The plaintiff appeared at the time appointed in response to said subpœna, whereupon he was informed by said board that it had been reported to it that the plaintiff had been for some time prior thereto in the employ of the United Railroads of San Francisco in a professional capacity, viz., that of an attorney at law. The plaintiff admitted that since his retirement from active duty as a police officer he had become an attorney at law and was employed as such by the United Railroads, but stated that his disabilities for service as a police officer had not ceased, and that he was still unable to perform the duties of a patrolman in the department; and he then applied for a hearing before said board upon a day set when he could produce witnesses and prove his continuing disability for such service. The board of police commissioners refused this application and, thereupon, sitting as a board of police relief and pension fund commissioners, ordered the plaintiff to report on January 12, 1904, to Dr. O. W. Jones, the police surgeon, for the purpose of physical examination, and to further report to said board at their regular

meeting to be held in the evening of the last-named day. The plaintiff endeavored to comply with this direction as to his examination by the police surgeon, but the latter refused to set a date for said examination earlier than January 15, 1904, at which time the plaintiff was to appear to be examined by him. On the evening of January 12, 1904, the plaintiff appeared before said board, sitting as police relief and pension fund commissioners, according to their direction, and informed them of his inability to procure said examination by the police surgeon before January 15, 1904, and requested a postponement of his matter until that time. This request was refused and an immediate hearing ordered to be proceeded with, to which the plaintiff objected upon the ground of the shortness of the time, the absence of his attorney to represent him, and of his witnesses, and requested a continuance until he could procure the attendance of these. This request the board also denied, and thereupon proceeded, without any further hearing or trial or investigation, and without any examination of the facts of the case, to pass a resolution purporting to restore the plaintiff to active duty in the police department of the city and county of San Francisco as a patrolman, and to order the plaintiff to report to the chief of police on the following day for assignment to active duty as such. Plaintiff did not report to the chief of police in accordance with said order, and thereupon charges of insubordination were presented by the chief of police to said board of police commissioners for the plaintiff's said failure to report for active duty. These charges were set for hearing by and before the board of police commissioners for January 26, 1904, and came on for hearing on the evening of said day, whereupon plaintiff appeared and objected to said proceedings upon the ground of want of jurisdiction in the said board to make their said order restoring him to active duty, and hence of a want of jurisdiction in them to try him upon the charge of insubordination for any disobedience of said former order. The board of police commissioners overruled his said objection, and at once proceeded to find the plaintiff guilty of insubordination and to dismiss him from the department. The plaintiff thereafter demanded of said board that they vacate and set aside their said several resolutions, and also repeatedly demanded his restoration to the pension roll as a retired police officer and the payment of his accruing pension as such. All of these demands were refused, whereupon the plaintiff instituted this proceeding in mandamus to compel his restoration and reinstatement as a retired police officer, and also to compel the payment of his accrued and accruing pensions as such. He also instituted a proceeding in the nature of a writ of review to have annulled the aforesaid orders of the board of police commissioners for want of jurisdiction in the board to make the same. Upon the hearing of the plaintiff's petition for a writ of mandate in this case, it was affirmatively made to appear that the plaintiff's disabilities which had led to his original retirement from active service in the department had not ceased but still existed, and that by reason thereof the said plaintiff continued to be unable to perform active duty as a patrolman in said department. It was also conceded at the trial that there was at all times in the police relief and pension fund sufficient money to have paid the plaintiff's pension if he should be found entitled to the same.

Upon the foregoing facts as found by the trial court it rendered its judgment in the plaintiff's favor, directing a writ to issue as prayed for, and from such judgment the defendants have prosecuted this appeal.

The charter of the city and county of San Francisco provides in section 3, c. 10, art. 8, thereof, that—

"Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty upon filing with the commissioners a verified petition setting forth the facts constituting such disability and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the company to which he belongs, and by two regularly certified physicians of the city and county recommending his retirement upon a pension on account of such disability, may be retired from the department, upon an annual pension equal to one-half the amount of salary attached to the rank which he may have held three years prior to the date of such retirement, to be paid to him during his life and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service, in the rank he occupied, at the time of his retirement."

[1, 2] In the case of Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 Pac. 36, it was held that a person entitled to a pension from the police pension fund of the police department of the city and county of San Francisco had a vested right to such pension which could not be taken away by subsequent changes in the charter. It is true that this ruling was made in the construction of a former statute creating a police pension fund in said municipality (Stats. 1889, p. 56); but the Supreme Court, in the case of French v. Cook, 173 Cal. 126, 160 Pac. 411, points out that the provisions of the present charter of the said city and county are so far similar to those of the earlier statute as to justify the application of said former case to the charter in its present form. The plaintiff herein having been regularly granted his pension upon proof of his disabilities had, therefore, a vested right to retain

his place upon the retired list and to have his pension continued until his disabilities should have ceased. This being so, the plaintiff, so long as his disabilities continued, would have been entitled to a writ of mandate to compel the board of police commissioners, acting as a board of police relief and pension fund commissioners, to maintain him in said position as a retired patrolman and to continue to pay his pension. French v. Cook, supra. In the case last above cited the Supreme Court points out that there is no provision in the present charter of San Francisco confiding to the board of police commissioners, acting in any of its capacities, the power to finally determine any question of fact in connection with such a pension.

"The board is apparently in the same position," says the court, "with relation to such a matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of a county or city auditor, in so far as any finality to its conclusions are concerned. * * * As we read the charter it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer. To hold in accord with defendants' claim in this connection would be, as we read the charter, to hold that any officer authorized and required by law to do a prescribed act upon a prescribed contingency, where no method is specially provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law."

[3, 4] Giving to this language of the Supreme Court full force and effect in its application to the facts of this case, we are constrained to hold that the attempted action of the board of police commissioners, acting in the capacity ex officio of a board of police relief and pension fund commissioners, in declaring that the plaintiff's disabilities had ceased without any proof or showing upon the subject, and in the face of the practically undisputed fact, as shown by the trial of this case, that the plaintiff's disabilities had not ceased, was entirely beyond their charter powers, and hence that their attempted acts in so declaring and in seeking to compel the plaintiff to report for duty as a patrolman, and in ordering his dismissal from the department for alleged insubordination in refusing to obey its order to so report for duty, were each and all void. Being so, the plaintiff had a right to a writ of mandate to compel said board to reinstate him in his position as a retired police officer and to compel the payment of his pension. That he may have had also the right to apply for a writ of review to test in that form of limited inquiry the jurisdiction of the board to make its said several orders cannot be held to have deprived him of his larger and more fully effective remedy by way of a writ of mandate. We are therefore of the opinion that the trial court was correct in holding upon the practically undisputed facts before it that the plaintiff was entitled to such a writ.

[5] As to the appellants' contention that the plaintiff, conceding his right to his writ restoring him to his place upon the retired list, is not entitled to that portion of the relief granted as gives him the right to recover his accrued pension for the reason that he was not shown to have complied with section 1, c. 4, art. 3, of the Charter, requiring the presentation of all claims upon the treasury of said municipality to the auditor and treasurer thereof within a limited period after the demand became due and payable, we are of the opinion that this contention has no merit. We are cited to the case of Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 Pac. 553, as supporting the appellants' contention in this regard. But we think a clear distinction exists between that case and the case at bar, since, as pointed out in that case, the plaintiff therein was urging a salary claim as a police officer which did not require approval by the board of police commissioners before presentation to the auditor in accordance with the requirements of the section of the charter above referred to; while in the instant case the charter (section 9, c. 10, art. 8) specifically requires that claims against the pension fund shall be passed on by the board of police relief and pension fund commissioners, who shall issue warrants to the persons entitled thereto. It is clear that, until the person entitled to such pension had

received from that body his warrant, he could not have applied to the auditor or treasurer of the municipality for payment of his claim. The undisputed proofs in this case show that the plaintiff made repeated demands upon the said board for the issuance of his pension warrant, which demands were refused. He could not do more under the charter, and hence was entitled to a writ of mandate compelling the action of said board in this respect also.

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

47 Cal. App. 793

SHEEHAN v. BOARD OF POLICE COM'RS, etc., et al. (Civ. 3156.)

(District Court of Appeal, First District, Division 1, California. April 7, 1920. Hearing Denied by Supreme Court June 3, 1920.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by James F. Sheehan against the Board of Police Commissioners and others for a writ of mandate requiring the restoration of the petitioner to the San Francisco police force and pension roll. From a judgment granting the writ, defendants appeal. Affirmed.

George Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for appellants.

Charles J. Heggerty and Knight & Heggerty, all of San Francisco, for respondent.

PER CURIAM. The facts in this case are identical with those set forth in the case of Sheehan v. Board of Police Commissioners (No. 3155) 190 Pac. 51, this day decided by this court, and on the authority of that case the judgment is affirmed.

47 Cal. App. 38

KELLEY v. GOLDSCHMIDT et al. (Civ. 2081.)

(District Court of Appeal, Third District, California. April 8, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Guaranty ⟸1—An independent contract.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person, and a person may become the guarantor even without the knowledge or consent of the principal, under Civ. Code, §§ 2787, 2788. It is therefore an independent contract, and an action on a guaranty is one with which the principal debtor has nothing to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

2. Guaranty ⟸75—Creditor may resort either to guarantor or security furnished by principal.

Where a debt secured by a mortgage or trust deed is guaranteed, the creditor may resort either to the security or the contract of guaranty; a guarantor not having the right given a surety by Civ. Code, § 2850, to compel the holder of security to apply the same to the payment of the debt.

3. Mortgages ⟸118 — Subsequently given mortgage must express intent to secure performance of contract of guaranty.

To justify a court in holding that the purpose of a mortgage or trust deed given subsequently to the execution of a contract of guaranty was to secure the performance of the contract of guaranty, such intent must be expressed clearly and unequivocally in the mortgage or trust deed.

4. Mortgages ⟸118 — Subsequently given trust deed held not intended to secure performance of contract of guaranty.

A trust deed given by principal debtor subsequent to the execution of a contract of guaranty "to secure the payment to H. of the debts evidenced by two notes," etc., *held* not to show an intent to secure the performance of the contract of guaranty as well as payment of the note, although the declaration of trust set out not only the notes, but also the contracts of guaranty; the latter being indorsed on the back of the notes.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by H. B. Kelley against Max Goldschmidt and another, individually and as copartners doing business under the fictitious firm name and style of Goldschmidt Bros. From an order denying their motion to discharge an attachment, defendants appeal. Affirmed.

Ernest C. Griffith, Loewenthal, Loeb & Walker, and Loewenthal, Collins & Loewenthal, all of Los Angeles, for appellants.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent.

HART, J. The appeal in this action is prosecuted by defendants H. H. Goldschmidt and Goldschmidt Bros. from an order made by the superior court in and for the county of Los Angeles, on August 7, 1917, denying a motion made by said defendants to discharge an attachment theretofore levied upon certain personal property belonging to them.

The complaint was filed on the 20th day of June, 1917, against the above-named defendants and one Milton Kauffman, but on the 16th day of July, 1917, plaintiff caused the action to be dismissed as against said defendant Kauffman. From that time on the action was against the guarantors alone, and consequently, upon the contract of guaranty only, and thus the action stood when

the notice of the motion to discharge the attachment was given on August 1, 1917.

The complaint was in two counts, in the first of which it was alleged that, on or about the 17th day of August, 1915, at the city of Los Angeles, defendant Kauffman, for a valuable consideration, executed and delivered to Hellman Commercial Trust & Savings Bank, a corporation (hereinafter called the bank), his promissory note in writing for the sum of $19,000, payable on demand; that thereafter, for a valuable consideration, said bank assigned and transferred the said note to plaintiff; that the sum of $5,000 was paid upon said note; and that at the date of the commencement of the action there was due thereon the sum of $14,000.

In the second count of the complaint it was alleged that, contemporaneously with the making of said promissory note and as a part of the same transaction, the defendants Goldschmidt delivered to said bank their written contract of guaranty, indorsed upon the back of said note, by which they guaranteed "the payment of the within note or any renewal or extension thereof, and all expenses of collection thereof," and also agreed to pay reasonable attorney's fees in case suit was brought to enforce the guaranty. The assignment of said guaranty to plaintiff was alleged, as well as demand upon defendants, on the 17th day of November, 1916, that said note be paid, and $1,400 was asserted to be a reasonable fee to be paid plaintiff's attorneys.

On June 22, 1917, plaintiff filed an affidavit for attachment, in which he stated:

"That defendants in the said action are indebted to him in the sum of $14,585.27 * * * upon an express contract, for the direct payment of money, to wit, upon a promissory note and contract of guaranty, and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property. * * *"

Accompanying said affidavit was a "Statement to Clerk," directing that an attachment be levied upon certain real property in the county of Orange, describing it. On the 25th of June, 1917, another "Statement to Clerk" was delivered to the county clerk, directing the attachment of the wholesale liquor establishment of Goldschmidt Bros. in Los Angeles; "also run a personal property garnishment directed to the Title Insurance & Trust Company."

The return of the sheriff showed that he levied said writ of attachment on "all moneys, goods, credits, debts due or owing, or any other personal property belonging to the defendants, or either of them, in the possession of or under the control of Title Insurance & Trust Company," and that he also attached the "stock of liquors, store fixtures and all other personal property located" in the city of Los Angeles in the possession of defendants Goldschmidt Bros.

On August 1, 1917, the defendants Goldschmidt served and filed a notice of motion to discharge attachment, supported by the affidavit of Herman H. Goldschmidt, one of the defendants, in which it was stated that, after the signing by Goldschmidt Bros. of said contract of guaranty, Valencia Groves Company, a corporation, to secure the repayment of the indebtedness arising out of said promissory note and said contract of guaranty, conveyed to said bank certain real property described in a declaration of trust, and that said bank accepted said declaration of trust. "Affiant states that said real property is still subject to the lien aforesaid, and the statement made by plaintiff in his affidavit for attachment that payment of the alleged contract on which suit was brought has not been secured, is erroneous."

Attached to said affidavit was a copy of said declaration of trust, in which said bank certified and declared that it had received and accepted from the Valencia Groves Company, the trustor, deeds conveying to said trustee certain real property in the county of Los Angeles (describing two parcels of land, the first of which was subject to a mortgage of $90,000 and the second to a mortgage of $85,000), in trust for the following purposes: First, to secure the payment to the bank "of the debts evidenced by two notes, for $19,000 and $2,000, respectively," said note for $19,000 being the one herein sued upon. The contract of guaranty signed by Goldschmidt Bros. on the back of said note is also reproduced. The note for $2,000 bore date January 28, 1916, and was signed by Milton Kauffman and Isaac Kauffman, and contained a guaranty signed by Max Goldschmidt. Second, after the payment in full of the debts evidenced by said notes, to secure the payment of a certain note of the Valencia Groves Company to David S. Unruh for the sum of $2,155.12.

The single question presented hinges on the real meaning and scope of the trust deed. The appellants contend that the declaration of trust was intended to secure payment, not only of the promissory notes referred to in said declaration (one executed by Milton Kauffman and the other by Milton and Isaac Kauffman), but also the performance of the conditions of each of the guaranties indorsed on said notes, the one by Goldschmidt Bros. by Max Goldschmidt, and the other by Max Goldschmidt. The position of the appellants is that the provision in the declaration of trust, to wit, "To secure the payment to Hellman Commercial Trust & Savings Bank * * * of the *debts* [italics ours] evidenced by two notes," etc., can reasonably be given no other construction than that it means and was in-

tended to mean that the security afforded by the said declaration was to include and cover, not only the promissory notes, but the performance of the contracts of guaranty. With this view of the provision referred to we are unable to agree.

[1] A guaranty is a promise to answer for the debt, default or miscarriage of another person (Civ. Code, § 2787), and a person may become a guarantor even without the knowledge or consent of the principal (Civ. Code, § 2788). A guaranty is therefore an independent contract—that is, entirely independent of any contract of debt the payment of which is thus assured, and it follows that an action on a guaranty such as the one involved herein is upon an independent contract of the guarantor with which the principal debtor has nothing to do. "The liability of the guarantor depends entirely upon the terms of his contract of guaranty, and 'there is no privity, or mutuality, or joint liability between the principal debtor and his guarantor.'" Cooke v. Mesmer, 164 Cal. 332, 340, 128 Pac. 917, 920. See, also, Adams v. Wallace, 119 Cal. 67, 51 Pac. 14; Kinsel v. Ballou, 151 Cal. 762, 91 Pac. 620.

[2] A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the same purpose are each intended, of course, to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other. But the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given. In case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security the law is different. In the latter case, the holder of the mortgage or other security would be compelled to apply to the payment of the debt the property of the debtor which had been mortgaged to secure the debt. Civ. Code, § 2850; Adams v. Wallace, supra. Such, however, is not the case as to a guarantor, as we have shown.

[3, 4] In view of the character and effect of a contract of guaranty, as above indicated—that is, that it creates an obligation wholly independent of that of the debt which it is given to secure—there would have to be to that effect a clear and unequivocal intent expressed in a mortgage or a trust deed given to secure the payment of a large sum of money, where there has also been given a guaranty for the payment of the same debt, to justify a court in holding that the purpose of the mortgage or trust deed, given subsequently to the execution of the contract of guaranty, was to secure payment, not only of the promissory note evidencing such debt, but also to secure the performance of the contract of guaranty. This is true because the guaranty is itself security for the payment of the same debt. It is hardly supposable that in such case property would be hypothecated to secure a security already in existence to secure the debt to secure the payment of which such property is hypothecated. No such intent is clearly and unequivocally expressed in the instrument involved herein. The word "debts" we think it is clear, from a fair and reasonable construction of the declaration of trust, means, and was intended to mean, the debts created by the notes themselves, and was not intended to refer to and include the obligations created by the guarantors by their contracts of guaranty. It is true the declaration of trust sets out therein, not only the notes, but also the contracts of guaranty, but the latter contracts were indorsed on the back of the notes, and it was not only proper, but necessary, as a matter of description—that is, for the purpose of describing the notes to secure the payment of which the trust deed was given—to insert in the declaration of trust the contracts of guaranty.

Our conclusion is that the motion to dissolve the attachment was properly denied, and the order denying said motion is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem; BURNETT, J.

47 Cal. App. 86

EDWARDS v. GUARANTY TRUST & SAVINGS BANK. (Civ. 3192.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1920. Hearing Denied by Supreme Court June 10, 1920.)

Gifts ⟸32(1) — No gift where drawer gave check to payee, but payee did not cash it before drawer's death.

There was no valid gift where the donor's check, given to the payee as a gift, and presented to the drawee bank prior to drawer's death, was not accepted or paid before such death, although payment was rejected without any malicious or wrongful intent, for a reason later shown to be incorrect.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. S. Edwards against the Guaranty Trust & Savings Bank, as executor. From judgment for plaintiff, defendant appeals. Reversed.

Vincent B. Vaughan and Lewis Cruickshank, both of Los Angeles, for appellant.

F. A. Knight, of Long Beach, for respondent.

THOMAS, J. This is an action brought by plaintiff against defendant as executor of the estate of Benjamin Lezer Liveson, deceased, on a "rejected claim," evidenced by a check given to plaintiff by the deceased on February 28, 1916, in the sum of $4,000, and intended as a gift to plaintiff.

From the record it appears that on March 2, 1916, the plaintiff deposited the check in question with the National Bank of Long Beach for collection; that on March 3, 1916, the check was presented to the bank on which it was drawn, and in which it is conceded the deceased had on deposit a sum approximating $9,000, and by said bank payment thereof refused, the check being returned marked "signature incorrect"; and that on March 4, 1916, Liveson, the drawer, died.

The case was tried to the court without a jury, and findings and judgment were in favor of the plaintiff as prayed for. The appeal is from the judgment so entered, on the judgment roll alone. There is just one point, and that one of law, in this case. The question with which we are here confronted is: Can a check, given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid, but payment of which was rejected for any or no reason, constitute a valid gift inter vivos or a gift causa mortis?

So far as material here, the court found as follows: That the deceased executed and delivered the said check as already stated; that at the time of the execution thereof deceased had a sum in excess of $8,000 in the drawee bank, known as a "term account"; that the bank book evidencing such account, in the possession of deceased at and prior to the time of his death, showed "that the bank reserved the right to require on term deposits six months notice of intention to withdraw"; that said bank refused to pay said check, giving as the sole and only reason for such refusal the fact that the signature of said Liveson on said check was "incorrect"; that said bank waived the provisions requiring six months' notice of intention to withdraw from the funds of the said Benjamin Lezer Liveson, and waived the presentation of the passbook; that the refusal to pay said check was not caused by any malicious intent of the defendant; and that said signature on said check was not incorrect.

As already intimated, the proposition which confronts us on this appeal is whether, under the record here, the intended gift to plaintiff had become complete before the drawer's death, or whether it was merely inchoate. If the transactions between them constituted a completed gift, the money represented by the check—it being conceded here that the drawer had sufficient funds to his credit in the bank to meet the check—belonged to the plaintiff, and, under the facts found, and under this assumed state of facts, it became and was the legal duty of the bank, with respect to the drawer of the check, at least, to honor the same when so presented, although even if, for our present purpose, it be conceded that there was no liability on the part of the bank to the holder of the check. On the other hand, if the gift had not been perfected, but was incomplete at the time of the drawer's death, the money in the bank belonged to the estate of decedent, and descended to his heirs. Under this latter assumption the plaintiff cannot recover.

Counsel for respondent in his brief says:

"We do not know of any case in the United States, and we have looked carefully, where the point involved in the case at bar has been decided."

We, too, have looked, and have, we think, found much law in opposition to the position taken by respondent here. In the case of Provident, etc., v. Sisters, etc., 87 N. J. Eq. 424, 100 Atl. 894, the Court of Chancery of New Jersey had before it a case in its material aspects very similar to the case at bar. Mrs. Bowdoin, an old lady, 86 years of age, had died in the hospital. The day before her death she gave a check to the defendant in that case for $5,000. On the same day the check was given it was presented at the bank upon which it was drawn, and payment was refused, not absolutely, but until investigation could be made. The old lady died the next day, and before any further efforts to collect the check were made. The court in that case—which is a well-considered case, and very illuminating and instructive—among other things said:

"It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit when the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. * * * It cannot be questioned in this case that, if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does it make any difference what may delay or prevent the check from being cashed."

We are in full accord with this reasoning and the conclusion reached. See notes L. R. A. 1918C, 340; Foxworthy v. Adams (Ky.) 27 L. R. A. (N. S.) 308; Estate of Taylor (Pa.) 18 L. R. A. 855. Until the money was actually paid over or transferred from Liveson's account to that of the plaintiff by the drawee bank, the gift, whether it be regarded as inter

vivos or causa mortis, would be revocable, and after the death of Liveson the whole transaction would have stood legally as an incomplete gift, entirely unenforceable at law or in equity. Provident, etc., v. Sisters, etc., supra. "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation." 20 Cyc. 1193. In order to accomplish this, "there must be a parting by the donor with all present and future legal power and dominion over the property." 20 Cyc. 1196; Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757; Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Simmons v. Savings Society, 31 Ohio, 457, 27 Am. Rep. 521. That the law of this state is as stated in the Provident Case, supra, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length.

As the result, therefore, of our own independent search, we are confident that "the great weight of authority supports the proposition that one cannot make his own check * * * the subject of a gift, so that, in the absence of payment, it can be enforced against the donor or his representatives." Foxworthy v. Adams, supra, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308 and note thereunder.

It may be conceded that the record here discloses sufficient facts so that we may infer that it was really the intention of the deceased to make a gift of the money on deposit in the bank, to the extent of $4,000 to plaintiff. Still, as was said in the case of Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001, "however much we may desire to carry out the intentions of deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of her property," which, under the authorities, as we have seen, cannot legally be done.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

182 Cal. 781

MASSACHUSETTS BONDING & INS. CO. v. LOS ANGELES R. CORPORATION.
(L. A. 5324.)

(Supreme Court of California. May 19, 1920. Rehearing Denied June 17, 1920.)

1. Master and servant ⊂=410—Charge allowing subrogated compensation insurer to recover damages to sons of deceased employé held erroneous as not supported by pleading and evidence.

In an action by an insurance company, which became subrogated to the rights of the widow and heirs to recover against a stranger for the death of an employé by paying compensation to her, where the only damage pleaded and supported by the evidence was the damage to the widow, an instruction, authorizing recovery of damage to the two sons of deceased as well as to the widow, was erroneous.

2. Master and servant ⊂=389—Insurer paying compensation to employé's widow held subrogated to rights of sons also.

Where a deceased employé left a widow and two sons, but only the widow claimed compensation and received payment from the insurer, the insurer nevertheless was subrogated to the right to recover damages to the sons as well as to the widow.

3. Master and servant ⊂=410—Admission by counsel held not to justify charge authorizing subrogated insurance carrier to recover damages not pleaded.

An admission by defendant's counsel that the right of the widow and heirs to recover for the death of deceased vested in the insurer who paid the compensation does not warrant a charge authorizing the insurer to recover damages to the sons of deceased, where it pleaded and proved only damage to the widow.

4. Appeal and error ⊂=302(2)—Right to complain of error in record not lost by failure to assert in motion for new trial.

The right to complain of an error which appears by the record is not lost by failure to call specific attention to it in motion for a new trial.

Department 1.

Appeal from Superior Court, Los Angeles County, Curtis D. Wilbur, Judge.

Action by the Massachusetts Bonding & Insurance Company against the Los Angeles Railroad Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment for plaintiff in an action for damages sustained by the death of one, Ogan, through the alleged negligence of the defendant. At the time of his death Ogan was employed by a corporation known as Bowles Bros. Company, and in the course of his employment was driving a wagon westerly on Pico street in Los Angeles. The defendant operates a two-track electric street railroad on the street, the tracks occupying the middle of the street. Ogan was on the northerly or right-hand side of the street as he was going, and off the tracks. On approaching the intersection of South Union street he turned to the left or south across the tracks as if to turn into South Union street. He was driving slowly, and apparently turned without any signal of his intention and without looking back. His wagon was struck by one of the defendant's cars coming up behind him; he was thrown from the wagon and sustained injuries from which he died. He left a widow and two adult sons. His widow made claim against his employer under the Industrial Compensation Act (St. 1913, p. 279), and the claim was allowed, and was paid by the plaintiff as the insurance carrier for the employer. The plaintiff then brought the present action as subrogated by the Industrial Compensation Act to any right of action against the defendant for Ogan's death.

There seems to be little doubt but that Ogan was guilty of contributory negligence in turning as he did across the defendant's tracks without signal and without looking back. Counsel for the plaintiff do not contend to the contrary. The case was tried for the plaintiff in the lower court chiefly upon the theory that after Ogan had turned and had placed himself in a position of peril, his peril was observed and realized by the motorman of the approaching car in time for him, acting with reasonable promptness under the circumstances, to stop the car and avoid the accident, and he did not do so. It is upon this theory alone that it is sought here to justify the verdict for the plaintiff. If the evidence be sufficient to sustain the verdict upon this ground it is at best but little more than sufficient for that purpose. It is not a case of which it can be said that a verdict for the plaintiff is certainly a just one or that a new trial would reasonably result in another such verdict. In other words it is not a case where it can be said with any certainty that substantial justice has been done and that the result should therefore not be disturbed because of errors which may have occurred in reaching it. There was one substantial error which did occur and which under these circumstances requires a reversal and new trial.

The plaintiff's complaint alleged the fact of Ogan's death through the negligence of the defendant; that he left a widow and two sons of whom the widow was dependent on him for support; that the plaintiff by reason of its payment of the claim of the widow against Ogan's employer had been subrogated to any right of action for his death,

and then, as the only allegation of damages suffered, alleged that by reason of Ogan's death, his widow had been damaged in the sum of $10,000. There was no allegation of damage to the sons nor of facts from which such damage might be inferred. The complaint, also, in alleging the right in the plaintiff by way of subrogation to maintain the action alleged it to be to maintain an action for all damages suffered by the widow without mention of any damages to the sons. At the trial no evidence was introduced of any relation between Ogan and his adult sons who were not living with him, which showed any pecuniary damage on their part.

[1] In this condition of the pleadings and the evidence the jury were charged that the action was one prosecuted by the plaintiff to recover damages alleged to have been sustained by the widow and sons of Ogan; that the right of the widow and heirs to recover for his death had vested in the plaintiff; that if the jury found for the plaintiff the measure of the recovery which should be allowed was the amount of damages suffered by the heirs; that the jury in fixing damages might consider the relation of the widow and children to their deceased husband and father; and that the fact that the widow and children had been and would be deprived of the comfort, society, and protection of the defendant might be considered in arriving at the pecuniary value of the life of Ogan to his widow and children.

In other words, while the complaint alleged and the evidence showed only damage to the widow, the case was unequivocally submitted to the jury as one wherein their verdict, if they found for the plaintiff, should be for the amount of damages suffered by the adult sons, as well as by the widow. The error in so instructing the jury is manifest.

[2] In this connection it may be well to note a claim made by the defendant. It is that since only the widow made claim against Ogan's employer and was alone paid by the plaintiff, the plaintiff's right by way of subrogation was limited to a recovery of the damages suffered by her alone. This is not correct. The making of a lawful claim for compensation under the Industrial Compensation Act works a subrogation of any right of action to recover for his death, whether the person making the claim be the exclusive beneficiary for whom such action would lie or not. Western States, etc., Co. v. Bayside Lumber Co., 187 Pac. 735. The plaintiff, therefore, was entitled to maintain an action for any damages suffered by the sons, as well as by the widow. But the point is that it did not bring such an action. The action it brought was only for damages suffered by the widow. The jury, nevertheless, were instructed that the action was one for damages suffered by the sons, as well as by the widow, and that if they found for the plaintiff they should determine the amount of the verdict accordingly.

[3] The only answer made by plaintiff's counsel to the defendant's claim of error in the respect under discussion is: First, that it appears that the trial court in charging the jury stated, "It is admitted by counsel that for the purpose of this litigation the right of the widow and heirs to recover for the death of the deceased husband and father have vested by operation of law in the plaintiff corporation"; and, second, that attention was not called to the point in argument on motion for a new trial when, in fairness, it should have been. It is argued that, in view of the statement in the charge as to admission by counsel, it must be presumed that such admission was made, even though there be, as there is, nothing in the record showing such admission. We need not decide whether such statement in a charge to the jury proves itself, so to speak, without anything in the record to substantiate it, for, assuming that an admission was made as stated, it was plainly no more than an admission of the subrogation worked by law. It was not an admission that the plaintiff was entitled to recover for damages suffered by the sons, as well as by the widow. The language quoted itself shows that it was not this question, but the matter of subrogation which was in the mind of the court as that which was admitted, and a reading of the balance of the instruction confirms this view.

[4] As to the second contention of plaintiff's counsel, that attention was not called to the point in the argument on motion for a new trial when, in fairness, it should have been, suffice it to say, both that this fact does not appear from the record, but only from counsel's statement, and also that it cannot be said that the right to complain of an error appearing on the record is lost by a failure to call specific attention to it in presenting a motion for a new trial.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

Ex parte WILLIAMS. (Cr. 2290.)

(Supreme Court of California. May 20, 1920.)

1. Criminal law ⊂=252(1)—Complaint essential to jurisdiction of police court.

It is essential to the jurisdiction of a police court to put a person on trial for public offense that there should be on file a complaint charging such person with the commission of such offense.

2. Habeas corpus ⊂=85(1) — Parol evidence held not to show lack of complaint in police court.

On habeas corpus to procure discharge after conviction in police court, parol evidence introduced *held* not sufficient to show that no complaint was filed against petitioner in the police court, though there was no record of any complaint.

3. Habeas corpus ⊂=85(1)—Evidence held to show trial.

Evidence that a police officer had testified against petitioner for habeas corpus at the proceedings in police court *held* to show that there was a trial in such court, notwithstanding petitioner's testimony showing such summary proceedings as would not amount to trial.

4. Habeas corpus ⊂=85(1)—Burden is on prisoner to show lack of trial.

Where petitioner for habeas corpus seeks discharge because there was no trial in the police court before his conviction, the burden is on him to show such lack of trial; errors or insufficiency of the evidence at the trial not being reviewable on habeas corpus proceedings.

5. Criminal law ⊂=251—Constitutional rights of accused must be preserved in police courts.

The constitutional rights of one accused of a crime should be preserved even more strictly in a police court than in higher courts, because of the summary nature of its proceedings, since accused in those courts generally have no counsel to protect their rights.

Lawlor, J., dissenting.

In Bank.

Application by Earl Williams for a writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco to secure discharge from custody after conviction of vagrancy. Writ discharged, and prisoner remanded.

See, also, 186 Pac. 610.

Raine Ewell, of San Francisco, for petitioner.

Isadore Golden, of San Francisco, for respondent.

PER CURIAM. This is a proceeding in habeas corpus.

The prisoner was confined in the county jail of the city and county of San Francisco under a commitment from the police court showing his conviction therein of vagrancy, and a judgment based thereon of 30 days' imprisonment. The writ of habeas corpus was issued by us upon a petition alleging that no complaint was ever filed against petitioner in said court, that no trial was had and no evidence introduced in said court in support of any charge against him, and that he was denied all opportunity to obtain witnesses to disprove any claim that he was guilty of vagrancy.

[1, 2] It goes without saying that it is essential to the jurisdiction of a police court to put a person upon trial for a public offense that there should be on file therein a complaint charging such person with the commission of such offense. Prisoner's case in this behalf rests solely upon the fact that no complaint charging him with a public offense can be found, or, indeed, that any such complaint has been seen, so far as the evidence shows, at any time since the day on which he was convicted. It appears that it is the practice in the police court to there hold the complaint until the case is disposed of, and then to deliver the same to a department of the county clerk's office where it remains as a part of the files of the office. Apparently no record whatever is kept of the fact of the filing of a complaint, which usually is sworn to before the police judge and delivered by him to the clerk of the court, a deputy county clerk, who thereupon endorses the same as filed. If perchance the complaint is subsequently abstracted or lost, no record of there having been any complaint whatever remains. In a matter involving the personal liberty of individuals, the practice is, to say the least, not to be commended. However, as against the failure to show the complaint itself, or any record thereof or record of the fact of the filing thereof, there is parol evidence tending to show that a complaint was in fact filed in the prisoner's case. The prisoner was arrested without a warrant and booked at the city prison for vagrancy. A daily docket sheet of the arrested persons assigned to a department of the police court is made up and delivered to the deputy clerk of that department, and on this sheet, which apparently constitutes the record of the court for the day, but which is made up and delivered to the clerk entirely regardless of whether any complaint has been filed in any of the cases enumerated thereon, the clerk notes the disposition of each case. The case of the prisoner was shown upon such a sheet, this record showing conviction and judgment. The deputy clerk testified positively that in all cases in which no complaint is ever filed, which sometimes happens when the arrested person is dismissed without trial, a note to that effect is made, and that the fact that no note was here made as to the absence of a complaint shows positively that there was

a complaint on file. He further testified that he would not have delivered a commitment in this case unless there had been a complaint filed prior to the delivery of the commitment. The police judge testified substantially that he had no independent personal recollection of this particular case. He further testified substantially that in accord with the practice obtaining in his court a complaint would have been duly sworn to and filed before the trial. The arresting officer testified positively that in this particular case he swore to a complaint before the police judge in open court on the morning of the trial, leaving the same with the judge, and the clerk of the court testified that he saw such a complaint. In addition there is, of course, a presumption that official duty has been duly performed. In view of all the circumstances we do not feel warranted in holding that no complaint was filed in this case.

[3, 4] As to the alleged want of trial, failure to introduce any evidence, and denial of opportunity to procure witnesses on his own behalf, the evidence is conflicting. The prisoner who had been out on bail testified substantially that all there was to his so-called trial was that his name was called and the judge asked him substantially if he had anything to say and he told him that he was working for the "News" (a daily newspaper), that the judge then said that would do and it would be 30 days; and that he then asked the judge to give him time to obtain witnesses who would testify that he was working, and the judge told him that if he said another word he would make it 60 days. He is corroborated to some extent by certain witnesses. Of course, whatever a proceeding of this kind might be styled it would not be the "trial" to which every accused party is entitled, and it could not be tolerated by any respectable court. On this matter, however, the burden of proof was necessarily on the prisoner. Unquestionably the arresting officer went upon the witness stand, and it sufficiently appears that he gave the judge some information about the case. He testified here that he was duly sworn before giving his testimony. We cannot in this habeas corpus proceeding enter into an inquiry as to the sufficiency of his testimony to support a finding of guilt. That was a matter available to the prisoner on an appeal to the superior court. The police judge testified before us and denied each and all of the claims of the prisoner in regard to the proceedings on the trial. The testimony in this regard is not such as to satisfy us that there was in fact no trial.

[5] It was suggested on the argument that somewhat summary methods of disposing of business in the police court are essential to a dispatch of the great number of cases coming on daily therein. This may be conceded, and it might be admitted also that in all courts it should be the aim to dispose of business as quickly as is consistent with the proper and careful administration of justice. But however summary the methods adopted in any court there are certain rights guaranteed by our Constitution to one charged with any crime, entirely regardless of his station in life. These rights are as sacred and inviolable in the police court as in the highest court of the land, and must necessarily be observed therein. Indeed, when we consider the greater opportunity for the disregard of those rights in the police court of a large city dealing in large part as it does with cases of individuals who by reason of their lack of means, friends, and lack of knowledge, are almost entirely dependent upon the court for impartial investigation and disposition of their cases, a greater measure of care on the part of the judge of such a court to see that every right of the defendant is carefully guarded is essential than in a higher court where the defendant is represented by counsel who can ordinarily be relied upon to protect his rights.

It was because the prisoner alleged facts tending to show a disregard of some of those rights and a denial of due process of law that we issued the writ. But the showing before us is not sufficient to convince us that the proceedings in the police court were actually as alleged, and without a convincing showing we are not justified in avoiding what purports to be the result of a regular judicial determination.

The writ is discharged and the prisoner remanded.

ANGELLOTTI, C. J., and SHAW, LENNON, OLNEY, and WILBUR, JJ., concur.

LAWLOR, J. I dissent. Did the police court acquire jurisdiction by the filing of a complaint against the petitioner? If none was filed, the proceeding was wholly void, and concededly the petitioner should be discharged. It is admitted that no complaint could be found at the time of the hearing. Parol evidence was, however, introduced to the effect that prior to the case being called a complaint had been filed. Police Officer William J. Harrington, who arrested the petitioner, testified that a complaint was drawn in the office of the bond and warrant clerk; that he swore to it before the judge in open court; and that he left it on the judge's desk. The judge's testimony on this point was that he had no independent recollection of a complaint, and the official who, it is claimed, framed the pleading, was not produced as a witness. The clerk of the court testified that he had seen a complaint during the proceedings, although in another part of his examination he stated: "I don't remember of no complaint except what is on the

calendar sheet." I have reached the conclusion that the clerk was not speaking from recollection, but based his testimony on the custom followed in the police court. This witness called attention to the absence from the loose "docket sheet" of the notation, "no complaint filed," which he said was customarily stamped opposite the title and number of the cause, as they appeared on such sheet, whenever a complaint had not been filed. But, however that may be, the fact remains that no entry of a complaint appeared on the "docket sheet"—which represented the only "minutes" kept by the clerk. Officer Harrington further testified that he saw a complaint in the superior court during the hearing of a similar writ, but that he did not "know what the custom is, whether to bring the original or a copy." He was finally asked whether, so far as he knew, the last time he saw the complaint was not when he swore to it and placed it on the judge's desk, and he answered: "Yes, sir." Attached to the return of the chief of police in the superior court is a printed form of complaint purporting to charge the petitioner with the commission of each of the eleven acts denounced as independent crimes in section 647 of the Penal Code. The names of the petitioner, the complaining witness, and the judge of the police court, and the date it is alleged the specified offenses were committed, are filled in in typewriting. This paper is not certified by the county clerk, the ex officio clerk of the police court, and the custodian of its records. The return does, however, contain this language:

"* * * A copy of which complaint is hereunto annexed and the original thereof produced and exhibited to this court."

But no one, who, having knowledge whether an original complaint or a copy thereof was actually "produced and exhibited" in the superior court, was called to testify, nor was any attempt otherwise made to confirm or negative Officer Harrington's testimony in that regard. It may be mentioned in passing that the cases of nine other men were before the court at that time, and that no complaint was produced in any of them.

The prevailing opinion relies in part on the presumption that "official duty has been duly performed." This is a disputable presumption which, unless overcome by other evidence, must prevail. Subdivision 15, § 1963, Code Civ. Proc. But has this rule of presumption any application where the jurisdiction of a court of inferior or limited jurisdiction is called in question? In this respect a distinction is to be drawn between the acquiring of jurisdiction and the proper exercise thereof. The rule of evidence where the jurisdiction of inferior courts is questioned is thus stated in 15 Corpus Juris, at page 832:

"The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction, does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts."

It is also said in the same volume, at page 842:

"There being no presumption in favor of the jurisdiction of a court of inferior, limited, or special jurisdiction, it is usually considered necessary, in order to sustain the proceedings of such a court, that the record should affirmatively show that the court had jurisdiction."

Among the cases cited in support of the above text is Ex parte Kearny, 55 Cal. 212, wherein the petitioner was discharged on habeas corpus on the ground that the complaint did not state facts sufficient to constitute a public offense. It was said in that case at page 214:

"The police court of the city and county of San Francisco is an 'inferior court' of limited jurisdiction, whose powers are conferred, and whose duties and mode of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant, and over the subject-matter."

The same rule would, of course, apply where there is no complaint at all. The respondent sets up in his return a "commitment"—which purports to be a "copy," although it is not certified—but, as the issuance of a commitment is an act in the exercise of jurisdiction, and jurisdiction must be affirmatively shown in the case of a court of inferior or limited jurisdiction, it must affirmatively appear that jurisdiction was conferred by the filing of a complaint. Section 1426, Pen. Code. In my opinion, where the jurisdiction of such a court, particularly where life or liberty is involved, is in issue, and especially where it is sought to establish that jurisdiction by parol, the proof must be of the clearest and most convincing character. The law requires, justice demands, and the courts should see to it that the individual is not put to trial unless it plainly appears that the court has jurisdiction to act. In the determination of this question it is not enough that the evidence may tend to show that a complaint was filed or that it may be involved in conflict. We must carefully weigh the evidence and give to it the force to which it is entitled. Speaking as one of the triers of the fact, I am convinced from the evidence, upon whichever side the burden of proof may rest, that the petitioner was sentenced by a court which had never acquired jurisdiction by the filing of a complaint.

I am also convinced from the evidence that the proceedings in the police court did not, either in form or substance, constitute a trial, "according to prescribed forms, and in ac-

cordance with the general rules for the protection of individual rights." Kalloch v. Superior Court, 56 Cal. 229, 240. In reaching this conclusion I have not failed to observe the distinction between the absence of a trial which would involve a violation of constitutional guaranties, and the erroneous exercise of jurisdiction in the course of a trial the remedy for which would be by appeal. Nor have I considered whether the prisoner was guilty of any or all of the eleven acts specified in the printed form of complaint already alluded to.

The police court of the city and county of San Francisco is the creation of the municipal charter thereof, but also has jurisdiction in crimes prescribed by the state. The Legislature, in title XI of the Penal Code, has provided a special form of procedure in criminal offenses in justices' and police courts: "Police courts" include "police judges' courts." Section 1461. Jurisdiction is acquired by the filing of a complaint. Section 1426. The minutes of the action and proceedings must be kept in a docket. Section 1428. In arraigning the accused, and in the receiving and recording of the plea, the same procedure is required as in the case of an indictment. Section 1429. If a jury is not waived, the charge must be tried by jury, otherwise by the court. Sections 1430 and 1435. Either party may, upon good cause shown, have a reasonable postponement. Section 1433. After a plea or verdict of guilty the court must appoint a time for rendering judgment, which must be not more than two days or less than six hours after the plea or verdict, unless the defendant waive the postponement. Section 1449. "At any time before judgment, defendant may move for a new trial." Section 1450. The judgment must be entered in the minutes of the court. Section 1453. A certified copy of the judgment must be delivered to the sheriff. Section 1455.

The petitioner should have been tried, therefore, under the above procedure, and yet there was a palpable disregard of practically every one of the foregoing provisions. I shall find it necessary, in order adequately to describe the proceedings, to state what was done in the cases of the nine other men —which were before the court and were disposed of at the same time—for the reason that, if it could be said there was an attempt to conduct a hearing, there was at most a single hearing. What happened was this: The petitioner had been released on $25 cash bail and was in the body of the courtroom when the proceedings began. The other nine men were brought from the dock and lined up before the judge. Officer Harrington was sitting in a chair "right alongside" the judge's desk. To my mind the weight of the evidence is against the testimony of Officer Harrington that he was sworn as a witness. The judge did not remember and the clerk was not questioned as to whether Officer Harrington or any one else was sworn. Charles T. Kelley, who was present, testified that Officer Harrington was not sworn, and Wells Fadden, one of the nine men, stated: "When I come up I don't know whether he was sworn." It was not testified that any other witness was sworn in any of the ten cases. We shall hereafter have occasion to refer to the "docket sheet," wherein petitioner is designated as a witness. At any rate, while the nine men were standing in the presence of the judge, and while the petitioner was making his way to take his place in line—his name being the last called, the judge asked Officer Harrington: "What about these men?" The substance of the reply was that they were vagrants and had been "hanging around Third and Market." The judge thereupon proceeded to ask each man successively: "What have you to say for yourself?" Wells Fadden answered that he was employed by the Santa Fé, but it does not appear that any of the others made a reply to the judge's questions, and it is not claimed that any further inquiry was made into the question of their guilt or innocence. Eight of the men were given "24 hours to leave town," and Wells Fadden was convicted. As already noted, petitioner's case was the last called, and there is some conflict in the testimony as to what was done. Charles T. Kelley testified that the petitioner did not take his place with the others until after eight of the cases had been disposed of; that he did not hear Officer Harrington "say anything after the first review of the men that was brought up"; that Officer Harrington gave no testimony after the petitioner had taken his place at the bar; that no other testimony was taken in any of the ten cases; and that in answer to the judge's question:

"What have you to say for yourself?" "The petitioner said he was working. * * * Then the judge gave him 30 days, and petitioner said to him, 'I am working on the Daily News,' and the judge said, 'If you say anything more, I will make it 60 days,' and the incident was closed."

The petitioner gave this version:

"The judge asked me what I was doing when I was arrested. I told him I was on my way to work, and he said, 'That's enough, 30 days.' I said, 'If you will give me till to-morrow morning, I can get witnesses here to prove that I am working,' and the judge said, 'If you say anything more, I will give you 60 days. Sit down there.' * * * Not to my knowledge, Harrington didn't say anything while I was up. * * * I can't say positively, but I didn't hear him. * * * The charge was not explained to me."

When Wells Fadden was asked: "What happened in the case of Earl Williams?" he answered:

"They called his name. He come up, and the officer testified. * * * He said he was a vagrant and had been hanging around Third and Market. That is all I heard. Q. What happened? A. 'I find you guilty. County jail, 30 days.' * * * Williams asked the judge if he could put the case over until he could consult with his employer, and the judge says, 'If you say anything more, I will give you 60 days,' and he sat down."

This is Officer Harrington's testimony:

"Q. Were you sworn as a witness? A. Yes, sir. * * * I said to the judge that I had arrested this man previously on six different occasions; that I had a complaint from my captain about him begging on Third street, and that he was a dope user, and I had arrested him several times with fiends in the Southern district, and it seems that before this time I had no special complaint about him, but this time I had a complaint by a business man on Third street."

The judge's testimony was as follows:

"So far as the facts of the case and the trial are concerned, I do not remember them. * * * Q. Do you recall whether or not you administered an oath to Mr. Harrington before he testified in the case? A. As far as that as an independent fact I do not recall, except that I administer an oath when a witness goes on the stand. Q. Do you recall Officer Harrington testifying in that case? A. I do. I recall very distinctly, but as to all his testimony, I don't remember. Q. Do you recall anything as to his testimony about this man Williams? A. * * * I will have to say no, I don't. * * * Q. The statement made yesterday of what happened was this in substance: That ten cases of vagrancy were called, and the case of Earl Williams was the last on the list; that nine of these men were in the dock while Earl Williams was in the audience, having been released on bail; that as nine of the ten cases were called nine men came out of the dock and were lined up in front and Earl Williams was making his way out of the audience up to join them; that you went through the list of these men and discharged all but one, who was sent back into the dock convicted; that no testimony whatever was asked for in connection with Earl Williams as he got before you, and you asked him what he had to say for himself, and he replied in substance that he was employed on the Daily News, and you said, according to the testimony here: 'That is enough to hear from you, 30 days. Now let's see what the News can do for you?' And he said, 'Judge,' something to the effect that might he have an opportunity to show that he was employed on the News, and you said to him that if he said anything more it would be 60 days, and that practically all this took place in the courtroom as far as this particular case was concerned. * * * A. I say that is absolutely not true, because I have never convicted men on such evidence. It is not my custom down there, and I have never convicted men on any such testimony."

If it is to be insisted that what took place in the police court constituted a trial according to the law of the land, then, in my opinion, it may justly be said that there is very little left of our boasted constitutional guaranties that one accused of crime shall have a full and fair hearing before being deprived of life or liberty. I do not think that any one of the constitutional requirements of a trial was observed in this case. The petitioner was not asked whether he had counsel, if he desired the aid of counsel, or if he was ready to proceed to trial. No complaint was produced, there was no arraignment, no taking of a plea—unless the inquiry of the judge as to what petitioner had to say for himself can be said to call for a plea, and, except for what appears in the "docket sheet," no "minutes" of proceedings on arraignment were entered. Petitioner was not asked if he waived a trial by jury—one of his fundamental rights—and it is not pretended that it can be ascertained from the records of the police court whether he was proceeded against—if proceeded against at all—alone or in conjunction with the other men. If the former, he was entitled to a separate trial, and it does not appear whether a separate trial was demanded. He was not asked if he was ready to proceed to judgment, and no time was appointed therefor. He was not arraigned for judgment, and no inquiry was made whether he had any cause to show why judgment should not be pronounced upon him. On a charge of vagrancy evidence as to employment is always admissible, and yet petitioner's request for a postponement, in order—as he claimed—to produce his employer as a witness, was denied. Whatever the judge said to the petitioner in this connection—and undoubtedly he made some remark after sentence was pronounced—I am satisfied that in no true sense was the petitioner given a "trial."

If it be proper to hold in this connection that the testimony on behalf of the respondent may be aided by a presumption of regularity based on the record of the police court, nevertheless the only evidence of a record is the "minutes" in the "docket sheet," which is a printed, unbound page with certain captions, opposite which appear the following entries:

"Offense: Vagrancy.
"Released or in custody: $25.00 bail.
"Plea: Not guilty.
"Arresting officers: Harrington and posse.
"Proceedings: Guilty.
"Witnesses: Defendant and Harrington.
"Judgment: 30 days."

Clearly this record cannot be said to contain any "minutes" of the required statutory steps which I have enumerated, and it cannot be determined therefrom what did take place during the proceedings. The loose "docket sheet" may have some merit as a work-saving device, but it could have no other virtue.

If petitioner were relying here on any one of the indicated departures from the prescribed mode of trial, it might be held that the police court merely erred in the exercise of jurisdiction, and that relief must be sought by appeal. But, in my opinion, even if the police court had acquired jurisdiction by the filing of a complaint, the failure to observe so many essentials of a trial would cause the jurisdiction to lapse and leave the police court without jurisdiction to render a judgment.

It might be assumed from the proceedings that in the case of a "drug addict" or "vagrant" it is not necessary to observe the constitutional requirements of a trial. There is no such discrimination in the law. Indeed, the greater the demoralization of the accused, the more need there is, it would seem, to conserve his rights. I do not think these proceedings should be given our sanction or be accepted as a sufficient compliance with constitutional mandates. It is not enough to moralize on the showing that has been made before us; the proceedings should be condemned as a perversion of law.

I am strongly of the opinion that the petitioner should be discharged on the grounds, first, that no complaint had been filed, and, second, that there was no trial before judgment.

183 Cal. 29

In re MORO'S ESTATE. (S. F. 9125.)

(Supreme Court of California. May 21, 1920. Rehearing Denied June 17, 1920.)

1. Wills ⇐123(3) — Substantial compliance with statutory requirements as to execution essential.

A substantial compliance with the requirements of Civ. Code, § 1276, for the execution of a will, including the requirement that the witnesses must sign at the end of the will, is essential to the validity of any will other than an olographic or noncupative will.

2. Wills ⇐121—Attestation on separate sheet after blank space does not invalidate.

The fact that the attestation clause was on a separate sheet from the concluding provisions of the will and the signature of testator, though there was a sufficient blank space on that sheet, does not invalidate the will, where the sheets were fastened together in proper order so that the attestation clause was upon the sheet immediately following that containing the end of the will.

3. Wills ⇐121—Attestation clause must follow testator's signature so as to occur at "end of the will."

Civ. Code, § 1276, subd. 4, requiring the attestation clause to be at the end of the will, requires that it shall follow the last clause of the will and the testator's signature in such manner that it is apparent from an inspection of the will, without reference to any other evidence, that it was the purpose to attest the will at the end thereof.

Lennon, J., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of Giovanni Moro, also known as John Moro, deceased. Appeal from an order admitting a purported will to probate. Affirmed.

Rehearing denied in bank; Lamar, J., dissenting.

Arnold C. Lackenbach, of San Francisco, for appellant.

W. H. Early, of Petaluma (Fred S. Howell, of Petaluma, of counsel), for respondent.

ANGELLOTTI, C. J. This is an appeal from an order admitting a purported will to probate as the will of deceased, and denying the petition of appellant for letters of administration. The sole contention of appellant is that the purported will was not executed in the manner required by law.

The only alleged defect in the matter of execution is that the signatures of the two attesting witnesses are not "at the end of the will" as required by subdivision 4, § 1276, Civil Code. The purported will was typewritten on three separate sheets of paper approximately 8½ inches wide by 13 inches long, which, with a cover sheet, indorsed as the will of deceased, were fastened by eyelets at the top. The typewriting commences a little over 2 inches from the top of the first sheet, consumes the entire page, continues on the second sheet, commencing a little over 2 inches from the top, and ends a little over 3½ inches from the top of the second sheet, with, "In witness whereof I have hereunto set my hand and seal this 25th day of June, 1917." The signature of the deceased was placed immediately after this on a line left for that purpose. There are no other signatures on the page, there being a blank space of about 8½ inches to the bottom thereof. On the third sheet or page the typewritten attestation clause commences about 2 inches from the top, occupying about 3 inches, and the signatures of the attesting witnesses are written directly beneath the attestation clause, on lines provided for that purpose, with their respective places of residence stated in typewriting. The third sheet is not numbered at the bottom, the others being numbered at the bottom respectively "1" and "2." The evidence at the hearing was such that there is no pretense that the instrument was not executed and attested in the precise form and order of sheets in which it was filed for probate. The attestation clause and signatures of witnesses follow the signature of

the testator, which was properly appended immediately after the last sentence of the will. Looking at the instrument as a whole, it has every appearance of careful preparation and genuineness, and of being in exactly the condition in which it was at the time the various signatures were appended.

The whole claim of appellant is that because of the blank space between the signature of the testator and the commencement of the attestation clause, and the fact that such attestation clause and the signatures of the witnesses are on the succeeding sheet or page instead of on the sheet or page on which appears the testator's signature, the two witnesses did not sign "at the end of the will."

[1] It must be conceded, of course, that substantial compliance with the requirements of section 1276, Civil Code, is essential to the validity of any will other than an olographic or noncupative will. That section requires in subdivision 1 that "it must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto," and in subdivision 4 that "there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence." Whether there has been substantial compliance with this requirement as to the place of signature of the witnesses is a question that necessarily must be determined solely upon an inspection of the paper itself, assuming, as we must, in view of the circumstances, that the document when signed by the witnesses was in the same condition as when filed for probate. If the signatures are not in fact "at the end of the will" within the meaning of subdivision 4 of section 1276, Civil Code, that is an end of the matter, and it must be held that the will was not executed in the manner prescribed by law.

[2] We think, in view of the appearance of the document itself, that in the determination of this question the mere fact that the attestation clause and signatures of witnesses are on the sheet or page following that on which the testator appended his signature is altogether immaterial. As said in the Matter of Field, 204 N. Y. 448, 454, 97 N. E. 881, 883 (39 L. R. A. [N. S.] 1060, Ann. Cas. 1913C, 842):

"There is no statute forbidding the use of separate sheets or directing how they shall be joined together."

The instrument filed, consisting of the three sheets fastened together as already described, must be regarded as a completed whole, and so regarded each part, down to and including the signatures of the witnesses, follows a previous part naturally and in proper order, with the signatures of the witnesses and their places of residence the very last words of the instrument. The place of such signatures bears the required relation to the conclusion of the will proper, and obviously they were there placed for the sole purpose of legal attestation. If the words of the will itself with the signature of the testator had reached to the very bottom of the second sheet or page, no one could claim with any show of reason whatever that the fact that the attestation clause and signatures followed on another sheet or page instead of on the second sheet or page in any degree affected the question of sufficiency of execution. The real claim of appellant that the signatures of the witnesses are not "at the end of the will" is necessarily based on the fact of the blank space on the second sheet or page following the testator's signature, a space considerably more than sufficient in size to have permitted the insertion therein of the attestation clause and signatures of witnesses.

[3] What is meant by "the end of the will" with reference to the place of signature of testator and witnesses is a question that has received some consideration at the hands of the courts of New York, from which our statute was taken, as well as from this court; but in our opinion no case cited goes to the extent of warranting the rejection of the will here involved on the theory that there was not a substantial compliance with the requirement that the witnesses sign "at the end of the will." It is settled by the decisions that in view of the requirement no portion of the writing constituting the will proper may follow the signatures. This, of course, is clear. So where the purported signatures, whether of testator or witnesses, have been found in places preceding the end of the writing, the will has been rejected as not executed in accord with the imperative demand of the statute. Obviously, the end of the will cannot be at the beginning or in the middle or anywhere else except after the last provision of the instrument itself. The claim of appellant is that, to be "at the end of the will," the signature of the testator must immediately follow the close of the will, without any considerable intervening blank space, and that the signatures of the witnesses, or at least the commencement of the attestation clause, must immediately follow the signature of the testator, without any considerable intervening blank space. In this behalf reliance is placed on certain expressions in the "court" opinion in Estate of Seaman, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, where the purported signatures, both of testator and witnesses, were on the back of a folded will, under the printed words of endorsement, "The last will and testament of" under which the name "Henry Seaman" had been written, and a printed form for date of filing, certainly not a natural or

proper place for them, or a place bearing any proper relation to the concluding portion of the provisions of the will. While these signatures were subsequent in place to every provision of the will, it was held that the signature of the testator was not at the end of the will within the meaning of the statutory requirement, and that the end of the will "is not the foot or physical end of the sheet of paper upon which the 'will' is written, but is the physical termination of the testamentary provisions which constitute the will." Discussing the requirement as to the testator's signature, "the court" opinion said:

"The requirement that the name shall be subscribed 'at' the end of the will is not satisfied by having that name written *at any place* 'after' the termination of the written matter, *irrespective of the relation which such place bears to the concluding portion of the will.* This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, *but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes.*" (The italics are ours.)

The court went on to say that the signature must in fact be placed in such proximity to the testamentary provisions as to constitute a substantial compliance with the statute, and that while a slight space, a single line "or even more," might be left blank, yet to leave blank an "entire page" would indicate a disregard of the statute which should prevent admission of the will to probate. In his concurring opinion Chief Justice Beatty said:

"The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses [which were in the same place as the testator's], and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution."

In another concurring opinion by the writer of this opinion, concurred in by Justice Shaw, the test of Chief Justice Beatty was accepted as correct, with the further statement that the signature must be after the termination of the testamentary provisions, and that where so placed "the mere extent of space between such termination and the subscription ought not to affect the question as to whether the statute has been complied with, if the document on its face, disregarding the signatures of the witnesses and all evidence aliunde, fairly indicates that the name was so placed by the testator as a subscription and for the purpose of execution," and that "the extent of space is, of course, material upon the question as to what the document does indicate upon its face." It will be seen that the gist of these opinions is that as to the testator's signature it is not enough that the signature be in any place after the termination of the will proper, "irrespective of the relation which such place bears to the concluding portion of the will" (it being in that case on the back of the folded will and under the words of indorsement of the nature and character of the instrument), and that while it is not required that it shall be in immediate juxtaposition with the concluding words of the will, "it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes." This was the express test prescribed by "the court" opinion as regards the testator's signature, and it may here be assumed as suggested by the court, that the intervention of an "entire" blank page between the concluding portion of the will and the signature would require the rejection of the will as showing a material disregard of the provisions of the statute, for the reason that the instrument would not then on its face warrant the required inference. With relation to the signatures of the witnesses the same test would require that they be placed in such a position with relation to the concluding words of the will and so near thereto, and, of course, following the same, as to warrant a reasonable inference that they were placed where they appear solely for the purpose of attesting the execution of the will. If so placed, they are practically and substantially "at the end of the will" within the meaning of the statutory requirement. We consider this to be practically the ruling in Estate of Seaman, supra, and it commends itself to us as correct. In this case the inference to that effect arising upon an inspection of the instrument is irresistible, and we are satisfied that in the respect suggested there was a substantial compliance with the law in the matter of the execution of the will.

We think the distinction between the case at bar and the various cases relied on by learned counsel for appellant is so obvious as to render consideration of those cases unnecessary here.

The order appealed from is affirmed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

LENNON, J. I dissent. The will in question was not, in my opinion, executed in keeping with the requirements of section 1276 of the Civil Code. That section provides, among other things, that every written will, other than an olographic will, must be signed by two attesting witnesses who must affix their signatures at the end of the will.

The document admitted to probate as the last will and testament of Giovanni Moro

is typewritten and consists of three sheets of paper, 8½ inches wide and 13 inches long, fastened together at the top by staples. The dispositive clauses completely fill the first page. A concluding paragraph consisting of four lines appears at the top of the second page and is immediately followed by the signature of Moro. The remainder of the second page, a space of about 8 inches, is blank. The usual attestation clause followed by the signatures of the attesting witnesses appears at the top of the third page and occupies altogether a space of about 5 inches.

The Estate of Seaman, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, is the leading case in California on the question of what is meant by the words "at the end of the will" as they are used in section 1276 of the Civil Code. The decision in that case is fully in accord with the New York cases construing a similar statute. The law is stated by the court in that case as follows:

"The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The 'will' at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the 'end thereof' is not the foot or physical end of the sheet of paper upon which the 'will' is written, but is the physical termination of the testamentary provisions which constitute the will. * * * 'To say that where the name is there is the end of the will is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that when we find the name there is the end of the will. * * *' Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of O'Neil's Will, 91 N. Y. 522; Matter of Andrews' Will, 162 N. Y. 1.

"The requirement that the name shall be subscribed 'at' the end of the will is not satisfied by having that name written at any place 'after' the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter, and the name without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which should prevent its admission to probate. See Soward v. Soward, 1 Duval (Ky.) 126."

In the Estate of Seaman, supra, as in the instant case, several New York authorities were urged upon the court by the proponent of the will. Of these Matter of Gilman, 38 Barb. 364, may be taken as representative. In the last-mentioned case the written matter of the will terminated four lines above the bottom of the page where the testator signed his name. The court said:

"An instrument is signed at the end when nothing intervenes between the instrument and the subscription. * * * The place named in the statute is the end. The end of an instrument, in writing, commences and continues until something else, or some other writing occurs."

Referring to the quoted words this court said:

"This language may have been appropriate to the will then before the court, but as a construction to be given to the statute it does not meet with our approval, and is moreover inconsistent with the construction given in the above cases cited from the Court of Appeals of that state [New York]. Particularly do we dissent from the definition of 'end' as given in the last sentence of the quotation." Estate of Seaman, supra.

Applying the reasoning of Estate of Seaman to the instant case, it is manifest that the attesting witnesses did not sign "at the end of the will" within the meaning of the statute. In that case the court opinion, which, of course, states the law of the case, distinguishes between the "will," or declarations of the testator, and the physical substance upon which the will is written. According to the reasoning of that opinion it is not sufficient for a signature to a will to be affixed at any place between the termination of the written matter and the physical end of the material substance which contains the writing; in order to be at the "end" of the will, the signature must be placed at the close of the testamentary provisions. The signature must be affixed in such relation to the place which bears the concluding portion of the will as to afford a reasonable inference that the signature was intended to indicate an authentication of the instrument as a completed expression of the testamentary purposes or, in the case of a witness, as an attestation of the execution of the will. But that alone is not sufficient. Irrespective of the indication of intent, it must appear that the signature was in fact placed in such proximity to the end of the testamentary provisions as to constitute a substantial compliance with the statute. A slight space might be left between the signature of the testator and the signatures of the witnesses, "such as a single line or even more," as stated in Estate of Seaman. Here, however, there is a space consisting of two-thirds of

a page, "a space considerably more than sufficient in size to have permitted the insertion therein of the attestation clause and signatures of witnesses." The signatures were placed at the top of a different and subsequent page. While the witnesses signed the last of several pages containing a will and there was no writing following the signatures of the witnesses, they did not sign at the termination of the testamentary provisions. Therefore, there has not been in fact an observance of the provisions of section 1276 of the Civil Code as that section has heretofore been interpreted by this court.

It is true that the question determined in the Estate of Seaman related to the position of the signature of the testator. But the requirement of the statute as to the position of the signatures of the witnesses and the signature of the testator is the same. Under the doctrine of the Seaman Case, we would be constrained to declare the will void had the signature of Moro been placed on the third page where the signatures of the witnesses appear. The same language in the same statute cannot be given two totally different interpretations.

"It is a requirement of the statute that both the testator and the witnesses must sign at the end of the will. Wherever the will ends there the signatures must be found, and one place cannot be the end for the purpose of subscribing by the testator and another place be the end for the purpose of signing by the witnesses." Estate of Hewitt, 91 N. Y. 261.

Although appellant does not rely upon any circumstance of fraud in the execution of the will, it may not be amiss to note that the will was not written upon a connected printed form but was typewritten upon several separate sheets of paper; the sheet containing the attestation clause having no connection, physical or otherwise, with the preceding sheets until it was stapled to them. It is not even numbered. It may be noted, moreover, that, while in the will itself the testator is referred to as Giovanni Moro, this being the name which is signed to the will, the testator is referred to in the attestation clause as John Moro. These circumstances are mentioned, not for the purpose of indicating the probability of fraud in this particular case, but to illustrate the undoubted possibilities of fraud, which it is the very purpose of the statute to prevent, should it be held that a will was duly executed where it appeared that the attestation clause and the signatures of the witnesses were placed upon a separate and independent sheet of paper, regardless of intervening space. For all that appears from the document itself, the paper containing the attestation clause may have been attached to the other sheets composing the document months after the signature of the testator was affixed.

Nor is it material that there may have been no fraud in fact in the instant case.

"It would have been wholly unavailing to show that this will was in other respects properly executed; that there was some excuse for not placing the names of the witnesses at the end of the will; that there was the absence of fraud; and that the transaction was attended with entire good faith and fairness. The proof offered would not tend to show that the place where the signatures were signed was the end of the will." Estate of Hewitt, supra.

182 Cal. 777

JONES v. CALIFORNIA GROWERS & SHIPPERS, Inc. (L. A. 6048.)

(Supreme Court of California. May 18, 1920.)

1. Sales ⟸353(6)—Seller of growing crop, suing for price, need not allege delivery.

In action by seller of growing crop for balance of purchase price, brought while crop was still growing, it was unnecessary to allege delivery.

2. Sales ⟸12—Growing crops subject to absolute sale.

Growing crops are subject to absolute sale.

3. Pleading ⟸279 (4) — Installment of price due after action brought may be set up by supplemental complaint.

Nonpayment of balance of purchase price falling due subsequent to commencement of seller's action may be set up by supplemental complaint.

4. Costs ⟸260(4)—Buyer's appeal on ground that delivery was not alleged held frivolous.

In action by seller of growing crop for balance of purchase price, brought while crop was still growing, buyer's appeal from judgment for seller on ground that there was no specific allegation of delivery *held* frivolous and to warrant $100 penalty, in view of Const. art. 6, § 4½.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by H. T. Jones against the California Growers and Shippers, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant.

James W. Griffin, of Holtville, for respondent.

WILBUR, J. [1-4] Plaintiff recovered judgment for $2,600, being the balance of the purchase price of the entire crop of melons growing on his ranch, which was sold by him to the defendant for $4,600, payable $2,000 cash, $600 June 25, 1918, and $2,000 July 1, 1918. Suit was brought June 26, 1918, for $600. Payment of $2,000 having become due July 1, 1918, its nonpayment was set up by

supplemental complaint filed July 10, 1918. The findings and judgment being in favor of plaintiff, the defendant appeals upon the judgment roll alone, claiming that there is no specific allegation of delivery.

Appellant attempts to distinguish this case from that of Christensen v. Cram, 156 Cal. 633, 635, 105 Pac. 950, in which, on an appeal on the judgment roll alone, an allegation that the goods "sold" was held sufficient allegation of a completed sale, upon the ground that "in the case at bar the allegation is that the melons were still growing; therefore a delivery in future must of necessity have been contemplated, and the transaction was not a completely executed one." This position is not tenable. Growing crops, as well as other personal property, are subject to ab-absolute sale. Hamilton v. Klinke (App.) 183 Pac. 675. See, also, Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487; Wong Foo v. Southern Pacific Co. (App.) 181 Pac. 823; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134, 136.

It was proper to set up the nonpayment of the $2,000 note by way of supplemental complaint. The judgment of the trial court was correct. In view of section 4½, art. 6, of the Constitution, the appeal is without semblance of merit, and a penalty for a frivolous appeal should be imposed. Johnson v. Dixon Farms Co., supra.

Judgment affirmed, with penalty of $100 for frivolous appeal.

We concur: LENNON, J.; SLOANE, J.

182 Cal. 771

TIPPS v. LANDERS. (L. A. 6086.)

(Supreme Court of California. May 18, 1920.)

1. Evidence ⊜383(8)—Book account, not kept in usual course of business, and not showing all the dealings, of no probative value.

A book of account, showing on its face that it was not kept in the usual course of business and did not contain all the dealings between the parties, had no probative value above mere memoranda to use to refresh the memory.

2. Payment ⊜67(1)—Check presumed payment of debt and not loan.

Under Code Civ. Proc. § 1963, subd. 7, a check delivered by one party to an account to the other is presumed to be a payment on an indebtedness due the payee, and not a loan.

3. Witnesses ⊜167—Plaintiff cannot testify as to correctness of book account against decedent.

Under Code Civ. Proc. § 1880, subd. 3, making incompetent testimony as to matter or fact occurring before death of decedent, plaintiff, in an action against an executor, cannot testify that entries in a book concerning transactions with deceased are true and correct.

Department 2.

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by J. H. Tipps against Ida B. Landers, executrix of the estate of T. R. Landers, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

H. E. Gleason and Conkling & Brown, all of El Centro, for appellant.

James W. Glassford and J. J. Simmons, both of El Centro, for respondent.

WILBUR, J. This is an action to recover $15,485.47. The complaint is in two counts, each for the above amount, the first upon an "open, mutual and current book account," and the second upon an open, mutual current account, between the plaintiff and T. R. Landers. Plaintiff appeals from a judgment of nonsuit. Plaintiff testified that he kept a record of the transactions between himself and the deceased; that the entries were made by him at or about the time of the transactions, on pages 62 and 65 of an old book, from which the two pages 63 and 64 had been torn out, the credit entries to the plaintiff being on page 62 and those against the plaintiff on page 65. These pages were admitted in evidence over the objection of the defendant that no proper foundation had been laid for their introduction. These pages are as follows, to wit:

Page 62: Paid to T. R. Landers by Check

Dembe	29	1909	1500
On 0			100
9/1		1910	1500
11/28		1910	2000 Thurman Mag
12/10		1910	626 28
12-23		1910	300
6/22		1911	5413 58 Margages
12/20		1910	Check Moners Pd 1500
11/1		1911	106 50
12/6		1911	Calex 600
4/14		1912	1500
7/24		1912	1200
8/8		1912	El Centro Bank 684 49
9/13		1912	993 50
9/26		1912	500
1/12		1913	600
1/9		1913	500
4/1		1913	500
			Ioned 460
3/14			J. H. Conditt Ione 50000
Durant Mote		1914	By Lane Mg. Corp. 24182 55

Acct. with Landers

—65—				
July	1	1910	Note for	$5692.00
"	1	"	Note for	$5000.00
Dec	13	1911	"	$4054.07
April	10	1914	hogs	85
				$14,831.07

Due July 1, 1915
" " 1, 1915
" " 1, 1916
$14,746.07
85

The evidence shows that the entries were not a correct record made at the time of the transactions and in the usual course of business. The last item in the account of $85.00, dated April 10, 1914, was for eight hogs de-

livered on January 28, 1914, and was entered in the book on April 10, 1914. The plaintiff paid for these hogs by check on delivery. If the books had been correctly kept there should be a corresponding entry of this amount in favor of the plaintiff. The last item credited to the plaintiff is $50,000, dated March 14, 1914. Plaintiff claims that this item should be $5,000, and the date March 31, 1914, and claims only this amount in his bill of particulars. The item of $300, December 23, 1910, precedes the item of $1,500, December 20, 1910, and the item of June 22, 1911, precedes the item of December 20, 1910. The item of December 20, 1910, was thus entered more than six months after the transaction recorded. In proof of the correctness of the account, the promissory note of July 1, 1910, for $5,692.00 shown in the account, was introduced in evidence, together with the indorsements thereon. These indorsements were as follows:

Paid 9—1—1909	$ 100.00
11—29—1909	1500.00
	100
Paid November 28, 1910	2000.00
Paid 12—10—1910	300.00
Paid 12—23—1910	626.28
Pad 6—22—1915	4526.28

All Pade June 22, 1911.

[1, 2] A comparison of these payments with the account shows that the item of $100, paid September 1, 1909, was not entered in the account at all; that the item of $1,500, paid November 29, 1910, was entered in the account as made December 29, 1910; that the item of $300, paid December 10, 1910, was entered as made December 23, 1910. The $626.28, paid December 23, 1910, was entered as made December 10, 1910. The indorsement: "Pad 6—22—1915 $4526.28" is claimed by plaintiff to be so much of the item of the account, "6—22—1911, $5413.58," as was necessary to complete the payment of the note, the balance of the amount being applied to the $5,000 note executed at the same date. There are four difficulties with this explanation. First, the date of the indorsement is 1915 instead of 1911; second, the sum of all the items, including the item $4,526.28, exceeds by over $3,000 the amount due thereon June 22, 1911; third, the item $4,526.28 is the exact sum of all the previous payments (omitting the undated $100 item, for which there is no corresponding entry in the account). Fourth, the indorsement "All Pade June 22, 1911" is a much more appropriate indorsement, if made at the time the note was surrendered, as plaintiff testifies. Plaintiff testified to the transaction of June 22, 1911, in explanation of the item of $5,413.58 in the account, to the effect that this item consisted of a total of the amount of certain chattel mortgages executed to the plaintiff and by him transferred to the defendant in payment upon the notes as follows:

"P. E. Patterson, mortgagor, $967.50; T. White, mortgagor, $550.00; D. M. Kirklin, $526.00; E. S. McCollum, $1492.50; Louis Fechin, $355.00; Louis Fechin, $365.00; J. H. Stevinson, $1085.00."

The total would be $5,341. Further, at the foot of page 62 is $24,182.55. It is apparent, therefore, that the entry of $50,000 is a mistake, and the amount should be $5,000. This, however, does not tend to establish the correctness of the book. Furthermore, it also appears that all of the transactions between the plaintiff and Landers were not recorded in the book, Otis Tipps testifying in relation to the item of $85, when asked if any other hogs were sold under similar transactions, stated that there were such transactions, and that he was buying hogs all over the country for different parties, and that his father, the plaintiff, and the deceased had extensive business dealings together. The preliminary proof showed that it was not a book kept in the usual course of business, containing all the dealings between the plaintiff and others, nor did it show all the dealings between the plaintiff and T. R. Landers, nor was there sufficient evidence of the correctness of the account. These book entries, therefore, do not rise in probative value above mere memoranda used to refresh the memory of a witness, as they fail in the foregoing essentials as a book of accounts. Landis v. Turner, 14 Cal. 573, 576; Colburn v. Parrett, 27 Cal. App. 541, 544, 545, 150 Pac. 786. These entries should not be considered of any probative value in determining whether or not there was sufficient proof to establish plaintiff's claim. In discussing the account both parties seem to overlook the interest accruing upon the notes. Even without considering this interest respondent claims that the account shows a balance due the deceased of $3,885.52, on the theory that moneys shown by the account as paid to the defendant are presumed to be applied to some indebtedness, and that only the items indicated in the bill of particulars as having been "loaned," etc., are to be considered as credits in favor of plaintiff. Code Civ. Proc. § 1963, subd. 7. Appellant contends that, even on this theory, the total debits would be $26,575.87, and that "deducting the credits of $14,806.07 leaves a balance due appellant of $11,769.80." If we assume that at the time plaintiff and wife executed the notes of July 1, 1910, their total was the balance due to the payee, as seems reasonable, and credit plaintiff with all subsequent items claimed in his account, the balance would be in favor of T. R. Landers for $647.12, if we include interest. If we accept the testimony of the plaintiff, incompetent as it was, that the balance due the defendant on the notes after the payment of June 22, 1911, was $3,500, and credit him with all the subsequent items, the bal-

ance due the plaintiff would be $5,806.53. But this includes the item of March 14, 1914, and in view of the fact that this item was merely a deposit of plaintiff's check by Landers, the check would be presumed to be a payment on an indebtedness due Landers. Light v. Stevens, 159 Cal. 288, 113 Pac. 659. Ignoring this payment, we would have a balance in favor of the plaintiff of only $806.53. This balance is more than overcome by the fact that no proof other than the account itself was offered as to the items of "November 12, 1912, $600.00" and "January 9, 1913, $500.00"; and these items must therefore be disallowed. It remains to be determined whether there was sufficient evidence, other than the so-called account book, to establish a prima facie case. In addition to the indorsements upon the notes, it was established that certain checks drawn by plaintiff were deposited by Landers in his bank account. These transactions failed to establish any obligation to repay these amounts by reason of the presumption that money paid by one to another is due the latter. Subdivision 7, § 1963, Code Civ. Proc.; Light v. Stevens, supra.

[3] In the foregoing discussion we have mentioned evidence given by the plaintiff as a witness in his own behalf. He was, however, an incompetent witness either to establish the correctness of the account, or to testify with reference "to any matter or fact occurring before the death of" T. R. Landers. Section 1880, subd. 3, Code Civ. Proc. In Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539, it was stated that plaintiff in an action against an executor could testify with reference to the keeping of books and their correctness. This statement as to the right to testify as to the correctness of the book was criticized in the later case of Stuart v. Lord, 138 Cal. 672, 72 Pac. 142, and shown to be dicta. In Colburn v. Parrett, supra, it was held by the District Court of Appeals, Second District, that in such a case the plaintiff could not testify that the entries were true and correct. We agree with this decision. An examination of the record satisfies us that the defendant did not waive her objection to the incompetence of the plaintiff as a witness, and that his testimony as to all the items and transactions should be therefore ignored by us in determining whether or not the plaintiff has shown any right of recovery against the defendant. Section 1880, subd. 3, Code Civ. Proc. Omitting the incompetent evidence improperly admitted, the judgment of nonsuit on the general ground of failure of proof was properly granted. Carter v. Canty, 186 Pac. 346.

In view of the foregoing conclusion it is unnecessary to determine whether the motion for nonsuit upon the ground that the plaintiff's claim was barred by the statute of limitations could be sustained where the bar of the statute is pleaded by section number only (337), and not by subdivision thereof. Wolters v. Thomas, 3 Cal. Unrep. 843, 32 Pac. 565. It may be observed, however, that the only subdivision of that section which could apply to the plaintiff's cause of action would be subdivision 2. In view of this conclusion it is also unnecessary to consider whether or not the account in question is either a mutual open and current account or a book account within the meaning of that subdivision. Therefore we do not decide that question.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

182 Cal. 778

NEWMAN et al. v. E. E. OVERHOLTZER SONS' CO. (L. A. 6037.)

(Supreme Court of California. May 18, 1920.)

1. Municipal corporations ⇐706(5) — Evidence held to show that defendant was operating its ambulance at a negligent speed.

In an action for injuries arising out of a collision between plaintiffs' car and defendant's ambulance, evidence *held* to warrant finding that defendant was operating its ambulance at an excessive speed, and that such negligence was the sole proximate cause of the collision.

2. Appeal and error ⇐1001(1)—Verdict based on sufficient evidence not disturbed.

Where the evidence was sufficient to carry to the jury the question of defendant's contributory negligence, its verdict will not be disturbed on appeal.

3. Municipal corporations ⇐706(4) — Ordinance prescribing duties of drivers on approach of ambulance admissible.

In an action by motorists whose car was struck by an ambulance when they stopped the vehicle at a street intersection to allow the ambulance to pass, an ordinance, prescribing the duties of drivers on the approach of an ambulance, was properly admitted.

4. Appeal and error ⇐1053(3) — Defendant cannot complain of admission of ordinance where instructions construed it as he contended.

In an action by motorists for damages from collision with defendant's ambulance, where it appeared that motorists proceeding across a street intersection stopped on the approach of the ambulance, defendant cannot complain of the admission of a municipal ordinance requiring drivers to stop as near the right-hand curb of the street as possible on the approach of an ambulance, where the court charged that the driver of the ambulance was warranted in assuming the motorists would continue, and that, if the stopping was the cause of the accident, there could be no recovery.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Frank Newman and Anna M. Newman, husband and wife, against the E. E. Overholtzer Sons' Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

G. P. Adams, of Los Angeles, for appellant.

Frank P. Doherty and Randall & Bartlett, all of Los Angeles, for respondents.

WILBUR, J. Plaintiffs recovered damages for personal injuries to Anna Newman and for injuries to a Ford automobile belonging to plaintiffs, resulting from a collision between the defendant's ambulance and plaintiffs' automobile at the intersection of Twenty-fifth and Main streets, Los Angeles. Main street is 69 feet between curbs at the intersection. The ambulance was empty until after the accident, and was not answering a call. It was a long, heavy machine, having a 149-inch wheel base and weighing 4,500 pounds. It was traveling in a northerly direction at a high rate of speed estimated at 35 to 40 miles per hour, straddling the east rail of the double-track street railway on Main street. The machine driven by plaintiff Frank Newman was proceeding westerly on Twenty-fifth street, and entered Main street, in low gear, at 6 miles per hour and was going across the intersection at that speed until near the east rail of the last track when, hearing the loud and insistent ringing of the ambulance gong, it was stopped when the ambulance was, as some witnesses testified, about 100 feet away and remained standing until the collision. The ambulance driver applied brakes, causing the hind wheels of the ambulance to skid to the point of collision. He swerved to the right in an endeavor to pass to the rear of plaintiffs' machine, but was unable to make the turn, either because of too great speed or because another automobile on his right was also passing. The ambulance struck the respondents' car at the rear wheel, swung it around, and stopped within a few feet.

Appellant claims that the decision of the lower court is erroneous for two reasons: First, that the accident occurred by reason of the sudden negligent stopping of respondents' car; second, that the court erred in admitting in evidence an ordinance of the city of Los Angeles containing the following section regulating the conduct of vehicles upon the approach of an ambulance, to wit:

"Upon the approach of any apparatus of the fire department or any police patrol wagon or any ambulance, the driver of any vehicle in or upon any street shall immediately stop such vehicle as near as possible to the right-hand curb of such street, and it shall be unlawful for any such driver to cause or permit such vehicle to be moved until such apparatus, police patrol wagon or ambulance shall have passed such vehicle."

[1, 2] As to the first claim it is sufficient to say that the jury were justified under the evidence in concluding that the appellant was operating its ambulance at an excessive rate of speed in approaching the intersection in question, and that such negligence was the sole proximate cause of the collision. As to whether or not respondents were negligent under the circumstances in stopping to avoid a collision, it is sufficient to say that the question as to whether such conduct was negligence, and, if so, was a proximate cause of the injury, was for the jury to determine, and we cannot interfere with its determination.

[3, 4] Second: It was proper to admit in evidence the ordinance of the city regulating the conduct of vehicles upon a street upon the approach of an ambulance as an element to be considered in determining the question of negligence of both parties. Appellant's principal attack upon the admissibility of the ordinance is that it does not purport to regulate the conduct of drivers of automobiles crossing the street upon which an ambulance is being operated, and therefore should not be construed to justify the stoping of respondents' automobile. The court instructed the jury in effect that the driver of the ambulance had a right to assume that the respondents' machine would "continue in its journey at approximately the same rate of speed and to govern himself accordingly" thus apparently adopting appellant's interpretation of the ordinance, and again with reference to the stopping of respondents' automobile:

"If you find that such stopping constituted negligence, and that it contributed proximately in the slightest degree to the injury, your verdict must be for the defendant."

These instructions were quite as favorable to the appellant as it was entitled to, and under the circumstances left the issue of defendant's negligence and plaintiffs' contributory negligence to the jury as a question of fact. Their verdict is conclusive upon this court.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

GUARANTY LOAN CO. et al. v. FONTANEL.
(S. F. 9238.)

(Supreme Court of California. May 20, 1920.)

1. Corporations ⟸283(1) — Statutes governing corporations in regard to notice of meetings construed.

Civ. Code, § 302, providing that the directors of a corporation must be elected annually by its stockholders, which election must be held on the first Tuesday in June if a different date has not been fixed by the by-laws, and that notice of such election unless waived by all stockholders in writing must be given as prescribed in section 301, is the general rule applying to all corporations, and is not to be applied as a special provision relating to notice to be given of the annual election of directors to the exclusion of section 303, providing that a corporation by by-law may provide for the time, place, and manner of calling and conducting meetings, and may dispense with notice of all regular meetings of stockholders or directors, and may provide for the qualifications and duties of directors, the time of their annual election, and the mode and manner of giving notice thereof.

2. Evidence ⟸22(2)—Court knows that regular meeting of stockholders is that at which directors are elected.

It is a matter of common knowledge that the only regular meeting of stockholders of 99 out of 100 corporations is a meeting held annually at which the directors of the corporation are elected.

3. Corporations ⟸283(1)—Notice of meeting for election of directors may be dispensed with by by-law.

Though under Civ. Code, § 303, subd. 4, a corporation may adopt a by-law prescribing the method of giving notice of the annual meeting of stockholders to elect directors, under subdivision 1 it may by by-law dispense with such notice.

4. Corporations ⟸289—Authority of directors de facto could not be questioned collaterally.

Though election of directors of a corporation was invalid for lack of notice, where persons elected exercised functions of directors, and there was no other set of men claiming to be such officers, if they were not a board de jure they were a board de facto, their authority could not be questioned collaterally, and their right to office could be tested only in a quo warranto proceeding, or under Code Civ. Proc. § 803.

5. Corporations ⟸193, 194 — Attendance at and participation in meeting by all stockholders waives objections as to call or place.

Attendance at and participation in meeting by all stockholders of a corporation is a waiver of any objection either to the regularity of the call for the meeting or to its place.

6. Corporations ⟸290—Secretary who wrongfully refused to transfer stock cannot claim meeting invalid for absence of stockholders.

Where a meeting was attended by all stockholders except three not present only because of the wrongful act of the secretary in refusing to transfer their shares on the books, such secretary, against whom mandamus is sought for delivery of property in his possession to his successor elected at the meeting, cannot take advantage of his own wrongful act by claiming the meeting was invalid because such stockholders were not present.

7. Corporations ⟸283(4) — Secretary who wrongfully refused to transfer stock cannot claim stockholders ineligible as directors.

The secretary of a corporation who wrongfully refused to transfer stock to persons elected directors of the company at a meeting cannot be heard to urge their ineligibility as directors on account of not owning stock, when mandamus is sought to require him to deliver property in his possession to his successor as secretary.

In Bank.

Application for writ of mandate by the Guaranty Loan Company and another against Louis Fontanel, secretary of petitioning corporation, to require him to deliver certain property in his possession to his successor as secretary. Writ granted.

Arthur Joel, of San Francisco, for petitioners.

Arthur H. Redington and Albert J. Dibblee, both of San Francisco, for respondent.

Fabius M. Clarke, of San Francisco, amicus curiæ.

The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice Melvin. It is adopted as the opinion of this court.

Application for a writ of mandate directed to respondent, Louis Fontanel, commanding him to deliver to petitioners the seal, books, records, and other personal property pertaining to the office of the secretary of the Guaranty Loan Company, a corporation, of which Bernard E. Tormey is alleged in the petition here to be the secretary.

The parties to this proceeding have stipulated as to the main facts of the case, and, so far as they are essential to a determination of the questions herein involved, they may be summarized as follows:

The Guaranty Loan Company is a corporation having an issued and outstanding capital stock of 324 shares. The Goewey Estate Company is also a corporation with an outstanding capital stock of 1,000 shares, one-fifth of which is owned by Charles Goewey. The estate company is what is commonly called a holding company, owning and holding all of the stock of the Guaranty Company with the exception of three shares which stand of record, one in the name of Charles H. Goewey, one in the name of Louis Fontanel, and the remaining share in that

of Richard P. Roberts. These last-mentioned shares were also actually owned by the estate company, but had been placed of record in the names of the persons mentioned for the purpose of qualifying them to hold office as directors of the Guaranty Company. The certificates of these three shares had prior to May 26, 1919, been indorsed by their respective holders, and delivered to the Goewey Estate Company.

The by-laws of the estate company provide that the annual meeting of the stockholders shall be held upon a given day in April of each year for the election of directors and such other business as may come before it. They also provide that no notice of such meeting need be given.

The annual meeting for the year 1919 was convened upon April 14th without any notice to the stockholders by publication or otherwise, and 600 of the 1000 outstanding shares were represented thereat. The meeting, however, was adjourned to April 17, 1919, at which time all of the stock of the corporation was represented either by the presence of its owner or by proxy. Upon the announcement by the presiding officer that the next business before the meeting was the election of directors to serve for the ensuing year the proxy for Charles H. Goewey entered a protest against the holding of the meeting upon the ground that no notice thereof by publication had been given. This protest being disregarded, said proxy withdrew from the meeting. The stockholders remaining in attendance thereupon unanimously elected Walter H. White, R. M. Briare, and B. E. Tormey as directors to succeed Charles H. Goewey, Herbert S. Goewey, and Ansen Herrick, directors at that time. There was also adopted a resolution ordering the newly elected directors to cause to be transferred on the books of the Guaranty Company the three shares of stock formerly held by and still standing on the books of the corporation in the names of Goewey, Fontanel, and Roberts, to White, Briare, and Tormey, one share to each. In accordance with this resolution, the new directors of the estate company did on April 20, 1919, demand of Louis Fontanel, as secretary of the Guaranty Company, that he make said transfer; but this Fontanel then and ever since has refused to do. On said 17th day of April, 1919, the new directors of the estate company having organized by the election of R. M. Briare as president and Walter H. White as secretary, also adopted a resolution directing its president and secretary, on behalf of said corporation, as a stockholder of the Guaranty Company, to call a meeting of the last-named corporation for the purpose of removing from office its board of directors and electing new directors in the event the old board was so removed. Thereupon and in pursuance of said resolution, said officers of the Goewey Estate Company, acting on behalf of the corporation as a stockholder of the Guaranty Company, prepared a call for a meeting of the stockholders of the Guaranty Company to be held on May 26, 1919, for such purpose, addressed it to Louis Fontanel, as secretary of the Guaranty Company, requesting that he give notice of such a meeting and of its purpose as required by law, with which request or demand Fontanel refused to comply. On the 23d day of May, 1919, the office of the Guaranty Company being at that time at room 606 Bank of Italy building, San Francisco, its directors, consisting of Messrs. Goewey, Roberts, and Fontanel, passed a resolution changing its meeting place to an office at No. 809 Kearny street.

The meeting of the stockholders of the Guaranty Company for the purpose of removing its directors was held without published notice thereof in the office of the company in the Bank of Italy building, and Charles H. Goewey had no notice thereof. The 321 shares owned by the estate company were represented thereat; and Briare, White, and Tormey, claiming to represent the remaining three shares of the outstanding stock of the company—the transfer of which to their names from the names of Goewey, Roberts and Fontanel had been refused by the respondent—were also present. At this meeting a resolution was adopted removing the board of directors, and thereupon White, Briare, and Tormey were elected as directors in their place. Immediately afterwards the new board of directors proceeded to organize by the election of Briare as president and Tormey as secretary. Three days thereafter at a meeting of the new board of directors, held, however, at a place other than the Bank of Italy building or 809 Kearny street, White resigned as director, and J. W. Treadwell was appointed by the other two directors to fill the vacancy. On June 25, 1919, the board of directors as thus constituted adopted a resolution changing the office of the company back to the old location in the Bank of Italy building.

Under the by-laws of the Guaranty Company the date for holding the annual meeting of stockholders fell on July 10, 1919, and a notice of this meeting was published by both the old and the new board of directors, the former designating 809 Kearny street as the meeting place, and the latter stating that it would be held at room 607 Bank of Italy building. A meeting was in fact held at each of these places. The one called by Fontanel lacked a quorum and adjourned for that reason. The meeting called by Tormey was attended by the proxy of the estate company appointed by its new board of directors, and there was thus represented at that meeting the 321 shares of stock standing of record on the books of the Guaranty Com-

pany in the name of the estate company. There were also present at the meeting Treadwell, Briare, and Tormey, and they were elected directors. Thereupon they organized, and the petitioner Tormey was chosen as secretary. Shortly thereafter Tormey made demand on Fontanel for the books and records of the Guaranty Company in his custody. With this demand Fontanel refused to comply, claiming that the property thus demanded was properly in his custody and control as secretary of the company.

The by-laws of the Guaranty Company provide that no transfer of stock shall be valid until recorded in the books of the corporation. They also provide that each director shall hold one or more shares of stock of record in his name on the books of the corporation.

Respondent, upon the facts as stated, contends that the annual meeting of stockholders of the Estate Company was invalid because no notice was given as prescribed by section 301 of the Civil Code, such notice not having been waived by all of the stockholders in writing, and that the election of directors which took place at that meeting was, therefore, void; that consequently such directors were without authority to call the special meeting of the Guaranty Company, which was therefore invalid, and for the further reason that Fontanel having refused to call it, and the alternative method for calling such a meeting prescribed by section 301, Civil Code, not having been followed, no proper or any notice thereof was given. He also claims that the annual meeting of the stockholders of the Guaranty Company held in the Bank of Italy building on July 10th was invalid, first, because it was not held at the office of the company, and second, because it was not held in response to a call of the company's secretary Fontanel. Finally the contention is made that the persons elected as directors at this meeting were ineligible to hold that office because they were not stockholders of record of the company.

We will first consider the asserted invalidity of the election of directors of the Goewey Estate Company at the Stockholders' meeting of April, 1919, upon the ground that the notice thereof required by section 302 of the Civil Code was not given.

That section provides that the directors of a corporation must be elected annually by its stockholders, which election must be held on the first Tuesday in June if a different time therefor has not been fixed by the corporation's by-laws. Notice of this election, unless waived by all the stockholders in writing, must be given as prescribed in section 301 of that Code, and which notice, generally speaking, is by advertisement in a newspaper. Having laid down this general provision, however, the Legislature by section 303 has empowered corporations to make by-laws governing various matters, among them being the time of the annual election of directors and the method of giving notice thereof, and also permits the adoption of a by-law dispensing with the necessity of giving notice of regular meetings of stockholders or directors. Part of the language of this section may with advantage be quoted:

"303. A corporation may by its by-laws, where no other provision is specially made, provide for:

"(1) The time, place and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of stockholders or directors. * * *

"(4) The qualifications and duties of directors, and also the time of their annual election, and the mode and manner of giving notice thereof. * * *"

Purporting to act under the authority conferred by this section, the Goewey Estate Company by its by-laws fixed the second Tuesday in April at 2 o'clock p. m. as the time for holding the annual election of directors at a meeting to take place on said day each year, and also dispensed with notice of regular meetings of stockholders and directors, and, accordingly, as we have seen, held its election of directors for the year 1919 at a meeting of stockholders in the month of April of that year. The respondent's contention that this election of directors was invalid is based upon a construction of these two sections which would hold that the by-laws of a corporation cannot provide for the method of giving notice of the annual election of directors, nor dispense with notice of the meeting at which such election is held, because of the presence in section 303 of the words "where no other provision is specially made." He contends that section 302 above referred to contains just such a special provision relating to the notice to be given of the annual election of directors of a corporation, and that such special provision is to be applied to the exclusion of anything contained in section 303.

[1] We cannot agree that this is the construction which should be given to the two sections, and for two reasons: First, that in the matter under consideration, namely, the time, place, and manner of holding the annual election of directors of a corporation, section 302 is plainly the general rule upon the matter, applying to all corporations, unless and until they take advantage of the provisions of section 303 and adopt by-laws covering the same matter in a different manner; and, second, that the construction contended for by the respondent would entirely nullify subdivision 4 of the last-mentioned section, and should therefore be avoided if possible.

[2, 3] While subdivision 4 provides that a

corporation may by its by-laws prescribe a method of giving notice of the annual election of directors different from the one found in section 302, subdivision 1 in the same section also provides that notice of all regular stockholders' and directors' meetings may be entirely dispensed with. The Goewey Estate Company having adopted a by-law dispensing with notice of such meetings, under which by-law it proceeded in the present instance, the question arises whether the annual meeting of the stockholders for the election of directors is a regular stockholders' meeting. In resolving this question we cannot ignore the fact that it is a matter of common knowledge that the only regular meeting of stockholders of 99 out of 100 corporations is a meeting held annually at which the directors of the corporation are elected. Consequently, while under subdivision 4 of this section the corporation may adopt a by-law prescribing the method of giving notice of such annual election, under subdivision 1 thereof it may by like by-law dispense with notice. This is a procedure frequently followed; and while its wisdom may be doubted as tending to weaken the intimacy of stockholders with the affairs of corporations in which they have a pecuniary interest, it appears to be justified by the language of the Code provision under consideration.

[4] A further answer to the respondent's contention as to the invalidity of this election of directors is that, conceding for the sake of argument such invalidity, the persons elected exercised the functions of such directors, and there was no other set of men claiming to be directors. Under these circumstances, they were if not de jure certainly de facto the board of directors, and as such their authority could not be questioned collaterally, and their right to the offices claimed and exercised by them could only be tested in a quo warranto proceeding, or by the method provided by section 803, Code of Civil Procedure. Potomac Oil Co. v. Dye, 10 Cal. App. 534, 539, 102 Pac. 677; 2 Cook on Corporations, § 619.

If, as we hold, the election of directors of the Goewey Estate Company held at the stockholders' meeting of April, 1919, was valid, it follows that the other contentions of the respondent, in so far as they are based upon the alleged invalidity of such election, are untenable. Those contentions are that the following acts done by said board of directors, or by Tormey, their secretary, were void and without effect, namely, the appointment of Tormey as secretary; his demand, as such secretary, upon respondent as secretary of the Guaranty Company, upon presentation of the certificates of stock in the latter corporation duly indorsed by Goewey, Roberts, and Fontanel, to transfer the same into the names of White, Tormey, and Briare, and the demand upon Fontanel to call a special meeting of the Guaranty Company for the purpose of removing the board of directors thereof.

This leaves for consideration the contentions of the respondent that the special meeting of the Guaranty Company was not regularly called and that it was not held at the office of the company; hence that the ousting of its board of directors and secretary was ineffectual; that as to the annual meeting of stockholders of this company, at which Treadwell, Briare, and Tormey were elected and the latter appointed secretary, all its proceedings were void, since the said meeting was not held in response to the call of the secretary (Fontanel) and was not held at the office of the company, and that the directors elected thereat were not eligible to hold such office, not being stockholders of record.

[5] Admitting for the sake of argument the justness of respondent's criticisms of both the special and general meetings, those meetings were nevertheless valid if attended and participated in by all the stockholders of the company. Such attendance and participation would be a waiver of any objection, either to the regularity of the call or to the place of meeting. San Buenaventura, etc., Co. v. Vessault et al., 50 Cal. 534; Ann. Cas. 1916E, 1040. The question presents itself, therefore, as to whether or not these meetings were so attended.

The stipulation as to the facts in this case shows that the meetings in question were attended by all of the stockholders of the company of record with the exception of Fontanel, Goewey, and Roberts. As to these three, they were not the beneficial owners of the stock standing in their names, and a demand had previously been made upon the corporation through its secretary for a transfer of their stock into the names of three others, and these latter were present at the meetings. If the demand upon the company for the transfer of these shares of stock was a legal demand (and we have seen that it was), which should have been complied with by Fontanel, as its secretary, then the situation is that these meetings were attended by all stockholders entitled to be present thereat, and that where the stock of any person present was not of record in his name the lack of such record was due to the wrongful refusal of the respondent to make the transfer upon the company's books.

[6] Now, it is true that both by the provisions of the Code and the by-laws of this particular company it was not in general required to recognize as a stockholder any person who did not appear on the books of the company as such; but in this particular case, the refusal of the respondent to make the transfer being wrongful, the fact is that the three record owners of stock who were not

present at the meetings were such only because of the wrong of the respondent, acting as secretary of the company. To permit him under these circumstances to deny the validity of these meetings on the grounds now being considered would be to permit him to take advantage of his own wrong. This he cannot do. The case comes clearly within the equitable maxim that that will be considered as done which ought to have been done; so that as between the old board of directors and its secretary on the one side, and the three owners of stock whose demand for its transfer had been refused on the other, the case should be treated as if the latter were stockholders of record, since the fact that they were not is due solely to the wrongful refusal of an officer of the corporation to make them such.

[7] The objection of the respondent that the newly elected board of directors of the Guaranty Company were ineligible to that office is disposed of, we think, by applying to it the same principle to which resort has just been had. If those gentlemen were not stockholders of record of the company, it was because of the wrongful refusal of the respondent to comply with a legal demand for the transfer of stock to their names. He cannot therefore be heard to urge such ineligibility.

This disposes of the points made by the respondent. Let a peremptory writ of mandate issue, commanding said respondent, Louis Fontanel, to turn over to the petitioner the seal, books, papers, records, and other personal property pertaining to the office of secretary, or belonging to said corporation petitioner.

ANGELLOTTI, C. J., and OLNEY, SHAW, LENNON, WILBUR, LAWLOR, and SLOANE, JJ., concur.

182 Cal. 765

LANG v. LANG. (S. F. 8651.)

(Supreme Court of California. May 18, 1920.)

1. Pleading ⊜214(3)—Demurrer admits allegation that property belonged to community.

The truth of the allegation of the complaint that the property sought to be partitioned, and alleged to have been acquired by the parties after their marriage, title being taken in defendant's name, was their community property, is admitted under a general demurrer.

2. Divorce ⊜255—Final decree by default on complaint raising no issue as to property not conclusive of property rights.

Final decree in divorce, in so far as setting aside property to the husband, the successful plaintiff, no question of property being put in issue by the complaint, no disposition thereof being prayed, and judgment being by default, is not conclusive on the wife thereafter seeking partition.

3. Homestead ⊜158 — Partition ⊜12(3)—Homestead community property subject to partition after divorce making no disposition of it.

The husband on the granting of a divorce ceasing to be the head of a family, there being no minor children, and none of the persons mentioned in Civ. Code, § 1261, living with him, so that the qualities of the homestead estate were destroyed, the homestead which was carved out of the community property, and of which no proper disposition was made by the divorce decree, and in which the parties thereupon became tenants in common, is subject to partition.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action for partition by Carrie B. Lang against James A. Lang. From interlocutory decree for plaintiff, defendant appeals. Affirmed.

W. P. Thompson, of Fresno, for appellant.

Everts & Ewing and W. E. Simpson, all of Fresno, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

This is an appeal from an interlocutory judgment decreeing a partition and sale of certain real property situate in the county of Fresno. The decree was made and entered after the demurrer of the defendant had been overruled and his default entered for failure to answer the complaint. The only question here presented relates to the sufficiency of the complaint to state a cause of action.

[1] The pleading recites that the parties to the action intermarried, and subsequently became the owners of certain real property, which forms the subject of this litigation. The defendant herein took title to the property in his own name, but it is alleged in the complaint that such property was the community property of the parties herein. The truth of this allegation, of course, is admitted under the general demurrer. After the acquisition of the property the wife executed and recorded a declaration of homestead thereon. Thereafter the defendant herein, the husband, filed a complaint against his wife, praying for a divorce on the ground of desertion. The complaint contained no allegation either to the effect that there was or was not any community property belonging to the parties, and no mention, either directly or indirectly, was made of this or any property whatsoever. The prayer for relief

in the complaint for divorce was simply that the marriage existing between the parties be dissolved and that each of them be released from all the obligations thereof. Summons was served in that action on the defendant, plaintiff herein, and she having failed to appear her default was entered. This divorce action came on for trial, and the prayer of the husband was granted. The court signed and filed its findings and conclusions of law, but nothing therein contained made any reference to the existence of any community or any other property owned by the parties. The interlocutory decree entered in that action made no mention of or any reference to the existence of any community or other property. After the expiration of one year from the entry of the interlocutory decree a final decree was entered by the court. This final decree, however, set apart to the husband the homestead above referred to. Thereafter this action to partition the property so set aside was brought by the wife, and it is from the decree entered in her favor that this appeal is prosecuted.

From the foregoing state of facts two questions are presented to us for determination: First, whether the final decree of divorce which attempted to set aside the property to the defendant in the divorce action is conclusive against the plaintiff here; second, whether community property which has once been impressed with the character of a homestead retains that character after the marriage on which the homestead depended has been dissolved, and for that reason is not a proper subject for partition.

[2] Upon the first question it is contended by the appellant that the final decree of divorce constitutes a conclusive judgment disposing of the community property of the parties to that action, and that such judgment is not subject to attack at the instance of the plaintiff herein. In support of this argument the appellant relies upon the numerous decisions of our appellate courts declaring the general rule that a judgment is conclusive, not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated. This rule, while generally true, is not always applicable literally. Brown v. Brown, 170 Cal. 1–6, 147 Pac. 1168.

"What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint." Concannon v. Smith, 134 Cal. 14–18, 66 Pac. 40, 42. Accordingly it has been held that a finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action is not admissible in another action between the same parties, either as an admission or by way of estoppel. Bank of Visalia v. Smith, 146 Cal. 398, 81 Pac. 542. As long as matters are not tendered as issues in the action they are not affected by it. Brown v. Brown, supra.

Here, in the divorce action between the parties the question of the community homestead was not presented as an issue in the case. The complaint contained no allegation with reference to it, and the court made no finding as to the existence or nonexistence of community or other property; no disposition was attempted to be made of it under the interlocutory decree; and, except for the order in the final decree, it does not appear from the record in the divorce action that the parties thereto owned any property, community or otherwise. The court was therefore without jurisdiction to make any order with reference to the property rights of the parties, such question not being before it. The only relief sought in the divorce complaint was a dissolution of the marriage tie. The defendant in that action (plaintiff here) had the right to assume that the judgment which would follow a default on her part would embrace only the issues presented by the complaint and the relief therein prayed.

Appellant further argues, and cites us to cases, to the effect that the court having had jurisdiction of the divorce case, it had jurisdiction to err, and however erroneous the judgment might be that the only remedy was by appeal. The vice of this argument is that it assumes that the court had jurisdiction of the res. As above pointed out, the status of the parties was the only issue before the court.

Parties to an action for divorce may submit to the court the simple issue of their right to a divorce without reference to their property. Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844. This being so, where a complaint in divorce contains no allegation with reference to property rights, a defaulting defendant should be entitled to assume that the only matter which will be determined by the court is the matter of divorce, and that the question of property rights will be left for consideration and determination in another and separate action. In addition thereto, it is a well-established rule that in a default case the relief granted cannot exceed the prayer. Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073; Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided under the doctrine that it is not res judicata. See note to Sache v. Gillette, 11 L. R. A. (N. S.) 804. From what we have said upon this subject it follows that the judgment in the divorce case was not conclusive upon the plaintiff herein as to her property rights growing out of her marriage relation with defendant.

Upon this question the respondent presents the additional argument that the proper time and place for the determination by the court of the property rights of the parties was at the time of the entry of the interlocutory decree, and not under the final decree. The conclusion we have reached upon this question makes it unnecessary to further discuss this branch of the case.

[3] Upon the second contention counsel for appellant argues that this case falls within the rule that a homestead cannot be made the subject of an action for partition. In this behalf it is contended that property once impressed with a homestead continues ever to be a homestead until abandoned in accordance with the provisions of the statute in relation thereto. Authority can be found to the effect that where the rights of children are concerned the homestead is not affected by the divorce where the decree is silent upon the question. Redfern v. Redfern, 38 Ill. 509; Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145; and Byers v. Byers, 21 Iowa, 268. The cases to this effect are based upon the theory that there is still a head of a family within the meaning of the homestead acts, and that the children's rights cannot be affected by the quarrels of their parents. 2 Bishop, Marriage, Divorce and Separation, § 1210. Here, however, the rights of minor children are not involved. The only issue of the marriage was a son, who at the date of the entry of the final decree was an adult. It is not contended that defendant had residing with him upon the property in question any of the persons mentioned in section 1261 of the Civil Code upon which a claim could be based that he was the head of a family. No such questions are presented by this appeal.

Defendant complains of the judgment for the reason that it gives to plaintiff a forced sale of the homestead, by reason of the fact that she voluntarily and without cause abandoned her home—a right denied her had she remained a dutiful wife. As against this claimed hardship resulting from the judgment it might be mentioned that so far as the record shows plaintiff herself is not without cause for complaint. It appears therefrom that she had been the wife of defendant for over 22 years and the decree made no provision whatever for her support and maintenance. However, this may be, the law has made provision for the disposition of the homestead upon the dissolution of a marriage under which the rights of the parties may be equitably adjusted. Civ. Code, § 146, subd. 3. For reasons not disclosed by the record defendant failed to avail himself of this provision, for he raised no such issue in his divorce action. While as a general proposition a homestead cannot be made the subject of an action for partition, the principle has no force when applied to the instant case. Here the family was severed by the decree of divorce, and the qualities of the homestead estate were thereby destroyed. Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239; Bahn v. Starcke, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40. Such a decree is as effectual in producing this result as would be a declaration of abandonment, for where, as here, the homestead having been carved out of the community property, and no proper disposition having been made of it by the decree, the parties became tenants in common thereof, and this being so each had the right to sever their joint ownership. De Godey v. Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 505, 42 Pac. 1064; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; and Shoemake v. Chalfant, 47 Cal. 432. Under the circumstances of this case defendant upon the granting of the divorce ceased to be the head of a family, and he was no longer entitled to a homestead exemption of the character here involved. Zanone v. Sprague, 16 Cal. App. 333, 116 Pac. 989. No family, no homestead. Waples on Homestead Exemptions, p. 70. The homestead being destroyed, the parties as tenants in common could convey or sever their relative interests therein. Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Grupe v. Byers, 73 Cal. 271, 14 Pac. 863; and Brown v. Brown, supra; 13 Ruling Case Law, p. 679.

For the reasons given, the judgment is affirmed.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LENNON, and LAWLOR, JJ., concur.

46 Cal. App. 649

GILLONS v. TURNER OIL CO.
(Civ. 2735, L. A. 6521.)

(District Court of Appeal, Second District, Division 1, California. March 19, 1920. Opinion of Supreme Court in Bank Denying Hearing, May 19, 1920.)

1. Brokers ⊜65(1)—Representations of broker as to quality of oil to be produced mere statement of opinion.

A statement made by a broker to his principal that oil to be taken from a well would contain less than 2 per cent. of nonpetroleum substance could be no more than an opinion which could not have deceived the principal.

On Hearing in Supreme Court.

2. Brokers ⊜65(1)—Principal not deceived by representations disregarded by him.

A principal was not deceived by a representation of his broker that oil to be taken from a well would not contain 2 per cent. of

nonpetroleum substance, where the contract entered into between the principal and the seller disclosed no provision to the effect that the oil to be delivered therein should not contain more than 2 per cent. of nonpetroleum substance; it clearly appearing therefrom that such oil would contain substance in excess of such per cent. in contemplation of which the contract provided that in estimating net quantity nonpetroleum substance in excess of 2 per cent. should be deducted, and it being apparent that the representation was disregarded by principal.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George H. Gillons against the Turner Oil Company. Judgment for plaintiff, and defendant appealed. Judgment affirmed in District Court of Appeal, and hearing denied in Supreme Court.

William H. Fuller and Earl L. Wisdom, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

SHAW, J. Action to recover a commission as broker for services rendered to defendant in procuring an oil contract.

Judgment went for plaintiff, from which defendant appeals.

The material facts, as they appear from the verified complaint, are: That defendant, on January 31, 1917, made a written contract with the Graham-Loftus Oil Company for the purchase of certain crude oil to be delivered in monthly quantities during the year ending January 31, 1918, as therein specified. On the same date with this contract defendant made and delivered to plaintiff the contract herein sued upon, wherein, after reciting the making of the contract with the Graham-Loftus Oil Company and that plaintiff had rendered certain services to defendant in obtaining the same, it promised and agreed in express terms to pay him six cents per barrel for all the crude oil delivered to defendant by the Graham-Loftus Oil Company under and pursuant to the contract therefor, which payments were to be based upon and determined by monthly settlements had between defendant and the Graham-Loftus Oil Company for oil so delivered; that between the 1st day of August and the 28th day of September, 1917, the defendant, as shown by statements rendered, received from said Graham-Loftus Oil Company 19,808.45 barrels of crude oil, delivered to it by the Graham-Loftus Oil Company pursuant to the terms of said oil contract, for which it made payment; that by reason whereof defendant became obligated under its agreement with plaintiff to pay him $1,188.50, all of which sum remains due and unpaid; none of which material facts are denied by the answer.

As a defense, the answer affirmatively alleged that plaintiff and his partner, one Treat, represented to defendant that the oil to be delivered by the Graham-Loftus Oil Company pursuant to the contract therefor did not and would not when delivered contain more than 2 per cent. of nonpetroleum substance, whereas all the oil so contracted to be delivered by the vendor contained more than 5 per cent. of such substance, which, and the fact that said oil would contain such substance in excess of 2 per cent., was well known by plaintiff at the time of the execution of the contract made by defendant to pay him the commission, but that, with intent to deceive defendant, he fraudulently concealed such knowledge from it, who, believing and relying upon the representations so made, was thereby induced to make the contract to pay him said commission.

The court sustained plaintiff's objections to proffered testimony in support of these allegations, and this ruling constitutes appellant's chief ground of complaint. Respondent argues: First, that plaintiff was not the vendor of the oil, but was defendant's broker in procuring the contract from the Graham-Loftus Oil Company; that the contract made with him recites the making of the oil contract; and that as such broker he had rendered services to defendant in procuring this particular contract, for which, with full knowledge of the terms and conditions thereof, it without qualification agreed to pay him the commission; that the oil contract attached to and made a part of the complaint discloses no provision to the effect that the oil to be delivered thereunder, in quantities of 10,000 barrels per month and covering a period of 12 months, should not contain more than 2 per cent. of nonpetroleum substance, but, on the contrary, it clearly appears therefrom that such oil would contain substance in excess of said percentage, in contemplation of which the contract provides that in estimating the net quantity of oil delivered each car should be inspected and in ascertaining the net quantity all nonpetroleum substance in excess of 2 per cent. should be deducted therefrom. And hence it is apparent that the representations, if made, were disregarded by defendant. Second, that the alleged representations by plaintiff, assuming them to have been made, were not as to existing facts, but were expressions of opinion as to a commodity to be produced in the future, the quality of which must have necessarily depended not only upon the character of the oil, as and when extracted from the bowels of the earth, but upon the treatment thereof by the vendor prior to its delivery.

[1] We deem it unnecessary to discuss the first proposition, since, in our opinion, respondent's second contention must be sustained. It appears from the contract made be-

tween the Graham-Loftus Oil Company and defendant that the oil made the subject thereof was not then produced, but was oil which the vendor as lessee was to receive as royalty during the period covered by the contract from its lessee and to be produced and extracted from wells upon certain lands described in the contract. The representation alleged to have been made by plaintiff was that the oil so to be produced in the future "did not and would not, when delivered to defendant, contain 2 per cent. nonpetroleum substance"; and that Charles H. Treat, alleged to have been a partner of plaintiff, represented to defendant that said oil "so sold and to be delivered was and would be at time of delivery clean and free from sediment or other nonpetroleum substance that might interfere with or prevent the refining thereof through the equipment and under the process and method then in use in the refining plant of said defendant"; and that said Treat further represented to defendant "that he knew that none of said oil as and when delivered to defendant under the terms of the proposed contract of purchase would contain more than 2 per cent. of nonpetroleum substance."

In so far as the representations applied to the then present condition of the oil to be extracted from the sands underneath the surface of the earth, it is apparent that no one could tell with any degree of certainty from day to day or month to month what its quality as produced would be as to content of water and other nonpetroleum substance. Defendant, who was engaged in the purchase of oil, must be deemed chargeable with notice of this obvious fact; and thus knowing that plaintiff and Treat were without means of information enabling them to make the representation as an existing fact, it could not, from the nature and physical circumstances of the case, be calculated to deceive it. Therefore defendant was not justified in considering the statement other than as the expression of belief and opinion that the oil in place was of the quality stated. The alleged statement made by Mr. Treat was to the effect that the oil when delivered would not contain more than 2 per cent. of nonpetroleum substance. This was the expression of an opinion in the nature of a prediction based upon what he believed was the quality of the oil in place or what he believed would be done by the vendor of the oil in extracting nonpetroleum substances therefrom before delivering the same. The alleged representation did not purport to be a statement of an existing fact, but one in the nature of a promise as to the character of oil which the vendor would deliver, and this depended not only upon the purity of oil to be produced from the wells, but also upon the care and process of treatment given it prior to its delivery. Fraud in avoidance of a contract cannot be predicated upon such statements; and from the fact that defendant, in purchasing the oil from the Graham-Loftus Oil Company, contracted for oil containing in excess of 2 per cent. of nonpetroleum substance, it is clear that it did not rely thereon in making its contract to pay plaintiff the commission.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] Without expressing any opinion upon the question of the correctness of the conclusion of the District Court of Appeal that fraud in avoidance of a contract cannot be predicated upon such statements as were alleged to have been made by Gillons and Treat, we are entirely satisfied that the judgment must be affirmed upon what is styled in the opinion the first proposition of the respondent in support of the judgment.

The application for a hearing in this court is denied.

All concur.

46 Cal. App. 678

GILLONS v. TURNER OIL CO. (Civ. 3304.)

(District Court of Appeal, First District, Division 1, California. March 22, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Appeal and error ⇐110—Appeal from order denying motion for new trial dismissed.

In view of Code Civ. Proc. § 963, an appeal from a motion for a new trial is unauthorized and will be dismissed.

2. Brokers ⇐65(1)—Principal having independent knowledge could not rely on false representation.

A principal purchasing through a broker oil to be taken from a well could not, in a suit by the broker for commissions, assert that he relied on a representation of the broker that the oil would not contain more than 2 per cent. of nonpetroleum substance, where he made an independent investigation and had full knowledge as to the quality and character of the oil before the purchase.

3. Trial ⇐397(5)—Finding on ultimate fact makes other findings unnecessary.

In an action by a broker for commissions, where defendant set up a counterclaim for damages in excess of the commissions claimed, on ground that contract entered into with the third person was procured by broker's fraudulent misrepresentations, a finding for plaintiff on all the allegations of his complaint, and that

plaintiff made no misrepresentations or gave any warranty as claimed by defendant, disposed of all material issues in the case, and it was not necessary to make a finding as to the damage alleged to have been suffered by defendant, which was urged as a counterclaim and in support of which evidence was admitted.

4. Appeal and error ⟸1079—Points not argued in brief not considered.

Where appellant in its brief states, "There are many other errors specified in defendant's specifications or errors, but we submit the court's attention has been called to sufficient error to reverse the cause, and without waiving any of the other errors will not further discuss them," the points so presented will not be considered.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by George H. Gillons against the Turner Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

William H. Fuller and Earl L. Wisdom, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

WASTE, P. J. [1] Plaintiff brought this action to recover the sum of $1,889.59, together with interest, alleged to be due as commission, for negotiating a contract for the purchase of crude oil. Defendant appeals from the judgment in favor of plaintiff, and from an order denying motion for a new trial. The latter appeal was unauthorized and is dismissed. Section 963, Code Civ. Proc.

The complaint sets out in full a contract in which it is agreed that the defendant will pay a commission to the plaintiff, at the rate of six cents a barrel, for his services as broker, in procuring a contract between the appellant and the Graham-Loftus Oil Company, for the purchase of a quantity of oil. It also sets forth a contract, between the appellant and the latter company, under which it is further alleged the appellant purchased the oil on which plaintiff claims to be entitled to the commission. Defendant filed an answer and counterclaim in which it alleged, as a defense to the action, and as a basis for the recovery of damages, that the contract to pay the commission was procured through fraud, deceit, and misrepresentations made by the plaintiff, and one Charles H. Treat, who is alleged to be the partner or agent of plaintiff.

In support of its claim defendant alleges that plaintiff and Treat represented to it and warranted that the oil, which defendant contracted through plaintiff to purchase from the Graham-Loftus Oil Company did not, and would not, when delivered to defendant, contain a greater average amount than one per cent. of nonpetroleum substance, and that no part of said oil would contain a greater amount than 2 per cent. of the same material, whereas, in truth and fact, it is averred, all of the oil so purchased under the contract and delivered to the defendant, contained an average quantity of 6 per cent. of nonpetroleum substance, which facts were well known to plaintiff, but were concealed by him for the purpose, and with the intent to wrong and defraud defendant and to induce it to enter into the contract with plaintiff for the payment of the commission. It is further alleged that defendant was unable with its refining plant and equipment to properly refine the oil so purchased, by reason of the excess of nonpetroleum substance, in such manner as to obtain the profit therefrom which it could have obtained had said oil contained less than the specified 2 per cent. of such matter. Defendant placed its loss by reason of the alleged acts of the plaintiff at $53,700.

The court found in favor of the plaintiff on all the allegations of his complaint. On the issues tendered by the answer it found that neither plaintiff nor Treat at any time made the representations or gave any warranty, as claimed by defendant, but made no finding as to the damage alleged to have been suffered by defendant and which was urged as a counterclaim, and in support of which evidence was admitted. Because of these findings the defendant seeks a reversal of the judgment upon two grounds, which we will consider in reverse order from that in which they were presented.

[2] Appellant's contention that the contract sued upon was obtained through fraud, and is therefore void, is disposed of by the court's findings. The execution of the contracts, set out in the complaint, was admitted, as was the receipt of the given quantity of oil and the nonpayment of plaintiff's claim. The defendant is engaged in refining crude oil, and its president is, by occupation, an oil refiner. Prior to the time the defendant entered into the contract with the Graham-Loftus Oil Company, its president made an independent investigation, together with Treat, as to the quality and character of the oil, particularly the amount of water and sediment the oil contained. He was given the "run sheets" of the Graham-Loftus Oil Company, showing the percentage of water and sediment, in the oil produced from the lease of that company, as varying from 1 to 56 per cent. Disinterested witnesses testified as to other facts, clearly establishing that the defendant had full independent knowledge of the character of the oil before it signed the contract for its purchase. Both the plaintiff, and Treat, denied making the statements charged by the defendant. The

evidence therefore, amply supports the findings of the trial court that no fraud was practiced in the inception of the contract, and that the alleged misrepresentations were not made.

[3] Appellant asserts that in omitting to find the facts, presented by the allegations in support of its counterclaim for damages, the court failed to find upon a material issue, requiring a reversal of the judgment. We are not prepared to so hold. The ultimate fact in the case is whether or not the defendant is indebted to the plaintiff. Defendant has tendered, as a defense that the contract, under which plaintiff claims, was procured by false and fraudulent misrepresentations, made with intent to induce it to enter into the agreement, is void and affords no basis upon which plaintiff can recover. It therefore denies and puts in issue the indebtedness. All the other contentions revolve around the issue thus presented. Although the defendant may have been damaged by reason of its inability to refine the crude oil purchased by it from the Graham-Loftus Oil Company, the court's findings declare, in effect, that the detriment has occurred through no fault of plaintiff. The court has found, with ample support in the evidence, that no improper act of plaintiff entered into the transaction, that the defense interposed by the defendant cannot avail, and that the defendant is indebted to the plaintiff in the amount prayed for. This was a finding upon the ultimate fact, the amount, if anything, due from the defendant to plaintiff (Jacobs v. Ludemann, 137 Cal. 176, 178, 69 Pac. 965), and necessarily concluded the whole controversy. Tower v. Wilson, 188 Pac. 87.

As the findings disposed of all the material issues in the case, and necessarily defeated the defendant's right of recovery, it was unnecessary that they should go further. Smith v. Dubost, 148 Cal. 622, 624, 84 Pac. 38; Black v. Harrison Home Co., 155 Cal. 121, 132, 99 Pac. 494. The failure to do so was not an error requiring a reversal of this judgment.

[4] Appellant, in its brief, says:

"There are many other errors specified in defendant's specifications of errors, but we submit the court's attention has been called to sufficient error to reverse the cause, and without waiving any of the other errors will not further discuss them."

Points thus presented will not be considered by us. Dore v. Southern Pacific Co., 163 Cal. 182, 199, 124 Pac. 817; Duncan v. Ramish, 142 Cal. 686, 689, 76 Pac. 661.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 63

GREER-ROBBINS CO. v. INSURANCE CO. OF STATE OF PENNSYLVANIA.

(Civ. 3300.)

(District Court of Appeal, First District, Division 1, California. April 10, 1920.)

1. Insurance ⟸327—Removal of goods from one compartment of a building to another held not to violate fire policy.

Where goods insured were located in a building divided into two compartments by a fire wall having automatic fire doors, the fact that the goods were moved from one compartment to the other, which act decreased the risk, *held* not to violate the terms of the policy.

2. Insurance ⟸146(3)—Policy construed in favor of insured.

Where the language and terms of insurance policies are framed and formulated by the insurer, ambiguities therein are to be resolved in favor of insured.

3. Insurance ⟸327—Ambiguities in policy as to removal cleared by proofs.

The ambiguities in a fire policy, insuring goods described as located in a brick building, etc., "situate in the rear of" a given street number, which policy was claimed to have been violated by removal of goods from one side of fire wall to the other, were cleared away by proofs showing that the building was a single brick structure, and that the goods at the time of insurance were not in the rear of such structure.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Greer-Robbins Company against the Insurance Company of the State of Pennsylvania. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

James, Smith & McCarthy, of Los Angeles, for respondent.

RICHARDS, J. This was an action upon an insurance policy issued by the defendant to plaintiff on September 23, 1916, covering certain auto supplies and sundries of merchandise belonging to the plaintiff, and being at the time of their destruction by fire in the plaintiff's building at the northeast corner of Flower and Twelfth streets in the city of Los Angeles. The policy in question was a California standard form of fire insurance policy, and the terms thereof, in so far as they relate to the description and location of the property insured, read as follows:

"In consideration of the stipulations herein made, and of $37.50 premium, does insure Greer-Robbins Company, Incorporated * * * to an amount not exceeding $2,500.00 to the following described property while located and

contained as described herein and not elsewhere, to wit: $2,500.00 on merchandise, materials, sundries, spare and extra parts * * * all while contained in or attached to the brick building, in basements or under sidewalks thereof, and its additions, situate in the rear of No. 1158 South Flower street, being the northeast corner of West 12th street."

Upon the date of said insurance policy the goods in question were located in a rear room of the plaintiff's building and place of business on the corner of South Flower and Twelfth streets in the city of Los Angeles, but were subsequently moved to a front room of said building, where they were at the time of their destruction by fire. It is the appellant's contention that by the terms of the policy above quoted the obligation of the insurer was to insure said goods only so long as the same were located in the room in the plaintiff's said building in which they were at the time of their insurance, and that their removal to another part of said building terminated the liability of the insurer.

Upon the trial of the cause it appeared that the building and place of business of the plaintiff at the time of the insurance of said property, and also at the time of the destruction thereof by fire, was a single two-story brick building having a frontage of 80 feet on South Flower street and 155 feet on Twelfth street; that a fire wall had been constructed in accordance with a building ordinance of the city of Los Angeles across said building near the middle thereof, through which there were two automatic fire doors connecting the front and rear compartments of said building created by the construction of said fire wall. The trial court found from these facts that the rear portion of the building in which said goods were stored at the time of their insurance did not constitute a separate building or addition, and could not be held to be in any sense a rear or detached building from the plaintiff's main structure, and the court therefore held that the provision of the policy above quoted must be construed as insuring the goods in question while they were contained in any portion of the plaintiff's said building, and hence that the plaintiff, under the terms of said policy, had a right to move and relocate said goods in any portion of its said building without violating the terms of said insurance policy. And the court further found that by the plaintiff's removal of the goods from the rear to the front room of its said building the risk or hazard was decreased. From these findings the trial court drew the conclusion that the plaintiff had not violated the terms of its insurance policy by the change in location of said goods in its said building, and rendered judgment accordingly in plaintiff's favor.

[1, 2] We are entirely satisfied that the court in so doing correctly construed the terms of the insurance policy above set forth. It is true that there is some ambiguity in the language of the policy; but it is well settled that, since the language and terms of insurance policies are framed and formulated by the insurer, whenever ambiguities occur therein they are to be resolved in favor of the insured. Pacific, etc., Co. v. Fire Ins. Co., 158 Cal. 367, 111 Pac. 4; Raulet v. Insurance Co., 157 Cal. 215, 107 Pac. 292; Rankin v. Insurance Co., 89 Cal. 209, 26 Pac. 872, 23 Am. St. Rep. 460.

[3] The ambiguities in the present policy were practically cleared away by the proofs in the case, which showed that the plaintiff's building was a single brick structure, and that the goods at the time of their insurance were not in the rear of such structure as the uncertain terms of the policy would seem to indicate, but were actually within the plaintiff's said building at all times, and were simply moved from place to place therein for the convenience of the plaintiff's business. This being so, we are of the opinion that the trial court correctly held that the terms of the plaintiff's policy were not violated by the removal of the goods in question from one part of plaintiff's building to another.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

46 Cal. App. 665

DE BAIROS v. BARLIN.

BARLIN v. E. B. & A. L. STONE CO. et al.

(Civ. No. 3253; S. F. 9062.)

(District Court of Appeal, First District, Division 2, California. March 22, 1920. Opinion of Supreme Court in Banc, Denying Hearing, May 21, 1920.)

1. Vendor and purchaser ⊂=113—Variance between actual and represented description of land held to warrant rescission.

Deficiency of 2½ feet in a represented frontage of 80 feet *held* material, and to warrant rescission by the purchaser under Civ. Code, § 1690.

2. Vendor and purchaser ⊂=34—Vendor, misrepresenting frontage of lot without fraudulent intent, guilty of constructive fraud.

A vendor of land, representing a frontage to be 80 feet, without any actual fraudulent intent, was guilty of constructive fraud, where the frontage was only 77½; it being a vendor's duty to inform himself correctly regarding the boundaries of the land he is seeking to sell, in view of Civ. Code, § 1573.

3. Vendor and purchaser ⊂=107—Motive of vendee in rescinding not inquired into.

The motives of a vendee in rescinding a contract of sale of land may not be inquired into, when he has a legal reason for rescinding.

4. Appeal and error ⊂⊃877(6)—Cross-defendants, appealing as group, could not complain of decree affecting respective rights.

Where plaintiff and others, as cross-defendants, joined in one answer, and did not ask the court to litigate the matter of their rights as against each other, and, on judgment for defendant, joined in a notice of appeal, argument cannot be made on appeal that the rights of cross-defendants were not properly adjusted among them, since a cross-defendant, considering himself aggrieved, should have appealed therefrom, making the other cross-defendants respondents.

On Hearing in Supreme Court.

5. Vendor and purchaser ⊂⊃95(2), 101—Acceptance of overdue installments does not eliminate provision that time is of essence.

Acceptance of overdue installments of the price on an executory contract for the sale of land waives any right to declare a forfeiture on account of the previous failures to pay when due, but alone does not change the terms of contract as to forfeiture for future failures, nor eliminate a provision that time is of the essence of the contract, though there may be conduct and acquiescence by a vendor sufficient to justify the inference by a court as a matter of fact that the vendor has waived the condition regarding a forfeiture, in which case the condition may be revived by notice to the vendee.

6. Vendor and purchaser ⊂⊃118—Vendee in default may rescind contract for fraud or mistake.

A vendee's right to avoid and rescind a contract of sale for fraud of vendor in procuring its execution, or for mistake inducing its execution, is not lost by his default on payments due on the contract.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Bernardino De Bairos against Jacob J. Barlin, who filed cross-complaint against E. B. & A. L. Stone Company and others. From a judgment in favor of defendant, the plaintiff and cross-defendants appeal. Judgment affirmed by the District Court of Appeals, and hearing denied in the Supreme Court.

Raymond Perry, of San Francisco, for appellants.

W. E. Rode, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff and cross-defendants from a judgment against them in an action by which Bernardino De Bairos, as assignee of the other cross-defendants, sought to recover from the defendant $1,069.65, the sum of unpaid installments under three contracts for the sale of real property. Under these contracts, cross-defendants E. B. & A. L. Stone Company and Jennie F. Stone are vendors, and the defendant is the vendee, of a parcel of land in a subdivision of Stonehurst, Brooklyn township, Alameda county, Cal. Title to said property was not to be transferred until all of the payments provided by the contracts had been made.

Defendant answered, denying that the installments were due, and alleged that by mutual mistake of fact there was a deficiency of 2½ feet in the total frontage called for by the three contracts, and that he had rescinded the contracts. He also alleged that, because of said deficiency in said lots, plaintiff could not convey in accordance with the contracts, and that the contracts were not fair, just, and equitable in their terms, but, on the contrary, the purchase price provided therein was grossly in excess of the reasonable and fair value of the lots. He also alleged that plaintiff was suing for the balance due upon the full purchase price of the lots, and had never tendered a deed to defendant. In his cross-complaint, defendant set up the same facts regarding the mistake in the frontage on Pearmain street, and alleged actual fraud and fraudulent representations, as well as a want of consideration, predicated upon said facts, and, in an additional count, prayed for a return of the money paid under the contracts as money had and received by the cross-defendants. The cross-defendants answered, admitting an error in the description, creating a deficiency of 2½ feet, denied knowledge of this at the time of the sale, denied fraud and want of consideration, denied defendant's right to rescind, and offered to allow such rebate as the court might deem equitable on account of the deficiency of 2½ feet.

The court found that the three contracts sued upon constituted a single transaction. The contracts were entered into on June 10, 1910. The vendors had been the owners of an entire tract, including the lots sold to the defendant, and had platted and subdivided this tract into lots. Prior to the sale to defendant, plaintiff's assignors had had two surveys and plats made of this tract. These maps or plats were introduced in evidence. It appears that they are alike in the general platting—the difference between them being that on the first map Plum street (also called 107th avenue) is shown as 2½ feet southeast of its location on the second map, so that the block of land, of which defendant's purchase formed a part, is 2½ feet longer on the first map than on the second map, and lots Nos. 84 and 85 of said tract (being the lots at the corner of Plum and Pearmain streets) are shown with a frontage of 80 feet on the first map and 77½ feet on the second map.

One Hundred and Seventh avenue, or Plum street, was laid out, and the street work and gutters, curbs, etc., were placed, in accordance with the second map. This work, including the cement walks, extended up to the property line and was almost com-

pleted on June 10, 1910, when the defendant entered into his contracts. The difficulty arises by reason of the fact that the vendors had arrows stamped in the cement walks as monuments indicating the lot lines, and these arrows were stamped in accordance with the first map. The result was that lots 84 and 85, purchased by defendant, were shown by the arrows placed in the sidewalks to have a frontage of 80 feet on Pearmain street. Neither of the maps were recorded. The description of the property in the contracts was by courses and distances, and, on its face, conveyed 80 feet on Pearmain street. The testimony of the surveyor was, however, that, if this description were followed, it would lead to a point 2½ feet across the line of 107th avenue. The testimony of the defendant and his wife is that, when they went to look at the property with the agent of the vendor, they were shown the arrows in the cement walk, which indicated that the property had a frontage on Pearmain street of 80 feet by a depth of 100 feet along 107th avenue; the depth being indicated also by an arrow.

With respect to the finding that the three contracts were entered into as one transaction, there appears the testimony of defendant's wife that they bought the entire property (supposedly 80 feet) as one piece, and then asked the agent if he would divide it up in the contracts, so that one lot would have 30 feet frontage, and the other two would have a frontage of 25 feet each, and could be held by them for their sons who were at that time children. The boys had nothing to do with the purchase, and never paid any part of the consideration, and it was merely the idea of the mother, after the purchase had been decided upon, that portions of the land should be held by the father for the boys. The testimony of the defendant was to the same effect. Both testified, also, that they really wished a larger lot than the one they thought they were purchasing, but, not being able to secure an additional 5 or 10 feet, took what was represented to them as 80 feet. They testified that the lots scarcely would be large enough to meet their requirements if they were as represented, and that they would not have purchased them if they had known that they were only 77½ feet in the aggregate.

[1] Of course, the question of what is a material difference between the actual and represented description of land is a question of fact, and varies with the circumstances and the uses of the land and the size of the parcel being sold. There was some evidence in the record which, appellants insist, indicates that the discrepancy was not material in the present case, because of the use of the land contemplated by the defendant. There are other considerations, however, which evidently weighed with the trial court in making its findings upon this point. The defendant testified that he thought the lots were in a section which would develop and improve rapidly, that the agent so stated to him, and that the agent also stated that in a short time trains would run every hour from East Fourteenth street to Stonehurst station. The use to which such a lot may be put in the future is uncertain. The defendant may have had an idea at the time of purchasing of using the place as a home, but he was not bound by that intention. It was his privilege to use the lot in any manner that might be most profitable at any later date, or to sell the same for use by others.

There might be many uses to which an 80-foot lot could be put, which would not be equally well met by a 77½-foot lot. The sale value of such a lot might be materially different if it contained 80 front feet than it would be if it contained only 77½ feet, and the difference in value, we think, would not be a matter of exact measurement. The appellants' main argument upon this question is that, because the defendant testified that he thought when he got old he might build a home on the lot and have a garden and chickens, therefore it appears that the smaller lot would serve such purpose as well. The value of one's property certainly cannot be fairly estimated, without taking into consideration the ever-present possibility of sale. We think, therefore, that the finding of the court that the deficiency was material, is warranted under all the facts and circumstances in evidence. From the direct evidence of the defendant and his wife that they would not have bought less than 80 feet; that the lots were too small, even at that measurement, the court was justified in concluding that this was a material inducement for entering into the contract. We think the deficiency was not capable of exact and entire compensation, and the right of the defendant to rescind under such conditions is recognized in section 1690, Civil Code.

[2] The court found that the vendors had been guilty of fraud in misrepresenting the frontage of the lots. Constructive fraud is defined by our Code as:

"Any breach of duty which without an actually fraudulent intent, gains an advantage to the person in fault * * * by misleading another to his prejudice." Section 1573, Civ. Code.

It was certainly a breach of the vendor's duty not to inform himself correctly regarding the boundaries of the land he was seeking to sell. Furthermore, it appears that the vendor had in its possession at that time the two maps, which gave different measurements for this property, and it was its duty to become aware of this fact, and to investigate and ascertain the truth, before making any representations in regard there-

to. It had at hand the means of ascertaining the truth, and defendant did not have, because the maps were not recorded. Furthermore, it appears in the record, by the testimony of R. P. Macdonald, secretary of E. B. & A. L. Stone Company, that the two maps were made, and that there was a change in the second map, and that the attention of the company was called to this about two years later, at which time the company wrote to the surveyor, asking for an explanation. They received no reply and evidently nothing more was done about it. Thereafter, for several years, with actual as well as constructive knowledge of the discrepancy, the vendors continued to demand payment of the full purchase price from the defendant and to receive partial payments thereon, and made no allowance for, or explanation of, the discrepancy, and charged interest and compound interest upon their books against the defendant upon the entire purchase price. Indeed, the vendors made no attempt in any way to remedy the mistake until the defendant discovered the facts and rescinded the contracts, which was after the commencement of the present action, by which it was still sought to enforce the payment of the purchase price agreed upon for 80 feet of land.

Another question argued by appellants is that the defendant may not rescind because he was delinquent in his payments due under the contracts at the time of the attempted rescission, and that he must fully perform his part of the contract in order to come into equity with clean hands. It appears that the vendors accepted overdue payments from time to time under the contracts, and thus waived the provision that time was of the essence of the contracts. They have not terminated the contracts because of defendant's default, but, on the contrary, they have considered the contracts as in full force and effect, and have sued to recover the installments due thereunder. If they keep the contracts alive by their own election, they must keep them alive for all purposes, and bear their burdens as well as accept their benefits. If the contracts were in full force and effect, and a mistake had been made in a material fact, which was their inducement, they could be rescinded. The evidence is that defendant rescinded promptly after discovery of the misrepresentations.

[3] Appellants urge that the real reason why the defendant desires to rescind is that at this time he has not the money necessary to make his payments. The courts have held that the motives of the vendee in rescinding may not be inquired into, when he has a legal reason for rescinding and relies thereon. Cabrera v. Payne, 10 Cal. App. 675, 678, 103 Pac. 176; Crim. v. Umbsen, 155 Cal. 697, 702, 103 Pac. 178, 132 Am. St. Rep. 127.

[4] The deed from Stone Company, by which the plaintiff acquired his interest in the property in controversy, was introduced in evidence. The court found this deed to be in fact a mortgage. This finding was based upon the following clause in the deed:

"This deed is given to secure cash advances of $761.72, the amount of the consideration hereinbefore named on the property hereinbefore named."

There were also in evidence assignments of the contracts sued upon, which assignments recited that the interest of the assignors in the contracts and in the property covered thereby were transferred to the assignee, the plaintiff here. Appellants contend that, even though the above-quoted clause in the deed may have raised a doubt as to the character of the deed, the assignments nevertheless conveyed the title to the property absolutely, and that a consideration of both instruments together leaves no doubt as to the intention of the parties that the full and indefeasible title, subject to the contracts of purchase, should be conveyed. The holding of the court that the deed was in reality a mortgage only affects the rights of the cross-defendants among themselves. It does not affect the rights of the defendant and cross-complainant, who is the respondent here. The Stone Company is objecting because it asserts that it has by this deed transferred title to the property in controversy to the other appellant, De Bairos, and that by the decree of the court, the contracts being rescinded, De Bairos will have the title to the property, free of the lien of the contracts, and Stone Company will be compelled to return to the defendant the money paid by him, and thus Stone Company will be out both property and money. But the appellant Stone Company, for these very reasons, should not object to a finding of the court which is consonant with the protection of what it asserts are its rights: for, under the holding of the court that this deed was merely a mortgage, the equity in the property would be in Stone Company, and upon the payment of the advances made by De Bairos, Stone Company would have the full and free title.

Argument cannot be made upon this appeal that the rights of the cross-defendants are not adjusted among themselves in the decree. The cross-defendants joined in one answer and did not ask the court to litigate the matter of their rights as against each other. They joined in their notice of appeal from the judgment for the defendant. Their respective rights are matters in which the respondent is not concerned in any way. The cross-defendants should have asked, if they desired, a determination of their respective rights among themselves, and the one considering himself aggrieved by such determination should have appealed there-

from, making the other cross-defendant a respondent. The respondent here has no interest in defending the right of either against the other. In so far as the judgment affects the respondent it is proper. He recovers his money from the parties to whom he has paid it; his contracts are rescinded, and the title of the property, which never vested in the defendant, is left either where it was before the contracts were entered into, or where the cross-defendants by their own conveyances have placed it since that time.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing in this court is denied.

The opinion of the District Court, in answer to the appellants' proposition that the defendant was not entitled to rescind the contract while he was himself in default by nonpayment of installments due on the purchase price, says that—

"The vendors accepted overdue payments from time to time under the contracts, *and thus waived the provision that time was of the essence of the contracts.*" (Italics ours.)

The language we have italicized is not a correct statement of the law without further qualification.

[5] Acceptance of overdue installments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. But such acceptance alone does not change the terms of the contract as to forfeiture for future failures, nor eliminate the provision that time is of the essence of the contract. There may be conduct and acquiescence by the vendor sufficient to *justify the inference by a court* as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when, in such a case, the waiver has continued until after all installments are due, the condition cannot be revived, except by notice to the vendee. Boone v. Templeman, 158 Cal. 296, 110 Pac. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 285, 128 Pac. 751; Hayt v. Bentel, 164 Cal. 684, 130 Pac. 432; American, etc., Co. v. Butler, 165 Cal. 519, 133 Pac. 280, Ann. Cas. 1916C, 44; Myers v. Williams, 173 Cal. 304, 159 Pac. 982. But none of these cases holds that such waiver is absolute, or that the provision cannot be revived and a forfeiture produced by a notice requiring performance within reasonable time.

[6] The true answer to the proposition of appellants, above stated, is that the rule it invokes applies only to cases where a rescission is sought or claimed by one party to an executory contract on the ground of a breach of the contract by the other party. All the cases to that effect are of that character. State v. McCauley, 15 Cal. 458; Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 273, 110 Pac. 951; Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342; Hatton v. Johnson, 83 Pa. 222; Myers v. Gross, 59 Ill. 436; Seymour v. Bennett, 14 Mass. 266. We know of no case which holds that such rule applies to a case where the vendee, in default on payments due on the contract, seeks to avoid and rescind it for fraud of the vendor in procuring its execution, or for mistake inducing its execution. Payment by the vendee, after discovery of the fraud or mistake, might tend to show a waiver thereof, and thus defeat an attempted rescission, but a refusal to pay would be entirely consistent with the right of the vendee to rescind for such cause.

ANGELLOTTI, C. J., and SHAW, LENNON, LAWLOR, WILBUR, SLOANE, and OLNEY, JJ., concur.

47 Cal. App. 131

AMERICAN BOND & MORTGAGE CO. v. LINDSAY et al. (Civ. 3163.)

(District Court of Appeal, Second District, Division 2, California. April 14, 1920.)

1. Corporations ⇐110—Defendant, to whom stock was issued, but who transferred it, proper party to company's suit to cancel.

In action by corporation to cancel treasury stock as issued in exchange for other stock, in contravention of permit granted by commissioner of corporations under the Investment Companies Act, or Blue Sky Law, defendant *held* neither a necessary nor a proper party, so far as the relief sought by the company was concerned; he having transferred to another defendant, who had full notice and knowledge of all facts affecting its validity.

2. Appeal and error ⇐1073(3)—Error in judgment against defendant, not a proper party, prejudicial as to costs.

Error in judgment against a defendant, who was neither a necessary nor a proper party, was prejudicial in so far as the judgment held such defendant liable for costs.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the American Bond & Mortgage Company, a corporation, against L. Lindsay and others. From the judgment for plaintiff, defendant Lindsay appeals. Reversed as to such defendant, and cause remanded, for modification of judgment in accordance with the opinion.

A. L. Abrahams, of Los Angeles, for appellant.

Clark & Pierson and Denis Loewenthal, all of Los Angeles, for respondent American Bond & Mortgage Co.

FINLAYSON, P. J. This is an action by a California corporation to cancel an issue of certain of its shares of treasury stock—shares that it had issued to the four defendants, Lindsay, Corbaley, Maescher, and McKinney, in exchange for certain shares that they owned of the capital stock of the State Investment Company. The theory of the complaint is that the issue of plaintiff's stock in exchange for stock of the State Investment Company was in direct contravention of a permit that had been granted by the commissioner of corporations, and that therefore, under the provisions of the Investment Companies Act, commonly known as the Blue Sky Law (St. 1913, p. 715), the issue was a nullity. The appeal is by the defendant Lindsay.

The case, as presented by the complaint and found by the court, is substantially as follows: At a time when plaintiff's board of directors was dominated and controlled by one Pearson, the latter, for his own illegal profit and gain, caused 57,226 shares of plaintiff's treasury stock to be issued to the four above-named defendants in exchange for 71,532 shares of the capital stock of the State Investment Company, that theretofore had been issued to and were then owned by these four defendants. Of the 57,226 shares of plaintiff's treasury stock so issued, 19,944 were issued to defendant Lindsay. Previous to the issue of the 57,226 shares, and pursuant to the act commonly known as the Blue Sky Law, plaintiff, whose capital stock was divided into 2,000,000 shares of the par value of $1 each, had made application to the commissioner of corporations for authority to sell its corporate stock. A temporary permit was issued by that officer, whereby plaintiff was authorized to issue not exceeding 1,000,000 of its shares "in exchange for property, the fair and reasonable net market value of which * * * shall * * * equal or exceed 110 per cent. of the par value of the shares issued therefor."

It is alleged in the complaint and found by the court, in substance and effect, that the value of the State Investment Company's shares, that the four defendants transferred to plaintiff in exchange for its 57,226 shares of treasury stock, did not exceed 63 per cent. of the par value of plaintiff's capital stock. Wherefore plaintiff, which, since the exchange, has come under the control of a board of directors by whom the whole transaction has been repudiated, seeks to rescind the exchange and to cancel the issue of its treasury stock as a void issue under the Blue Sky Law, section 5 of which reads:

"It shall be unlawful to issue any security to which this act is applicable unless a certificate or a temporary permit authorizing the issue thereof shall first have been received from the commissioner of corporations as provided in this act."

The complaint alleges, and the court finds, that before the action was commenced the 19,944 shares of plaintiff's treasury stock that it had issued to Lindsay in exchange for shares of the State Investment Company had been transfered by Lindsay to John R. Gardiner, who, though made a party defendant, was not served with summons and did not appear in the action. It further is found by the court that, at all times since the transfer to Gardiner, the 19,944 shares have stood in his name on plaintiff's books. The complaint also alleges that Gardiner acquired the stock from Lindsay with full knowledge of all the facts affecting the validity of its issue. Plaintiff's evidence showed without conflict that, when the action was commenced, Lindsay had no interest whatever in the stock; he having theretofore transferred all his interest therein to Gardiner, as we have stated. For this reason Lindsay moved for a nonsuit. The motion was denied.

After finding the facts substantially as we have stated them, judgment was entered against the four defendants, Lindsay, Corbaley, Maescher, and McKinney, whereby the court, in substance, decreed: (1) That the issue of the shares of plaintiff's treasury stock, which, of course, included the 19,944 that had been issued to Lindsay and by him transferred to Gardiner, was and is void; (2) that plaintiff cancel said issue on its records; (3) that defendant Lindsay, as well as his codefendants Corbaley, Maescher and McKinney, deliver to plaintiff the certificate or certificates evidencing the issuance of the 57,226 shares, and this notwithstanding Lindsay had transferred his shares to Gardiner, in whose name the stock then stood of record on plaintiff's books; and (4) that plaintiff recover its costs. From that judgment Lindsay has taken this appeal.

[1] The appeal presents a number of interesting questions arising under the Blue Sky Law, which, however, it will not be necessary to consider, since appellant was neither a necessary nor a proper party defendant, and for that reason alone the court should have adjudged that plaintiff take nothing as against Lindsay and that he recover of plaintiff his costs. The stock certificate that evidenced the issue of the 19,944 shares to Lindsay was not a negotiable instrument; and, moreover, Gardiner, according to plaintiff's complaint, took the shares, as the transferee of Lindsay, with full knowledge of all the facts affecting the validity of the issue. Gardiner, therefore, cannot possibly have any cause of action against Lindsay for damages, or for reimbursement, based on the fact, if it

be a fact, that Lindsay never acquired title to the stock. Gardiner's knowledge of the facts precludes any possible claim that his vendor, Lindsay, impliedly warranted the title. 35 Cyc. 386; Dreisbach v. Eckelkamp, 82 N. J. Law, 726, 83 Atl. 175; Libby v. Pelham, 30 Idaho, 614, 166 Pac. 575, concurring opinion of Justice Morgan. Appellant's presence, therefore, as a party defendant, was not necessary to a determination of any controversy there might be between Gardiner and himself. There was no basis for any controversy between them.

[2] So far as the relief sought by plaintiff is concerned, appellant was neither a necessary nor a proper party defendant. Plaintiff asked that the issue of the stock be canceled. For that purpose (in so far as the shares issued to Lindsay are concerned) it was necessary to have Gardiner only before the court. Plaintiff and Gardiner are the only parties interested in those shares. Appellant had no possible interest in the controversy; there was nothing that he could do, or be compelled to do, that could effect a cancellation of the invalid issue of plaintiff's treasury stock; and his presence as a party defendant was therefore neither necessary nor proper. Topping v. Van Pelt, Hoff. Ch. (N. Y.) 545; Wright v. Day, 59 Misc. Rep. 76, 111 N. Y. Supp. 1105; Fairgate Realty Co. v. Drozda (Mo.) 181 S. W. 398; Campodonico v. Grossini, 66 Cal. 358, 5 Pac. 609. For this reason, appellant's motion for a nonsuit should have been granted. However, it will not be necessary to remand the case for a new trial, since the findings themselves, because they disclose that Lindsay had transferred all of his shares to Gardiner, show that it was error to render judgment against appellant; and that error, at least in so far as the judgment adjudges appellant liable for costs, is prejudicial.

The judgment is reversed as to the defendant Lindsay, and the cause remanded, that the judgment may be modified in accordance with what is here said.

We concur: SLOANE, J.; THOMAS, J.

47 Cal. App. 103

FAIRMONT CREAMERY CO. v. LOS ANGELES ICE & COLD STORAGE CO.

(Civ. 3354.)

(District Court of Appeal, First District, Division 2, California. April 13, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Appeal and error ⟸1097(1)—Decision on former appeal law of case.

A decision on a former appeal of the same action between the same parties is binding as the law of the case on retrial in so far as the facts on retrial correspond with those on the first trial.

2. Factors ⟸52—Pledge of goods by broker valid though bill of lading not negotiable.

Where an owner of eggs shipped a car to a broker, who, on obtaining possession, placed them in defendant's warehouse and obtained a loan on pledge of the eggs, the owner cannot defeat the pledge which was valid against it under Civ. Code, § 2991, there being nothing to indicate that the broker did not have title, on the ground that the bill of lading was nonnegotiable, for, even if defendant pledgee had examined the bill of lading, it would not have disclosed the broker's lack of title.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Fairmont Creamery Company against the Los Angeles Ice & Cold Storage Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry K. Norton and Roy V. Rhodes, both of Los Angeles, for appellant.

Sidney J. Parsons, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from the judgment against it rendered in an action for conversion of a carload of eggs. When the action was first tried, judgment was rendered for the plaintiff, from which judgment the defendant appealed. Upon the appeal the judgment was reversed. The decision upon the first appeal is reported in 33 Cal. App. 414, 165 Pac. 553. The case was then retried, resulting in a judgment for the defendant, from which judgment this appeal is prosecuted.

The important facts, as stated on the first appeal, also appear from the present record and are as follows:

On June 17, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignees and also as a dealer in merchandise on his own account. He had been in business for several years. In August, 1913, he was adjudged a bankrupt. The plaintiff was engaged in the produce business at Omaha, Neb., and had been doing business with Lambourn as a broker since April, 1911. On June 5, 1913, Lambourn telegraphed plaintiff that he had sold a car of eggs. The telegram was as follows:

"Sold car candled current receipts fifty-three and over small dealers eighteen cents track. Wire car number and when can ship."

On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17, 1913. When the merchandise was shipped from Omaha a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received from the railroad company, and was mailed by the plaintiff to Lam-

bourn. According to the testimony of plaintiff's sales manager, this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had sold as our broker." At the same time the plaintiff forwarded through the Omaha National Bank to that bank's correspondent in Los Angeles a draft on Lambourn for $2,160, the purchase price of the eggs. The draft was not paid. On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan upon it. The eggs were taken into the possession of the defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, on the same day, the defendant loaned to Lambourn $2,300, taking his note therefor, together with an agreement pledging the car of eggs to the defendant as collateral security for the payment of the note and any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." In making this loan the defendant made no special inquiry as to the ownership of the merchandise and did not see, or ask to see, the bill of lading. It simply accepted Lambourn's statement that he owned the car of eggs. It had no knowledge concerning the ownership of the property. On September 10, 1913 (after the bankruptcy of Lambourn), the defendant sold the eggs for $2,880. On September 24, 1913, the plaintiff made a demand for the same upon the defendant, claiming to be the sole owner, and offered to pay storage charges on the eggs. Upon these facts (the statement of which is taken from the opinion rendered upon the first appeal), all of which also appear clearly from the record now before us, the District Court of Appeal for the Second Appellate District, on April 14, 1917, decided that Lambourn was a factor, and as such had ostensible authority to deal with the goods of the principal as with his own in transactions with persons not having notice of the actual ownership. Civ. Code, §§ 2026, 2369. The appellate court also decided that section 2991 of the Civil Code was applicable to the facts shown; that the eggs were consigned to Lambourn to be transferred by him to the purchaser of the same; and that "in the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers." The opinion upon the first appeal continues further:

"Counsel for respondent further suggests the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading, and never saw that document until the day of the trial. Therefore, they say, that as to them Lambourn had mere possession, and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But since he did have it, the case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection."

[1] In so far as the facts are substantially the same upon the second appeal as upon the first appeal the decision upon the first appeal is the law of this case. However, appellant urges upon our attention two additional points in the evidence upon the second trial. It states them to be:

"(1) That Lambourn had a bond up with the railroad company so that he might obtain cars without showing a bill of lading and going through the usual course of business.

"(2) Lamoreaux, superintendent of cold storage for the defendant, testified that the board of directors of the L. A. Ice & Cold Storage Company had adopted a policy of transacting business, such as was done in this case with Lambourn, with only regular customers and not with strangers. And further he testified to the effect that the reason that they did not call for the bill of lading or some indicia of ownership in taking these goods as pledge for the loan, was because they relied upon the fact that they were dealing with an old customer."

[2] It is contended that, as the bill of lading was not made "to order" and was not negotiable, therefore this fact would have put the defendant upon notice if it had examined the same. We find no merit in this contention. The plaintiff consigned the goods directly to Lambourn, and the bill of lading designated him as the consignee. It is true that, as between the plaintiff and Lambourn, this bill of lading transferred only the right to the possession of the goods and not the full title, but it is this very possession for the purpose of transferring title to others which is the basis of a pledgee's rights under section 2991 of the Civil Code. It is true that because the bill was nonnegotiable Lambourn was obliged to wait until he secured possession of the goods before pledging them. If the bill had been negotiable, he could have dealt with it before the goods arrived and cut off all equities; but he did not attempt to do this. He did not negotiate the bill. He waited until the goods arrived and properly secured possession of them, because the eggs were billed to him. If the defendant had examined the bill of lading, it would have discovered nothing which would have militated against its rights under section 2991, Civil Code. The bill of lading merely showed that Lambourn was entitled to the possession of the eggs. The limited purpose of the possession did not appear from the bill of lading, and was enforceable only as between the plaintiff and Lambourn, or parties having knowledge of the facts. The plaintiff could

have protected itself fully by attaching the bill of lading to the draft which it sent to the bank for collection. It did not choose to do this.

The matter of the effect of the nonnegotiability of the bill of lading is argued by appellant in several connections, but the discussion herein disposes of the matter in its various applications. The other matter urged by the appellant we consider to be without merit.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 90

ZARTARIAN v. ZARTARIAN. (Civ. 3184.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1920.)

1. Divorce ⊂=37(6)—Decree cannot be based on cross-complaint for cause of action not accrued.

No divorce can be based on defendant wife's cross-complaint for desertion where such cause of action had not accrued, under Civ. Code, § 107, either at the time of the filing of plaintiff husband's complaint or of the wife's cross-complaint.

2. Divorce ⊂=93(3)—Complaint or cross-complaint must allege effects of cruelty.

A complaint or cross-complaint for divorce for cruelty must, under Civ. Code, § 94, allege either that the cruelty resulted in bodily harm, or injury to health, or in a reasonable fear of one or the other.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Markar H. Zartarian against Agavnie Zartarian. From judgment for plaintiff granting divorce, defendant appeals. Reversed.

Florence L. Stephens, of Los Angeles, for appellant.

A. M. Astor, of Los Angeles, for respondent.

THOMAS, J. In this action plaintiff sought a divorce from the defendant on two grounds —cruelty and desertion. Defendant by her answer denied the material allegations of the complaint.

Defendant also served and filed a cross-complaint, in which it is alleged, among other things, that for a long time after the marriage of the parties hereto they lived together in Boston, Mass., during which time plaintiff carried on and maintained a prosperous shoe-repairing business in that city; that during such time plaintiff upon several occasions ran away and left defendant, and that he finally sold the business for $1,500, and, taking such sum, together with some $3,000 which he had in the bank at that time, left "and came to California, city of Los Angeles," at which place he bought out a grocery business; that some time after plaintiff's departure from Boston, defendant, learning his whereabouts, "followed the plaintiff to the city of Los Angeles about November 15, 1915, and there effected a reconciliation, and lived with said plaintiff up to the very day of February 12, 1916, in the city of Los Angeles"; that plaintiff and defendant carried on said grocery business together, but finally determined that it was not paying, whereupon they decided to sell out, at which time it was understood that both of them would return to Boston; that at plaintiff's persuasion defendant preceded plaintiff to Boston, leaving Los Angeles on February 12, 1916, in accordance with the understanding arrived at, fully believing that she would be followed by her husband as soon as he sold out the business; that the business was in fact subsequently sold by plaintiff, and that plaintiff did not go to Boston as agreed, but remained in Los Angeles, there opening up a shoe-repairing business; that defendant took sick while in Boston after so returning to that city from Los Angeles, and that she, "being without means, was unable to return to Los Angeles, and was compelled to remain in Boston"; that later money was furnished her by friends, and, so aided, she returned to Los Angeles in December, 1916, but that "on November 11, 1916, while the defendant was in the city of Boston, waiting for plaintiff to come on, the plaintiff herein filed a suit for divorce, in the city of Los Angeles, against the defendant herein, on the grounds of desertion." Then follows a recitation of facts showing that plaintiff's net earnings from his shoe-repairing business were "about $50 per week," and "that by their united efforts they had acquired about $5,000 in cash before coming to Los Angeles," but that the whole amount thereof was in plaintiff's charge. It is further shown by the cross-complaint that the issue of the marriage of the parties hereto "was one daughter, eight years old"; that while defendant was sick in Boston, having no money with which to provide for said daughter, she sent the child, through the assistance of a mutual friend, to plaintiff herein in Los Angeles, to be cared for by him, and that plaintiff placed the said child in the Orphanage Home at Santa Monica, Cal. Cross-complainant, in conclusion, alleges that she is wholly dependent upon her own labor and the charity of her friends for support; that plaintiff, since defendant's return to California upon recovery of her health, has refused to inform her of the child's whereabouts, and refuses to live or cohabit with her; and that he has threatened her life, and refuses to provide for her in any way or to allow her to return to his house. Then follows a prayer for judgment on the cross-complaint, asking: (1) for a division of

the common property; (2) that plaintiff be restrained from disposing of or in any way incumbering the said shoe-repairing business, or the said $5,000, and from taking away the said child; (3) $15 per week permanent alimony for the separate maintenance of herself and child; (4) for support during the pendency of the action, as the court might deem proper; (5) attorney's fees and costs; and (6) for general relief.

Plaintiff, by his answer to defendant's cross-complaint, denies some of the material allegations, and sets up the defense that "he is now and has been working for his brother for $9 per week," and that that is all he earns.

On the issues thus presented the case was tried. Findings were specifically waived by the parties. There is some doubt as to whether this can be legally done; but that point is not before us, and we therefore refrain from any discussion thereunder. Omitting formal parts, the following judgment was entered:

"Therefore it is ordered, adjudged, and decreed that a decree of divorce be granted to the defendant against the plaintiff; that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action. It is further adjudged that the minor child of the parties, named Alice Zartarian, shall, until the further order of the court, be in the custody of the plaintiff, and the plaintiff is directed, until the further order of the court, to keep and maintain said child at the Los Angeles Orphans' Home, at 815 El Centro Ave., Los Angeles, Cal."

The appeal is on the judgment roll alone, and "from that part of the interlocutory judgment rendered by the above-named court in the above-entitled action, and herein entered on the 10th day of December, 1917, which ordered, adjudged, and decreed that a decree of divorce be granted to the defendant herein against the plaintiff herein, but denied the the prayer of the defendant herein for alimony and separate maintenance of herself and minor child, and which further adjudged that the custody of said minor child, named Alice Zartarian, be given to plaintiff."

[1, 2] Three grounds are urged by appellant for the reversal of the judgment: (1) That the judgment is not supported by the pleadings; (2) that the court erred in granting relief inconsistent with the case made by the pleadings and embraced within the issues; and (3) that the court erred in rendering a judgment for divorce in favor of the defendant.

Appellant urges in support of the first point that, the trial court having found from the evidence that plaintiff was not entitled to a divorce from defendant, "but in the face of the allegations of defendant's cross-complaint and the issues raised by the answer thereto and the relief sought by the defendant the court adjudged and decreed that a decree of divorce be granted to the defendant against plaintiff"—granting custody of the child to plaintiff—the only pleadings pertinent to this appeal, since plaintiff was denied relief on his pleadings, are defendant's cross-complaint and plaintiff's answer thereto, as well as the interlocutory judgment. It also is urged that the cross-complaint does not state a cause of action "on the ground of desertion, or any ground."

With this view we are in full accord. If the cross-complaint is intended to allege facts upon which to base a cause of action for desertion or willful neglect, and even though we concede, without so holding, that it does, yet it conclusively appears upon its face that no divorce can be based thereon, because such cause of action had not accrued, either at the time of the filing of plaintiff's complaint or defendant's cross-complaint. Section 107, Civ. Code. On the other hand, if the facts alleged in the cross-complaint be true—and for our present purposes we must so assume—still we are of the opinion that the cross-complaint fails to allege facts sufficient to constitute a cause of action against the plaintiff for extreme cruelty, as contemplated by section 94 of the Civil Code.

"The particular facts relied on as constituting cruelty should be set forth in detail; it is not sufficient to allege cruelty in general terms, as in the language of the statute. However, every act complained of need not be specifically described; it is enough if sufficient facts are alleged to establish legal cruelty as a ground for divorce. * * * The acts of cruelty should be alleged with reasonable certainty as to time and place. However, the exact day and place of the occurrence of each particular act need not be alleged; and where the conduct complained of is continued and not confined to any particular time or locality, a specific allegation of time and place is impracticable and should not be required. * * * Since, to constitute a ground for divorce, cruelty must result either in bodily harm or injury to the health or a reasonable fear of one or the other, *either one or the other of these effects of the misconduct on the complainant must be alleged.*" (Italics ours.) 14 Cyc. 667 et seq.; Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Smith v. Smith, 124 Cal. 651, 57 Pac. 573; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099; Ryan v. Ryan, 33 Mont. 406, 84 Pac. 494; Claunch v. Claunch (Tex. Civ. App.) 203 S. W. 930.

There is nothing in the cross-complaint now under consideration which brings it within the provisions of the rule just quoted, and particularly does it contain no allegation bringing it within the portions which we have italicized. There being no such allegation, then it is clear that no evidence could legally

be received, even if offered, in support of such contention.

Nothing is contained in the judgment roll before us upon which the judgment appealed from may find support. This being true, it becomes unnecessary to discuss any other point raised.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

47 Cal. App. 112

DIBBLE v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.
(Civ. 3317.)

(District Court of Appeal, First District, Division 1, California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Negligence ⊜134(1) — Evidence held to make prima facie case for owner of grain destroyed by fire.

In an action for destruction of grain by fire, evidence *held* to make a prima facie case for plaintiff calling upon defendants to rebut the necessary inferences arising from the testimony.

2. Master and servant ⊜330(3) — Evidence held to show relationship of principal and agent between defendants and workmen who set fire.

In an action for destruction of grain by fire, evidence *held* to make a prima facie showing of the existence of the relationship of principal and agent between the corporate defendants and the workmen on their power line who started the fire, adequate in the absence of evidence to the contrary to support findings that such relation existed.

3. Master and servant ⊜6 — Performance of work for another prima facie evidence of employment.

The fact that one is performing work and labor for another is prima facie evidence of employment, and supports the presumption that such person is the employé of such other, in the absence of evidence to the contrary.

4. Negligence ⊜134(10) — Evidence held to show that fire was communicated from power companies' right of way.

In an action against power companies for destruction of grain by fire set on their right of way, evidence *held* sufficient to justify finding that the flames were communicated by a fire which originated on the companies' right of way, and which had origin in some instrumentality used by their employés.

5. Negligence ⊜21—Employés of power companies negligent in not extinguishing fire on right of way.

The employés of power companies were guilty of gross negligence in not properly controlling and extinguishing a fire on the right of way occupied by a power line in proximity to a field of ripened grain when their attention was directed by a passerby to the probability of its spreading.

6. Appeal and error ⊜996—Appellate court cannot set aside findings supported by inferences from facts proved.

It is not within the power of the appellate court to disregard or set aside findings of the trial court supported by inferences founded on facts proved.

7. Assignments ⊜22—Chose in action arising from violation of property right or from obligation or contract assignable.

Under Civ. Code, § 954, a chose in action arising out of either the violation of a right of property, or out of an obligation or contract, is assignable.

8. Negligence ⊜106—Insurer of grain destroyed by fire not necessary party to owner's action against parties at fault.

It was not necessary that the insurance company which paid an owner of grain for its destruction by fire through the negligence of power companies should have been joined in the owner's action against the companies either as plaintiff or defendant.

9. Pleading ⊜11—Reassignment by insurer of rights under subrogation to owner of standing grain destroyed did not need to be pleaded.

The owner's insurer has merely a cause of action arising by subrogation or equitable assignment through settling a loss, by fire occasioned by negligence of another, and such assignment and the reassignment by the insurer to the owner are probative matters having no place in the owner's complaint against the wrongdoer.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by A. L. Dibble against the San Joaquin Light & Power Corporation, a corporation, and the Midland Counties Public Service Corporation, a corporation. From judgment for plaintiff, defendants appeal. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellants.

Goodfellow, Eells, Moore & Orrick and Geo. K. Ford, all of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the defendants from a judgment awarding plaintiff damages for the destruction by fire of certain grain belonging to him, caused through the negligence of the defendants. The case was tried before the court without a jury. It was stipulated that, if judgment went against one of the defendants, it might be entered against both of them. At the conclusion of plaintiff's case, the defendants moved for a nonsuit. The motion was denied, whereupon the defendants declined to offer any evidence. The findings of the trial

court followed the allegations of the complaint. In seeking a reversal of the judgment the appellants urge two grounds: First the insufficiency of the evidence to justify the findings, and the judgment based thereon; and, second, that the plaintiff is not the real party in interest in this action, at least to the amount of $3,025.60.

It is admitted that the plaintiff was the lessee of certain lands upon which he had grown a crop of wheat and barley. The defendants owned and maintained a right of way, adjacent to the land of plaintiff, over which it operated a power line. From the testimony of Mr. McCabe, who was called as a witness on behalf of the plaintiff, it appears that on the afternoon of June 8, 1915, he was passing along the county road, which was located a few feet westerly from the power line. Two men, Schultz and Moore, were at that time in view. One of them was in the act of descending from one of the poles, supporting the power line, while the other was on the ground near the foot of the pole. A team and wagon, which McCabe identified as belonging to the defendant power corporation, was standing nearby. A small fire, three or four feet across, was then burning in the tall, thick, dry grass which extended to plaintiff's field, a distance of about 200 feet, and in which plaintiff's grain was standing and ready for the harvest. The wind was at that time blowing from the fire in the direction of plaintiff's field. About 20 feet from the place where the fire was burning, and so situated that the wind would carry sparks from it toward the fire, McCabe observed a fire pot, with what seemed to be coals of fire in it. What appeared to be a torch, such as is used by plumbers, was lying just where the blaze was starting. The fire at this time could have been readily extinguished. When McCabe approached, the two men were standing near it with sacks or cloths in their hands. McCabe said, "Boys, if you ain't careful, you will have a big fire here on your hands," to which one of the men replied, "Never mind, partner, we will attend to the fire." Neither of the men, however, made any attempt to extinguish, or stay, the spread of the flames, which, owing to an increasing wind, almost immediately spread rapidly until they reached and consumed plaintiff's grain.

[1] It is the contention of the appellants that this evidence was wholly insufficient to prove that the fire in question was started by the negligence of the defendants, or that it was permitted to spread and reach the grain upon plaintiff's land, because of any carelessness whatever on the part of defendants, or either of them. We are of the opinion, however, that the plaintiff made out such a prima facie case as called upon the defendants to rebut the necessary inferences arising from the testimony, and that the motion for a nonsuit was properly denied.

[2, 3] Appellants first argue that as there was no direct testimony that either Schultz or Moore were employed by the defendants, and no evidence as to the kind of work they were doing at the time of the fire, they may have been strangers to the defendants and not in any way connected with them. This contention cannot be upheld. The men appeared to be engaged in some kind of work connected with the business of the defendants. They were working on the right of way of defendants' power line. One of them was descending from one of the power line poles. The other was close at hand. No other men were in sight. The implements for their work were scattered about. The fire pot, the torch, and the wagon and team, were all indicia of their employment. The facts were sufficient, in our judgment, to make a prima facie showing of the existence of the relationship of principal and agent between the corporation defendants and the workmen, which, in the absence of evidence to the contrary, was ample to support the findings of the trial court that such relation existed at the time of the fire. 1 Labatt, Master and Servant, § 22, pp. 69, 73. The fact that one is performing work and labor for another is prima facie evidence of an employment and supports a presumption that such person is the servant and employé of the other, in the absence of evidence to the contrary. King v. Hercules Powder Co., 178 Pac. 531; Indiana, etc., Railways v. Adamson, 114 Ind. 282, 15 N. E. 5; Waaler v. Great Northern Railway Co., 22 S. D. 256, 117 N. W. 140, 18 L. R. A. (N. S.) 297; Robinson v. Doe, 224 Mass. 319, 112 N. E. 1007; Bush v. Southern Railway Co., 63 S. C. 96, 40 S. E. 1029; Howell v. Mandelbaum & Sons, 160 Iowa, 119, 140 N. W. 397, Ann. Cas. 1915D, 349.

[4, 5] Appellants also claim that there is no evidence to show that the employés in question either started the fire, or failed to extinguish it, or that they negligently permitted it to spread. While it is true there is no direct evidence as to the origin of the fire, the trial court had the right to make any logical, reasonable deduction, which the admitted facts, and the undisputed testimony of the witness McCabe permitted. Davis v. Hearst, 160 Cal. 143, 176, 116 Pac. 530. It is a fair inference that the flames which destroyed plaintiff's property were communicated thereto by the fire, which originated on the right of way of defendants, and which had its origin in one or other of the instrumentalities used by defendants' employés in their work. Reuter v. San Pedro, etc., Co., 37 Cal. App. 277, 283, 174 Pac. 927; St. Paul Fire, etc., Co. v. Southern Pacific Co., 30 Cal. App. 140, 142, 157 Pac. 247; Fay v.

Cox, 188 Pac. 623; Toledo, etc., Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561, 562; Roundtree v. Mt. Hood, etc., Co., 86 Or. 147, 168 Pac. 61. It is equally clear to us that the employés of defendants were guilty of gross carelessness in not properly controlling and extinguishing the fire when their attention was directed by McCabe to the probability of its spreading. It was burning in tall, dry grass near the adjacent fields of stubble and grain, and it should not have required any warning to apprise them of this imminent danger.

[6] The deductions drawn by the trial court are not illogical, or inherently unsound, either as to the employment of Schultz and Moore or as to the origin and source of the fire. Whether or not the workmen were the servants of the power company was so peculiarly within the knowledge of the defendants that the plaintiff was not required to make as strong showing in that regard as might have been otherwise required. As against the deductions drawn by the trial court, which seem eminently reasonable, no other inferences founded on facts proved in the case find support. It is not within the power of this court to disregard, or set aside, the findings thus supported. Ryder v. Bamberger, 172 Cal. 791, 799, 158 Pac. 753; County of Alameda v. Tieslau, 186 Pac. 398.

On cross-examination of the plaintiff it was developed that the grain was insured against fire in the Hartford Fire Insurance Company, which paid plaintiff $3,025.60, the amount due under its policy. On redirect examination plaintiff established that, before the commencement of the action, the insurance company assigned to the plaintiff all rights and causes of action against the defendants, arising out of the loss or damage occasioned by the fire. A written assignment was admitted in evidence over the contention of the defendants, the objection being that the cause of action was not assignable and that the assignment had not been pleaded. The defendants then made application to the court to amend their answer by setting up a further defense, which, in substance, was that the action had not been brought, and was not being prosecuted, in the name of or by, the real party in interest.

The court denied the application to amend.

[7] Appellants complain of the act of the court in admitting the assignment in evidence and its further action in refusing permission to file the amendment to the answer. Their contention, first, is that the insurance company, upon the payment of the loss of the plaintiff, was subrogated to plaintiff's rights, and became the real party in interest to the extent of its payment, and that the cause of action which the insurer had, because of its subrogation to the rights of plaintiff, was not assignable. Appellants seek to invoke the rule of law relating to actions for death or personal injuries, and for damage to property under statutes different from ours. Section 954 of the Civil Code has effected a change in the common-law rule of the nonassignability of choses in action. One arising out of either the violation of a right of property or one arising out of an obligation or contract may now be transferred. Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 46, 166 Pac. 823.

[8, 9] The next point urged by appellants is that the insurance company should have been joined in the action, either as plaintiff or defendant. We find no merit in this contention. It was not necessary even that the assignment by the insurance company to the plaintiff should have been pleaded. The insurer merely had a cause of action arising by way of subrogation or equitable assignment. Caledonia Insurance Co. v. Northern Pacific Railway Co., 32 Mont. 46, 49, 79 Pac. 544. This assignment by operation of law, and the reassignment by the company to plaintiff, left the claim as it was originally and invoked probative matters that had no place in the pleading. Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373, 377, 114 Pac. 1026. The action was therefore properly commenced by the plaintiff alone.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 128

PEOPLE v. GUTIERREZ. (Cr. No. 699.)

(District Court of Appeal, Second District, Division 2, California. April 14, 1920.)

1. Infants ⇐19—Evidence held insufficient to show that infants had no parent or guardian.

In a proceeding to take from their father the custody of infants, evidence *held* insufficient to establish that they had no parent or guardian capable of exercising proper parental control over them.

2. Infants ⇐19 — To justify taking infants from custody of parent, facts specified in statute therefor must be averred and found.

To take from the father the custody and control of infants, under Juvenile Court Law, § 9b, providing that no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of such parent or guardian, unless the court shall find such parent or guardian to be incapable of providing, etc., proper maintenance, training, and education, or unless such person has been convicted of a felony, or the court shall find that the welfare of such ward requires his custody to be taken from the parent or guardian, averments of facts specified must be made in

the petition, and findings thereof must appear of record to support an order divesting the parent or guardian of control.

3. Infants ⊂⊃16—Custody of infants cannot be taken from parent under Juvenile Court Law because others might better provide for and train them.

The custody of infants cannot be taken from their parent and natural guardian under the Juvenile Court Law, and given to another because it is deemed the infants may be better provided for and trained as wards of the state, and interference with the natural relations of parent and child is justified only where there is demonstrated incapacity or something akin to criminal neglect.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Proceeding by the People of the State of California, on behalf of Guadalupe and Elvira Gutierrez, alleged wards of the Juvenile Court. From an order taking them from the custody and control of their father Tomas Gutierrez, he appeals. Order reversed.

E. F. Du Fresne, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SLOANE, J. This is an appeal from an order of the superior court of the county of San Diego, sitting as a juvenile court, declaring Guadalupe and Elvira Gutierrez, minors, to be wards of said court, and taking them from the custody and control of their father, Tomas Gutierrez, appellant herein.

The only averment upon which jurisdiction could be maintained to declare these minors wards of the court is contained in the following allegation of the petition: "That said Guadalupe and Elvira Gutierrez have no parent or guardian capable of exercising proper parental control." The court, in its order committing the minors to the care of their grandmother, under the custody of the probation officer, finds that all of the allegations of the petition are true. In the hearing on writ of habeas corpus in this same matter, we held that this finding was sufficient to sustain the order. On this appeal the issue is presented on the sufficiency of the evidence to support this finding. We think the evidence is insufficient.

[1, 2] It was shown by the testimony, without dispute, that at the time of commencing this proceeding the minors, who are girls aged respectively one and three years, were in the custody of their father. The mother is dead, and the children had for some time been in the immediate care of the maternal grandmother, with the father's consent, and under an arrangement whereby he paid for their keep. Some two or three months prior to this proceeding the father took them from the grandmother, owing to some personal differences which had arisen between the two. He at first kept them at his home, with the help of a woman he employed, but later sent for and paid the transportation of a brother and his family, who lived in New Mexico, to come to San Diego and live with him and make a home for himself and the children. They were all living together under this arrangement when this proceeding was commenced. It is undisputed that the father is an industrious man, earning good wages, affectionate with the children, spending his money freely to provide for them, and able and willing to care for them. There is nothing to indicate that the care and custody given these minors by their father is not as good as ordinarily falls to the lot of families in the same station in life. There was some evidence tending to show that the children were well and affectionately cared for by the grandmother, and that she was so situated as to given them better attention and more wholesome surroundings than they were likely to receive under the arrangements made by the father. It is quite evident from the remarks of the trial judge, shown in the transcript of the proceedings, that it was this circumstance that influenced his decision to take the children from the father and place them in the custody of the probation officer under the immediate care of the grandmother. But there is neither any allegation in the petition nor finding in the order of commitment to justify depriving the father of the custody of his children on the ground that their welfare demanded that the father be deprived of their custody. Section 9b of the Juvenile Court Law (St. 1915, p. 1233) provides that—

"No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of a crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

The findings thus required are necessary to support the order of commitment, and must regularly appear of record. In re Brodie, 33 Cal. App. 751, 753, 166 Pac. 605. As has already been pointed out, the only finding in this matter is that the minors "have no parent or guardian capable of exercising, proper parental control"; and we have held that this finding is not supported by the evidence.

[3] Moreover, we question if the evidence presented in the record is sufficient to justify

a finding that the welfare of the minors requires that their custody be taken from the father, if such an allegation had appeared in the petition, or such finding had been made. The Juvenile Court Law certainly does not contemplate the taking of children from their parents and breaking up family ties merely because, in the estimation of probation officers and courts, the children can be better provided for and more wisely trained as wards of the state. Probably from mere considerations of healthful and hygienic living and systematic education and training this would be true in the cases of thousands of families of wealth and respectability. We think it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child.

Notwithstanding we are fully satisfied that the juvenile court was actuated by its desire that these children should have a better home than the father was likely to provide, we are convinced that neither the law nor the facts in the case justified the order appealed from.

The order is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 124

SEARCY v. SUPERIOR COURT OF HUMBOLDT COUNTY et al. (Civ. 2182.)

(District Court of Appeal, Third District, California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

Venue ⟸78—Order transferring cause to other county deprived court of all jurisdiction.

In view of Code Civ. Proc. § 949, under section 399, when the superior court of Humboldt county made its order transferring a divorce action to the superior court of the city and county of San Francisco, it lost all jurisdiction of the action for all purposes, and could not allow plaintiff wife alimony for support, and counsel fees on defendant husband's appeal from the order; jurisdiction to do so was in the superior court of San Francisco county.

Application for writ of prohibition by C. L. Searcy against the superior court of the county of Humboldt and Hon. Denver Sevier, judge thereof. Writ granted.

Henry L. Ford and J. T. Fraser, both of Eureka, and V. A. McGeorge, of Sacramento, for petitioner.

E. L. Webber, of Napa, for respondents.

PREWETT, Presiding Judge pro tem. This is an application for a writ of prohibition to restrain respondents from proceeding further with certain orders and proposed orders in a divorce action wherein one Mary Louise Searcy is the plaintiff and above-named petitioner is defendant. Said superior court on the 9th day of January, 1920, on due proceedings had in that behalf, made and entered its final order, changing the place of trial of said action from said county of Humboldt to the city and county of San Francisco. On the same day the petitioner appealed from said order, and his appeal is now pending.

Notwithstanding said change of place of trial, said superior court, respondent herein, upon the usual notice and motion, proceeded to make its further order, allowing to said plaintiff Mary Louise certain sums by way of alimony for her support and also as counsel fees on appeal.

The petitioner insists that said orders are in excess of the jurisdiction of the court. Said court is about to take proceedings against petitioner looking to the enforcement of said orders.

1. When the court made its order transferring the cause to the superior court of the city and county of San Francisco, it thereby lost, for all purposes, all jurisdiction of the action. Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355; Hatch v. Galvin, 50 Cal. 441, and People v. Suesser, 142 Cal. 354, 75 Pac. 1093. In the first of these cases the court uses the following language:

"We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises."

In the Hatch Case the court says:

"The order thus entered * * * vested jurisdiction in the court of said Abner C. Squire, and necessarily put an end to the jurisdiction of the defendant over the case."

To the same effect are the following cases from other jurisdictions: State v. Lay, 128 Mo. 609, 29 S. W. 999; Cunningham v. Current, etc., 165 Mo. 270, 65 S. W. 556, and Fatt v. Fatt, 78 Wis. 633, 48 N. W. 52.

It is provided in section 399 of the Code of Civil Procedure that:

"The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein."

Therefore in the absence of an appeal there exists no doubt that the respondents lost all jurisdiction and power of every sort in the premises.

2. It is insisted by the learned judge of

the court below that, in the ordinary divorce action, the power of the court to make further allowances pending an appeal is fully recognized, and in support of this position he cites the following cases: Reilly v. Reilly, 60 Cal. 626; Ex parte Winter, 70 Cal. 292, 11 Pac. 630; and Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732. Without quoting from these cases at length, they may be summed up as holding that the lower court, in case of an appeal, retains sufficient jurisdiction to order further payments of alimony and counsel fees. While the authorities are far from uniform in other states, this doctrine in this state is too well settled to be open to question. This principle does not, however, obtain in a case wherein the place of trial has been changed. It is not to be doubted that some court has or retains the power to order additional alimony and counsel fees, but not the court from which the venue has been changed.

In the ordinary case, the entire jurisdiction in case of an appeal remains apportioned between the trial court and the appellate court. In the absence of a stay of proceedings all the powers which do not pass to the appellate court as appertaining to the disposition of the case on appeal remain with the lower court, and may be exercised by it. One of these powers is the right to award additional alimony and counsel fees.

But in the case now under examination the court made its unconditional order changing the place of trial. This order, as we have seen, operated, eo instanti, to change the jurisdiction to the new court. There is no provision for a stay of proceedings in case of a change of place of trial. Section 949 of the Code of Civil Procedure, so far as pertinent, reads as follows:

"And except, also, where the order grants or refuses to grant a change of place of trial of the action."

An interval of time ensued between the making of the order changing the place of trial and the taking of the appeal. And hereat is found the crux of the whole matter. During this interval it is manifest that the only court having any powers in the premises was the San Francisco court. It could during that interval have granted additional allowances and have proceeded in every way with the trial or other disposition of the case. The appeal which was subsequently taken did not reinvest the Humboldt court with any of the powers which had already passed to the new court. A part of the order complained of provides for alimony for the support of the wife. In every view of the matter the San Francisco court, by the order of transfer, acquired jurisdiction to make or modify similar orders. Such coordinate and coequal jurisdiction cannot have existed at the same moment of time in each of the two courts.

The conclusion of the court is that the order of transfer vested the entire jurisdiction in the San Francisco court, and that this order became operative immediately upon its entry. All subsequent proceedings in the Humboldt court are null and void.

Let a writ of prohibition issue as prayed for.

We concur: BURNETT, J.; HART, J.

46 Cal. App. 661

ROBINSON v. CLEMONS. (Civ. 2066, L. A. 5449.)

(District Court of Appeal, Third District, California. March 22, 1920. Hearing Denied by Supreme Court May 20, 1920.)

1. Highways ⟸184(2) — Evidence held to show that defendant's vehicle approaching intersection was not under control.

In an action for damages resulting from a collision between automobiles at an intersection of highways, evidence *held* sufficient to sustain a finding that the speed at which defendant was traveling was not such as to keep the car under his control, so as to permit vehicles on his right to pass, as required by a statute enacted in 1913.

2. Highways ⟸184(2) — Evidence held to show ordinary care by plaintiff automobilist at intersection.

In an action for damages resulting from a collision of automobiles at a crossroads, evidence *held* sufficient to sustain a finding that there was no want of ordinary care on the part of the plaintiff, independent of statute, in approaching the crossing at 12 to 15 miles per hour.

3. Highways ⟸177 — Automobilist about to cross intersection may assume car will not approach at excessive speed.

An automobilist reaching an intersection when another automobile on the intersecting street was 100 to 150 feet away could properly assume that such other car was not violating rules of prudence by excessive speed and that he had plenty of time to cross, and act accordingly.

On Hearing in Supreme Court.

4. Highways ⟸177—Violation of speed law does not prevent recovery unless contributing to accident.

A violation of the Motor Vehicle Act of 1913 (St. 1913, p. 639), regulating the speed of an automobile on approaching an intersecting way where the view of the road traffic is obstructed, will not prevent a recovery for damages caused by a collision, where such violation could not have contributed to the accident.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by L. F. Robinson against H. B. Clemons. Judgment for plaintiff and defendant appeals. Affirmed by the District Court of Appeal, and hearing denied by Supreme Court.

Earl E. Moss, of Ventura, for appellant.

John A. Galvin, of Fillmore, for respondent.

ELLISON, Presiding Judge pro tem. This is an appeal from a judgment in favor of plaintiff in an action for damages resulting from a collision between an automobile he was driving with one that was being driven by the defendant. The accident occurred at the town of El Rio, Ventura county, at about 8 o'clock of the morning of December 24, 1915. At that time the plaintiff was driving in a southerly direction on a crossroad towards the city of Oxnard and the defendant was driving in a westerly direction on the state highway towards Ventura.

We gather from the record that these two roads do not cross each other at a right angle. The highway runs somewhat in a northwesterly direction; the northeast corner of the intersection being at an obtuse angle and the northwest corner an acute angle. The plaintiff was driving at a speed of between 12 and 15 miles per hour. As he reached the north line of the state highway, he observed the defendant coming towards him at a distance of from 100 to 150 feet. The plaintiff proceeded across the highway a distance of about 35 feet when his car was struck by the defendant's, broken and injured, and himself hurt. The defendant's car was also damaged somewhat.

It is the claim of the appellant that the plaintiff was guilty of contributory negligence that brought on the injury. Thus, negligence is predicated on the claim that the state law then in force provided:

"That in any event no person shall operate * * * a motor * * * on any public highway * * * at a greater rate of speed than ten miles an hour when the operator's * * * view of the road * * * is obstructed, either upon approaching an intersecting way or in traversing a crossing or intersection of ways."

This charge of excessive speed against the plaintiff by the defendant does not come with very good grace from him, when we consider the speed with which he himself was traveling. The evidence shows that while plaintiff was traveling 35 feet the defendant traveled 100 or 150 feet. If the plaintiff, with a speed of 15 miles per hour, traveled 35 feet, while the defendant, approaching a crossing, traveled 100 feet, then the defendant was traveling at the rate of 42.9 miles per hour. If the distance covered by the defendant was 150 feet, while the plaintiff was going 35 feet, as is probable from the evidence, then his rate of speed was 64.2 miles per hour. But from other considerations the appellant's position is untenable.

1. The Motor Vehicle Act of 1915 did not go into effect until after this accident. By its terms it was not to be in effect, as to such matters as are here involved, until December 31, 1915. Stats. 1915, § 22, subd. d, p. 410. The act of 1913 (St. 1913, p. 639) was in force, but it did not contain any provision similar to the above in the act of 1915. It merely provided:

"Vehicles approaching an intersecting road," etc., "shall be under control of the operator thereof so as to permit vehicles on the right of the vehicles approaching to first cross such intersecting road."

[1] The defendant violated this provision of the act of 1913. The court could well find from the evidence that the speed he was traveling was not such as to keep the car under his control so as to permit vehicles on the right to pass, and he violated it in not giving the plaintiff, who was to his right, the right of way and permitting him to cross in safety. As to the plaintiff, the court was justified in finding that his speed of from 12 to 15 miles per hour did not cause the car to be "not under his control." Again, the plaintiff's rate of speed did not bring on the collision and injury.

The Civil Code, § 1714, in defining negligence and contributory negligence, uses this language:

"Every one is responsible, not only for the result of his willful acts, but also for all injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

[2, 3] Did the plaintiff, by want of ordinary care, bring the injury upon himself? The court was justified by the evidence in making a finding that there was no want of ordinary care on the part of the plaintiff in approaching the crossing at 12 to 15 miles per hour. The judge of the lower court stated that he was thoroughly familiar with the scene of the accident. This being so, he knew the width of the intersecting roads, the angle at which they crossed each other, and the presence or absence of obstructions to view, and it was for him to decide whether a speed of from 12 to 15 miles per hour at that particular place was an exhibition of a want of ordinary care on the part of the plaintiff. Any one, the most careful, about to cross a highway and observing another vehicle approaching at a distance of from 100 to 150 feet, would not deem it necessary to stop or to do any particular thing to avoid a collision. He would properly assume and have a right to assume that the other car was not violating all rules of prudence by excessive speed; that he had plenty of time to

cross and act accordingly. This would be the attitude of any reasonable man under the circumstances, and therefore the plaintiff was not guilty of a want of ordinary care in pursuing his journey. His speed of from 12 to 15 miles per hour did not cause the trouble. It may be that the slowness of his driving did. Perhaps, if he had been traveling 20 miles an hour instead of 15, the accident would have been avoided.

We have examined the evidence and are of the opinion that the findings of the court as to the amount of the damages sustained by the plaintiff have sufficient evidence to support them. We are also of the opinion that there was no failure to find upon any material issue raised by the pleadings.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The statement in the opinion that there was no provision in the Motor Vehicle Act of 1913 similar to that contained in the Motor Vehicle Act of 1915, regulating the speed on approaching an intersecting way where the view of the road traffic is obstructed, is apparently erroneous. However, it sufficiently appears that any possible violation of this provision by plaintiff did not contribute to the accident.

The application for a hearing in this court is denied.

All concur.

47 Cal. App. 118

PEOPLE v. GILMAN. (Cr. 693.)

(District Court of Appeal, Second District, Division 2. California. April 14, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Criminal law ⊂⊃371(12)—Evidence of assault on another subsequent to killing held admissible to show motive.

In a trial for murdering an officer, the defense being resistance to unlawful arrest, testimony regarding accused's assault on a woman immediately after the killing *held* competent, as tending to show accused's motive was anger growing out of the previous quarrel, in which they had all participated, and not resistance to his arrest.

2. Homicide ⊂⊃272—Question of resistance of illegal arrest held for jury.

In trial for murder of an officer, the defense being resistance of an unlawful arrest, the question of illegal arrest *held* for the jury on the issue whether accused was disturbing the peace so that deceased was authorized in arresting him under Pen. Code, §§ 836, 837, without a warrant.

3. Homicide ⊂⊃55—Resistance of illegal arrest reduces killing to manslaughter.

Where in resistance to an illegal arrest the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter.

4. Homicide ⊂⊃55—For murder to be reduced to manslaughter on ground of resistance of illegal arrest actual resistance must appear.

For killing an officer to be reduced from murder to manslaughter on the plea of resistance of illegal arrest, there must be evidence, not only of an illegal arrest, but also that the killing was done in actual resistance to the act of making the arrest or in maintaining the illegal custody of accused, and a person merely formally restrained by a verbal notice that he is under arrest for a misdemeanor cannot respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint.

5. Homicide ⊂⊃55—Resistance to illegal arrest not shown by facts.

Where accused, placed under arrest by an officer, had gone into his own house ostensibly to get his hat and coat, and, instead of asserting his freedom by refusing to return to the officer's custody, armed himself, and, returning to where the officer waited, for the purpose, as he himself declared, of ordering the officer from the premises, shot him down, without giving him a chance to leave or waiting for any overt act in attempted furtherance of the alleged illegal arrest, accused's claim that the killing was reduced to manslaughter as having occurred in the resistance of illegal arrest could not prevail.

6. Homicide ⊂⊃348—Failure to give instruction not reversible error, where absence of such instruction probably not prejudicial.

Under Const. art. 6, § 4½, in a murder trial, refusal of instruction as to resistance of illegal arrest as reducing the killing to manslaughter *held* not reversible, even if technical error, where the circumstances shown in the evidence were such as to render it extremely improbable that the absence of such instruction was in any way prejudicial to accused, or at all affected the jury's verdict.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Lewis H. Gilman was convicted of first degree murder, and appeals. Affirmed.

Shreve & Shreve and George H. Shreve, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SLOANE, J. The defendant and appellant was convicted before a jury in the superior court of the county of San Diego of murder in the first degree.

The circumstances leading up to the tragedy were substantially as follows: The defendant and his wife, on the morning of May

17, 1919, were in the kitchen of their house on the outskirts of the village of La Mesa. Just across the street lived a family by the name of Parks. One Miller, the brother of Mrs. Parks, on the occasion in question, fired his shotgun at a rabbit in the distance. The defendant and his wife, startled by the shot, and appearing to think the shot was aimed in their direction, ran out of the house, and, approaching Miller, who had fired from the Parks' grounds, accused him of shooting in the direction of and into defendant's house. The parties thereupon engaged in an altercation over the matter; Miller disclaiming shooting in the direction of the house. Different members of the Parks family came upon the scene, and the testimony is to the effect that defendant became much excited and very abusive. During the altercation the decedent, Fay, who was a special deputy sheriff, came upon the scene of action. He announced that he was an officer. The defendant demanded the arrest of Miller for unlawful shooting. Miller then explained that he had been shooting at a rabbit, and pointed out to Fay the place from which he shot, the location of the rabbit, and the direction of the shots. Miller's statement, according to the testimony of the people's witnesses, greatly angered defendant, and he applied a number of very offensive, vulgar, and opprobrious epithets to Miller and other members of the Parks family, in the presence and hearing of Fay and the women and children of the Parks family. The language and conduct, as testified to on the part of the people, clearly constituted a breach of the peace. Fay then ordered Gilman from the premises, and apparently took him into custody, leading him away toward defendant's own home. On approaching the house, defendant went in advance of Fay and defendant's wife, who had accompanied them back from the scene of the altercation, and entered the house, while Fay remained on the porch or just in front of the steps on the outside. In a very short time defendant reappeared with a revolver in his hand, and immediately opened fire upon Fay, shooting him twice and killing him instantly. He then, without stopping, hurried across the street toward the Parks' home, where Mrs. Parks and her mother and the children were standing outside. He fired the pistol, and the women and children ran. He overtook Mrs. Parks, tried to shoot her, but she diverted the shot by grasping his arm. He then threw her to the ground and beat her over the head with the pistol. She was rescued by Miller, her brother, who sprang upon the defendant from a window, held him down upon the ground, and beat him into submission; and he was then again taken into custody.

[1] Subject to two assignments of error presented on this appeal, there is no question that the conviction of the defendant for murder in the first degree was amply justified under the law and evidence of the case. One of the grounds of error relied on is the admission in evidence, over the objection of defendant's counsel, of the testimony regarding the assault upon Mrs. Parks by the defendant immediately after the killing of Fay. It is claimed that this was a subsequent and independent offense, not a part of the res gestæ, and the testimony thereof extremely prejudicial to defendant. The general rule that evidence of another offense cannot be introduced for the purpose of indicating a likelihood that the defendant is guilty of the crime charged is undisputed. The exception to the rule, as pointed out in People v. Edwards, 13 Cal. App. 551, 110 Pac. 342, is where the evidence of other acts is so connected with the original transaction as to be part of the res gestæ, or to show the motive and intent of the act charged. In this case the only justification suggested for the shooting of Fay was that it was done in resisting an illegal arrest. We think the fact that the defendant, without a moment's hesitation or delay, rushed from the scene of the first shooting, in an attempt upon the lives of members of the Parks family, was competent evidence tending to show that the motive which impelled him in both instances was anger and resentment growing out of the previous quarrel and altercation in which they all had participated; and that it was not in resistance to an arrest, but in resentment at the part that the deceased and the members of the Parks family had taken against him, that he entered upon his murderous purpose. The facts in People v. O'Bryan, 165 Cal. 59, 130 Pac. 1044, present a closely analogous case, where the court says:

"There was no error in permitting the people to prove the assault upon Molina, following the firing of the shot that killed Avila. The general rule is, of course, that evidence of offenses other than the one for which the defendant is on trial is not admissible. But where the two offenses are part of a single transaction, 'every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him' (People v. Manasse, 153 Cal. 10 [94 Pac. 92]; People v. Walters, 98 Cal. 141 [32 Pac. 864]; People v. Craig, 111 Cal. 468 [44 Pac. 186]; People v. Teixeira, 123 Cal. 298 [55 Pac. 988]; People v. Suesser, 142 Cal. 363 [75 Pac. 1093]). It was the theory of the prosecution—and the theory was entirely reasonable under the evidence—that the shooting of Avila and the assault on Molina were parts of one attack upon the two, perpetrated in pursuance of a single scheme to terrorize or injure them because they were working for the Llewellyn Iron Works. Whatever was done in the course of that attack was proper as throwing light on the motive and intent of O'Bryan and his companions."

[2-4] The other exception taken by appellant is to the ruling of the trial court in re-

fusing an instruction in behalf of defendant to the effect that where the evidence shows that a homicide is committed in resisting an unlawful arrest, the ground of conviction is limited to manslaughter. Defendant, corroborated to some extent by the testimony of his wife, denied that he was guilty of any tumultuous or offensive conduct, or used any vulgar, profane, or indecent language in the presence of Fay and the other persons present at the time of the arrest. As Fay was only a special officer, he was without official authority to make arrests without a warrant, and under the authority of Penal Code, §§ 836, 837, could only have legally arrested defendant for a breach of the peace committed in his immediate presence, either in official capacity or as a private person. While the evidence on this matter is such as to render it extremely unlikely that the jury entertained a reasonable doubt that defendant was disturbing the peace at the time of his arrest, the evidence to the contrary was such as to make the question of an illegal arrest one for their consideration. It cannot be doubted that the doctrine contended for by appellant, and stated in the opinion of the court in People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064, that "where, in resistance to an illegal arrest, the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter," finds support in a well-recognized line of authority. Ross v. State, 10 Tex. App. 455, 38 Am. Rep. 643; Briggs v. Commonwealth, 82 Va. 564; Wharton's Crim. Law, vol. 1, § 136, and citations. To admit, however, the application of this doctrine there must be evidence, not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. It cannot be admitted that a person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor can respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint. 2 R. C. L. p. 474; Roberson v. State, 43 Fla. 156, 29 South. 535, 52 L. R. A. 751; State v. Meyers, 57 Or. 50, 110 Pac. 407, 33 L. R. A. (N. S.) 143; Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730.

[5] In this case the arrest was effected by notifying defendant that he was under arrest, and perhaps by the further placing of hands upon him to direct him from the premises. Had he at that time resisted, and, in a struggle to regain his freedom, killed the arresting person, there might be room for the application of the doctrine contended for. But the homicide here occurred some time after the arrest, while the defendant was out of the physical control of the officer. Defendant had gone into his own house, ostensibly to get his coat and hat. Instead of asserting his freedom by refusing to return to the custody of the officer, he armed himself, and, returning to where the officer waited, for the purpose, as he himself declares, of ordering him from the premises, shot him down, without giving him a chance to leave or waiting for any overt act in attempted furtherance of the alleged illegal arrest. The testimony of the defendant and his wife as to the alleged act of Fay in making a movement and reaching out his arm toward the defendant, who was approaching him with a gun in his hand, presents too trivial a circumstance to in any way justify the shooting. At the time of the homicide the deceased was using no force or show of force toward the defendant. In People v. Bradley, 23 Cal. App. 44, 136 Pac. 955, where a special policeman in plain clothes arrested a man on suspicion, without revealing his identity as a peace officer, and the prisoner, while walking with the officer to the jail, suddenly turned into an alley and shot the officer, it is held that the killing was not justifiable, nor was the act reduced from murder to manslaughter. The court says:

"We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of a willful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that therefore it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter. People v. Pool, 27 Cal. 573; Keady v. People, 32 Colo. 57, 66 L. R. A. 353, 74 Pac. 893."

[6] The instruction asked by appellant and refused by the court was as follows:

"The court instructs you that if you find from the evidence that the decedent, Fay, was attempting to make an unlawful arrest of the person of the defendant, Gilman, and that the killing occurred while the defendant was resisting such unlawful arrest, it will then be your duty to acquit the defendant of the charge of murder, both of the first and second degree, and consider only the question of whether or not he be guilty of manslaughter."

We are satisfied that there was no sufficient evidence before the jury that the shooting was done in resisting an arrest to justify the instruction. Even if technically a proper instruction, the circumstances of the shoot-

ing, as shown in evidence, were such as to render it extremely improbable that its absence was in any way prejudicial to the defendant, or at all affected the verdict of the jury; and the error, if there was such, might be disregarded under section 4½ of article 6 of the Constitution.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 59

TYLER v. J. I. METROVICH BLDG. CO., Inc., et al. SUNSET LUMBER CO. v. SAME. HENRY COWELL LIME & CEMENT CO. v. SAME. (Civ. 3256.)

(District Court of Appeal, First District, Division 2, California. April 10, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Action ⟹59—Allegations of complaints in consolidated actions may be taken together to remedy defects.

Actions having been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading; the allegations in one complaint remedying the defects or omissions in another.

2. Fraud ⟹50—Must be proved.

The presumption is always against fraud, which can be put in issue only by direct and positive allegations, and must be proved.

3. Mechanics' liens ⟹229—Claimant entitled to judgment of foreclosure, irrespective of amount due contractor from owner, who did not file bond.

When no bond to satisfy materialmen and laborers, with good and sufficient sureties, has been filed by the owner in compliance with Code Civ. Proc. § 1183, a lien claimant is entitled to judgment to foreclose his lien on the land of the owner, irrespective of the amount due from the owner to the contractor.

4. Mechanics' liens ⟹226—Where bond filed, court must restrict recovery from owner to amount due contractor.

Where a bond to satisfy laborers and materialmen, with good and sufficient sureties, in compliance with Code Civ. Proc. § 1183, is filed by the owner, if it is equitable to do so, the court must restrict a lien claimant's recovery to the aggregate amount found due the contractor.

5. Mechanics' liens ⟹271(1)—Claimant must allege that statute relative to owner's bond has not been met.

To entitle a lien claimant to foreclose on the property irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of Code Civ. Proc. § 1183, relative to bond to be given by the owner to satisfy laborers and materialmen, have not been met.

6. Election of remedies ⟹3(2)—Lien claimants cannot enforce bond against sureties, and set up invalidity to enable them to go against owner.

A party cannot denounce a contract as void, and at the same time demand enforcement of its provisions favorable to him, so that mechanic's lien claimants cannot enforce against the sureties bond given by the owner, and at the same time seek recovery against the owner on the theory of the invalidity or insufficiency of the bond.

7. Mechanics' liens ⟹223—Bond need not be filed personally by owner or contractor.

Code Civ. Proc. § 1183, does not require that the bond to satisfy materialmen and laborers shall be personally filed for record either by owner or contractor.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Consolidated actions by G. L. Tyler, doing business under the name and style of G. L. Tyler Company, the Sunset Lumber Company, and the Henry Cowell Lime & Cement Company, respectively, against the J. I. Metrovich Building Company, Incorporated, Adolph D. Grabstein, Max Grabstein, and others. From a judgment for plaintiffs, defendants Grabstein appeal. Reversed.

R. N. Wolfe, of Pittsburgh, and J. E. White, of San Francisco, for appellants.

Ralph H. Wight, of Martinez, for respondent Tyler.

C. L. Colvin, of Oakland, for respondent Sunset Lumber Co.

G. G. Hatch, of San Francisco, for respondent Henry Cowell Lime & Cement Co.

Creed, Jones & Dall, of San Francisco, for respondent Contra Costa Bank and others.

NOURSE, J. This is a joint appeal from a judgment in favor of the plaintiffs in three consolidated cases, brought to foreclose their several liens for services and materials furnished to the contractor under a written contract for the construction of a building on the lands of the defendants Grabstein, the owners, and to recover deficiency judgments against the contractor and the sureties upon his bond. Judgment was rendered as prayed in the several complaints, and the owners alone appealed.

The allegations of the complaints relating to the execution of the contract, the filing of the liens within due time, the furnishing of the labor and material, and the amounts due the respective plaintiffs therefor were all admitted. The three actions having been duly consolidated and coming on regularly for trial, a stipulation was made that certain allegations of the complaints were true, and that a bond in proper form was filed, but it was left open to the court to determine "whether the bond is sufficient in law." No other evi-

dence was offered by the plaintiffs, and thereupon the defendants Grabstein moved for a nonsuit, upon the ground that there was no evidence to sustain a judgment against them to enforce a lien upon their real property. This motion was denied, and the defendants declined to offer any evidence, whereupon judgment followed in favor of the plaintiffs as above stated.

There is but one point presented by the record, and that is: Upon whom rests the burden of proof that the sureties on the bond filed under section 1183, Code of Civil Procedure, are good and sufficient? The question of the sufficiency of the sureties upon this bond was not put in issue by any of the three complaints. In the Tyler complaint it was alleged that neither the owners nor the contractor filed a bond. But it was affirmatively alleged that one Cornelius did file a bond, and at the trial it was stipulated that such bond was in due form. The theory of this respondent was that the bond should have been personally filed for record by either the owner or the contractor. In the complaint of the Sunset Lumber Company it was alleged that a bond was duly executed, and was thereafter, before the commencement of the work under said contract, filed with the county recorder. A similar allegation appears in the complaint of the Henry Cowell Lime & Cement Company, with the additional allegation that said bond was so made and executed for the purpose of complying with the laws of the state of California. In each of the actions a copy of the bond was made a part of the complaint, the contractor and the sureties upon the bond were made parties defendant, and deficiency judgments were rendered against the contractor and these sureties.

[1-5] The actions having been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading; the allegations in one complaint remedying the defects or omissions in another. Olson-Mahoney Lumber Co. v. Dunne Investment Co., 30 Cal. App. 332, 351, 159 Pac. 178. Hence, if the bond was made and executed for the purpose of complying with the laws of the state of California, as alleged in the complaint of the Henry Cowell Lime & Cement Company, it is to be presumed that the defendants did not commit a fraud by filing a "straw" bond, as argued by respondents. The presumption is always against fraud. It can be put in issue only by direct and positive allegations and must be proved. When no bond has been filed, with good and sufficient sureties, in compliance with section 1183, the lien claimant is entitled to a judgment to foreclose his lien upon the land of the owner, irrespective of the amount due from the owner to the contractor. But where such a bond is filed, and it is equitable to do so, the court must restrict recovery from the owner to the aggregate amount found due from the owner to the contractor. In order to entitle the lien claimant to a foreclosure upon the property irrespective of the amount due from the owner to the contractor, it is essential to allege that the terms of this section have not been met.

[6] Furthermore, it is elementary that a party cannot denounce a contract as void, and at the same time demand enforcement of its provisions favorable to him. Here all the plaintiffs assumed that the bond was good and joined the sureties as parties defendant, and the court gave judgment against each of the sureties in accordance with the prayers of the complaints. They thus put in issue the bond in its entirety, without any allegations in their complaints sufficient to apprise defendants that at the time of the trial they would attack its validity.

[7] On behalf of the respondent Tyler it is argued that the requirements of section 1183, Code of Civil Procedure, were not met, because the bond was actually filed for record by one Cornelius, who appears to have been the architect for the owner. But the section does not require that either the owner or the contractor shall personally file the bond for record.

For the reasons given the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 107

Ex parte GILLETT. (Cr. 719.)

(District Court of Appeal, Second District, Division 2, California. April 13, 1920.)

1. Arrest ⊜29—Affidavit for arrest, on ground that defendant was guilty of conversion as agent, insufficient.

An affidavit for arrest, made by the assistant secretary of a corporation, setting forth that property described was that of the corporation until the fraudulent conversion of money arising from the sale thereof by defendant, with whom the property was placed as the corporation's agent, etc., is insufficient to warrant an arrest under Code Civ. Proc. § 479, subd. 2, authorizing arrest in case of embezzlement by an agent; the remainder of the affidavit alleging that the defendant at times actually unknown, but believed to be on or about two years next preceding the bringing of the suit, did unlawfully, wrongfully, and fraudulently convert to his own use and sell the described property, etc., for it did not appear that the fiduciary relation existed at the time of the misappropriation.

2. Arrest ⊜27—Affidavit on information and belief, and not stating facts, held insufficient.

Where an affidavit as a whole, made by an officer of a corporation seeking the arrest of a defendant, under Code Civ. Proc. § 479, subd.

4, on the ground that he had fraudulently converted property of the corporation, showed that the officer had no personal knowledge of the transaction, and the facts on which information and belief was founded were not given, such affidavit is insufficient, under section 481, notwithstanding many of the averments as to fraudulent misappropriation, taken by themselves, did not appear to be made on information and belief.

3. Arrest ⊜29—Affidavit should set forth more than mere conclusion of fraud.

An affidavit seeking defendant's arrest, under Code Civ. Proc. § 479, subd. 4, providing for arrest in case of fraudulent conversion, etc., which merely set forth that defendant had fraudulently misappropriated property, without averring the circumstances, is insufficient to justify an order of arrest, in view of the fact that such averment would not support a judgment in a civil action.

Application by F. F. Gillett for writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release from custody. Petitioner discharged.

M. M. Meyers, of Los Angeles, for petitioner.

W. C. Smith, of Los Angeles, for respondent.

SLOANE, J. The petitioner is seeking under this writ to secure his discharge from the custody of the sheriff of Los Angeles county. The sheriff justifies the detention of petitioner under an order of arrest issued by the superior court of Los Angeles county by virtue of the provisions of section 479 of the Code of Civil Procedure for arrest and bail in civil actions. It is contended by petitioner that the affidavit under which the arrest was ordered is not sufficient to give the court jurisdiction to make the order.

The affidavit purports to be in pursuance of subdivisions 2 and 4 of said section 479. Under subdivision 2 it is apparently sought to charge the defendant with having converted to his own use and embezzled money or property belonging to the plaintiff while the same was in defendant's custody in a fiduciary employment as agent of plaintiff, and in the course of his employment as such agent. Under subdivision 4 it is attempted to charge the defendant with fraud in concealing or disposing of the property for the detention or conversion of which the action is brought. At any rate, if the affidavit does not state facts bringing the matter within these provisions of the subdivisions named, it is wholly and hopelessly futile.

[1] The matters alleged in the affidavit, so far as they are material in determining the objections to its sufficiency, are as follows:

"R. H. Chappel, being first duly sworn, deposes and says: I am the assistant treasurer of the Standard Scale & Supply Company, a corporation, plaintiff herein; that at all of the times herein alleged the property hereinafter described was the property of plaintiff herein, until the fraudulent conversion of the money arising from the sale thereof by defendant, with whom all of said personal property was placed by plaintiff, as plaintiff's agent; * * * that defendant herein, at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein, did unlawfully, wrongfully, and fraudulently convert to his own use and dispose of and sell the hereinbefore described personal property, with the intent to cheat and defraud plaintiff of said personal property and the value thereof; that defendant has received the full value of said property in money, and has unlawfully, wrongfully, and fraudulently refused to pay to plaintiff, or account to plaintiff, for said money, and no part of the money so received therefrom by the defendant has ever been delivered to or paid to plaintiff. * * *"

It is apparent that an essential of an affidavit, to justify the order of arrest under subdivision 2, is that the misappropriation or conversion of the property occurred in the course of the defendant's employment as agent of plaintiff. The fact that he was at any time such agent is only impliedly stated, by referring to the defendant as one "with whom all of said property was placed by plaintiff, as plaintiff's agent." This averment, such as it is, refers to the time when the property was intrusted to defendant. The time when the alleged misappropriation took place is expressly declared to be unknown to affiant or plaintiff, and it is nowhere intimated that the fiduciary relation existed at that time, or that the acts complained of were in the course of his employment.

[2] As to the averment charging fraudulent conversion under subdivision 4 of the section, it may be said to be substantially in the language of the statute. It has been held that an affidavit charging the acts substantially in the language of the statute is sufficiently specific, if the allegations are made upon affiant's own knowledge of the facts. Matter of Caples, 26 Cal. App. 786, 148 Pac. 795; In re Keene, 34 Cal. App. 263, 167 Pac. 194. In the latter decision the court says:

"The affidavit upon which an order of arrest in a civil action is asked need not state the evidentiary facts upon which the principal fact rests, if instead thereof the affidavit follows the statute and declares in positive terms that such principal fact exists."

But it is further added in the opinion that—

"This is subject, of course, to the qualification that, if the facts stated in the affidavit show that necessarily affiant is acting only on information and belief other than actual knowl-

edge, then the evidentiary facts must be stated."

The affiant in this case describes himself as the assistant treasurer of the plaintiff corporation, as of the date of the affidavit. It does not appear how far back his connection with the plaintiff company extended, or whether he had any personal knowledge of its transactions, and, as already pointed out, he expressly avers that the alleged wrongful acts of defendant occurred "at times actually unknown to affiant and plaintiff corporation, but believed to be on or about two years next preceding the bringing of the suit herein." How long prior to the date of the affidavit the suit was begun does not appear. In any event, it must be apparent that affiant had no personal knowledge of how or why or when, if at all, defendant disposed of plaintiff's property. It is at least a fair presumption that, if he had no knowledge during a period of more than two years after the happening of the event that there had been a conversion of plaintiff's goods, he was not in a position to testify on his own knowledge of the manner and nature of the conversion. Such presumption was entertained in Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 728, where it is said:

"Several of the statements of fact are made expressly on information and belief, while many others, although not so stated in terms, are of a character which could in their nature only have been so made, whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express * * * requirements of the statute" (Code of Civil Procedure, § 481).

[3] It is difficult to understand how, even on the most positive statement of personal knowledge, the bare averment that the act was done fraudulently can be accepted as a statement of fact in support of an order of arrest, whereby in a civil action a defendant is deprived of his liberty, when the same statement would constitute an insufficient averment of the fraud in the complaint to recover the money or property claimed to be misappropriated. Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016; Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26. Fraud is the gist of this proceeding. Its existence should be determined from the evidence stated, and not as a conclusion of the affiant.

"Where no prosecution for perjury would lie against the affiant, predicated upon the falsity of any of the matters set forth in the complaint, it is radically insufficient." Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135.

In Ex parte Fkumoto, supra, the court, while impliedly conceding that allegations of fact made in the words of the statute are sufficiently stated, in discussing the requisite proof of fraud under an affidavit in arrest and bail, says:

"It is not enough to assert such fraudulent intent in general terms. Like the statement or proof of a cause of action for fraud, the specific facts relied on must be shown, that the court itself may deduce the fraud, and not leave the question of the sufficiency of his facts to be passed upon by the party. Morris v. Talcott, 96 N. Y. 107. If this is so in cases not involving the liberty of a citizen, a fortiori is it demanded in a proceeding such as this. Otherwise the party is constituted the arbiter of his own rights." "A warrant of arrest cannot be issued on hearsay, nor upon any statement, however positive, founded upon hearsay." Lay v. Superior Court, 11 Cal. App. 558, 105 Pac. 775.

It may be added that such warrant of arrest cannot be made upon the mere statment of a conclusion of law.

In this case the defendant, petitioner here, seems to have come lawfully into the possession of the property involved. It does not appear when it was delivered to him, but it is admitted that for a period of two years or upwards the plaintiff corporation had had no knowledge of its condition or whereabouts, or the circumstances under which the petitioner disposed of it. It would be the establishment of a dangerous precedent to permit the petitioner here to be deprived of his liberty upon the bare statement of a conclusion or opinion of the assistant treasurer of the company that there was a fraudulent conversion of the goods.

The petitioner is discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 139

BAYLESS v. REED et al. (Civ. 3186.)

(District Court of Appeal, Second District, Division 2, California. April 16, 1920.)

1. Appeal and error ⊂=1175(2) — Appellate court cannot render judgment for amount due plaintiff to save expenses of another trial.

Under Const. art. 6, §§ 4, 4½, the appellate court, in an action on a claim against a decedent's estate, cannot find for plaintiff the amount due him to avoid the expense and necessity of another trial in the case.

2. Husband and wife ⊂=259—Wife's earnings held community property.

The earnings of a wife for her services as nurse, sought to be recovered by her husband in an action against a decedent's estate, are community property.

3. Witnesses ⊂=143(5)—Wife not incompetent as assignor of husband in his action against decedent's estate to recover for wife's services.

Where a husband is suing for services rendered by his wife to a person since deceased,

his claim is not derived from his wife, since he is entitled to the value of her services by virtue of his marital rights; hence she is a competent witness for him, her testimony not being excluded by Code Civ. Proc. § 1880, subd. 3, excluding testimony of parties or assignors of parties in such cases.

4. Witnesses ⊂⊃138—Statute excluding testimony in action against decedent's estate applies only to parties and assignors.

Code Civ. Proc. § 1880, subd. 3, excluding the testimony of parties or assignors of parties in actions against a decedent's estate, was not intended to extend the disqualification to any other persons except parties or assignors of parties.

5. Witnesses ⊂⊃140(9)—Wife not incompetent because of interest in husband's action against decedent's estate to recover for her services.

In an action by a husband against a decedent's estate to recover for his wife's services, the fact that should plaintiff recover the wife would be interested in the result, the fruits of such recovery being community property, does not make her an incompetent witness under Code Civ. Proc. § 1880, subd. 3.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by C. R. Bayless against J. F. Reed and another, as executors of the last will of Edwin Ferris, deceased. Judgment for defendants, and plaintiff appeals. Reversed.

H. W. Scheld, of San Diego, for appellant.

Ward, Ward & Ward, of San Diego, for respondents.

THOMAS, J. By this action plaintiff seeks to recover $2,354.92 from the defendants, executors of the estate of Edwin Ferris, deceased, for work, labor, and services performed and supplies furnished to said Ferris, at his special instance.

The answer of defendants to plaintiff's third amended complaint, after admitting formal parts only, denied each and every material allegation thereof, and set up an alleged agreement under and by virtue of which plaintiff performed the work and furnished the materials, etc., for which he now seeks pay, asserting that said decedent, Ferris, had paid plaintiff in full for all said service. We think it unnecessary to recite in detail the terms of this alleged agreement. The case was tried by the court without a jury. Findings were expressly waived. Judgment went for plaintiff in the sum of $102.92. There was no motion for a new trial. The appeal is from the judgment, by the so-called "alternative method."

We have read the entire record, consisting, as it does, of the clerk's transcript and reporter's transcript, also appellant's opening brief and respondents' answering brief, from which it appears that both parties hereto seek a reversal of the judgment.

[1] Appellant in his brief says:

"Under section 4½ of the Constitution of the state of California, and when it appears from the whole of the record in a case on appeal that substantial justice should be done, the appellant asks this appellate court, without having to undergo the expense and necessity of another trial herein, that this court find for plaintiff the amount which is justly due him in this case."

Much as we might desire to comply with the foregoing interesting request, the answer is that the court is without jurisdiction to grant it. Section 4, art. 6, Const. A large portion of the amount claimed by plaintiff as aforesaid was for the services of his wife as nurse for deceased at the latter's special instance and request, and in order to prove the allegations of his complaint as to such services, plaintiff offered his wife, Minnie E. Bayless, as a witness in his behalf, whose testimony, if received, would have tended to show such allegations to be true. To the testimony of this witness the following objection was interposed:

"We object to this witness testifying as to the transactions had with the decedent on the same ground, that of section — subdivision 3 of section 1880 of the Code of Civil Procedure. This witness is not, of course, the nominal party, but the section is broader than to exclude nominal parties; it excludes not only parties or assignors of parties, it also includes—excludes persons in whose behalf the action is prosecuted. Now, of course the testimony has not progressed far enough to show, but the pleadings indicate so clearly, the nature of the claim being presented against this estate, it is for services rendered, a larger part is a claim for services of this witness, as a member of the community of which she and the plaintiff are members, and by the same reasoning and on the same theory the testimony of this witness is also incompetent."

This objection was at first overruled, but later, and after the witness had testified fully, the ruling, so far as it relates to that portion of the witness' testimony in reference to plaintiff's claim for her services as nurse, was set aside, and the objection thereupon sustained. It is claimed by appellant that this ruling was erroneous, and we think the contention must be sustained.

[2, 3] That the earnings of the wife in such a case as this are community property is too well settled to require the citation of authorities. Such being the case, we think that where a husband is suing for services rendered by his wife, his claim is not derived from her, since he is entitled to the value of her services by virtue of his marital rights, and she, therefore, is a competent witness for him. 40 Cyc. 2295; Porter v. Dunn, 131 N.

Y. 314, 30 N. E. 122; Hopkins v. Clark, 90 Hun, 4, 35 N. Y. Supp. 360; Hiskett v. Bozarth, 75 Neb. 70, 105 N. W. 990; Parker v. Wells, 68 Neb. 647, 94 N. W. 717; Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; Cullen v. Bisbee, 168 Cal. 695, 144 Pac. 968.

[4] Nor do we think that it is intended by this section to extend the disqualification to any except parties or assignors of parties. Todd v. Martin, 4 Cal. Unrep. Cas. 805, 37 Pac. 872.

[5] If it be contended in this case that should plaintiff recover, the wife would by that fact be interested in the result because of the fruits of such recovery being community property, the answer, as we see it, is that in legal contemplation she would not be invested with any legal interest therein. In the case of Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532, the Supreme Court of Iowa held that while the statute provided that "no party to an action, or the wife of such party, shall be examined as a witness in regard to any personal transaction between such witness and a person since deceased, as against the administrator of such deceased person," still, it not appearing that the wife had any part therein, in such a case she was a competent witness. Such cases as we have found holding to the contrary are predicated upon statutes differing in various respects from ours.

For these reasons we think the ruling referred to was prejudicial.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

47 Cal. App. 72

WOODSTONE MARBLE & TILE CO. v. DUNSMORE CANYON WATER CO. et al. (Civ. 3249.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1920.)

1. Corporations ⟸122—Buyer at execution sale of stock of mutual water corporation does not necessarily acquire title.

The rule that a buyer of corporate stock at a sale under execution acquires absolute title, if the stock stood on the corporate books in the name of the judgment debtor and the buyer had no notice of the claim of another, does not apply to stock of a mutual water corporation not organized for profit but merely to supply water to stockholders.

2. Waters and water courses ⟸154(1)—Water right held appurtenant to land, though represented by stock in mutual company.

Where the owners of water rights appurtenant to their several tracts of land formed a mutual corporation and transferred their water rights to the corporation in exchange for stock representing the right to water, the water right remained appurtenant to the land notwithstanding the formal change in ownership and passed to a mortgagee of the land and appurtenant water rights as against a subsequent execution buyer of the stock which still stood on the corporate books in the name of the mortgagor.

3. Appeal and error ⟸909(1)—Compliance with statute making water stock appurtenant to land presumed to support judgment.

In the absence of anything in the record, it will be presumed that a water corporation complied with the requirements of Civ. Code, § 324, to make its stock appurtenant to the lands, if that is necessary to support the court's conclusion that the stock was appurtenant.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Woodstone Marble & Tile Company against the Dunsmore Canyon Water Company, William Garland, and others, in which William Garland was the only defendant who appeared and answered. Judgment for defendant Garland, and plaintiff appeals. Affirmed.

Barstow, Rohe & Jeffers, of Los Angeles (C. E. Spencer, of Los Angeles, of counsel), for appellant.

Hunsaker, Britt & Cosgrove, Le Roy M. Edwards, and G. Harold Janeway, all of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought a decree adjudging it to be the owner of ten shares of stock in the Dunsmore Canyon Water Company and an order requiring said company to issue to it a certificate for the same.

The Dunsmore Canyon Water Company, together with Mrs. John Leenhouts and her husband, who were made parties defendant, suffered default. Defendant Garland filed an answer, and the result of the trial was a judgment against the plaintiff, from which it appeals on the judgment roll, claiming that it is entitled to have judgment in its favor entered upon the findings.

The facts as disclosed by the findings, are in substance as follows: In 1886 one Briggs, being the owner of 900 acres of land and the right to use thereon $^{90}/_{110}$ of all the waters of Dunsmore Canyon, subdivided the same into 90 ten-acre parcels under the name of Crescenta-Canada tract, which parcels he sold and conveyed, together with the right to $^{1}/_{110}$ of the said waters of Dunsmore Canyon as an appurtenance to each of said ten-acre parcels of land. In 1908 Mrs. Leenhouts, by mesne conveyance, acquired lot 1, block K, of this subdivision, with which there was conveyed to her as an appurtenance thereto $^{1}/_{110}$ of all the waters of Dunsmore Canyon, which supply of water, in the cultivation of said land and the irrigation of the same in growing fruits and other

crops, was used thereon from 1886 to the bringing of this action, and without which said land would be of little or no value for the growing of crops thereon. In the year 1908 certain owners of these ten-acre tracts of land and the rights to the waters of Dunsmore Canyon so acquired as appurtenant thereto, organized a mutual water company, designated the Dunsmore Canyon Water Company, the purpose of which was to facilitate the collection, management, and distribution of the waters of said canyon to the owners of said lands in proportion to their respective rights to said waters; that thereupon Mrs. Leenhouts, as owner of said lot 1, block K, in said tract, and other property owners likewise having interest in the waters of said canyon, conveyed the same to the said corporation, and, as consideration for such conveyance, immediately received shares of the capital stock of said company in proportion to their original rights to the waters of Dunsmore Canyon which had theretofore been conveyed to them as an appurtenance to their lands, there being issued to Mrs. Leenhouts the ten shares of stock in controversy; that said water company is a mutual water company, and, without payment of dividends or profits, distributes the waters to its stockholders in proportion to the number of shares possessed by each; that defendant Garland acquired title to said lot 1, block K, by purchase at a sale duly made upon the foreclosure of a mortgage executed by Mrs. Leenhouts as owner, whereby she mortgaged to him said lot, consisting of ten acres of land, "together with all and singular the * * * water and water rights, pipes, flumes and ditches thereunto belonging"; that at the time of the execution of said mortgage and the sale so made under foreclosure, followed by the execution of a deed to said property, the ten shares of stock in question stood upon the books of said company in the name of Mrs. Leenhouts, and no mention of the stock as such was made in the mortgage and no transfer or delivery thereof was made to the mortgagee. In an action brought against Mrs. Leenhouts by plaintiff, it caused the stock of which she, as shown by the stock books of said company, appeared to be the unconditional owner, to be attached, and, upon judgment being obtained, purchased the shares at sale under an execution issued upon said judgment, all of which acts were had and taken without notice to plaintiff that any one other than Mrs. Leenhouts had any claim, right, or title to the stock. As ultimate facts the court found:

"That at the time of the execution and delivery of said mortgage to the said William Garland, all right of Mrs. John Leenhouts to receive water from the said Dunsmore Canyon Water Company was a right appurtenant to the aforesaid lot 1 in block K of the Crescenta-Canada tract, and formed a part of the property mortgaged at said time to the said defendant William Garland; and that the said William Garland * * * is now, and has been at all times since, the owner and holder of said lot * * * together with all water rights, pipe lines and appurtenances thereunto belonging, or in any wise appertaining"; and that "said William Garland is the owner and holder of, and entitled to the possession of, the aforesaid ten shares of the capital stock of the Dunsmore Canyon Water Company, standing in the name of the defendant Mrs. John Leenhouts, and all of the right, title, and interest of the said Mrs. John Leenhouts therein and thereto, and is entitled to have the said stock transferred upon the books of said corporation into his own name." And, further, "that the said William Garland is the only person who has any right, title or interest in or to said ten shares of stock, and that the plaintiff has no right, title or interest in or to said ten shares of stock, or any part thereof."

[1] Upon these facts appellant invokes the well-recognized rule that where one at a sale under execution, and in the absence of facts shown which charge him with notice that another has an interest therein as owner or pledgee, buys shares of corporate stock standing upon the books of a corporation in the name of the judgment debtor, he acquires absolute title thereto. Farmers' etc., Bank v. Wilson, 58 Cal. 600; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. Conceding the general application of this rule to purchases of stock so made in a corporation conducted for profit and distributed to its shareholders as dividends, it is, both upon principle and authority, inapplicable to the facts found to exist in the instant case.

[2] That prior to the formation of the Dunsmore Canyon Water Company Mrs. Leenhouts, by virtue of a deed of conveyance, was, as owner of the ten-acre tract of land, entitled to $1/110$ of the flow of water in said Dunsmore Canyon as an appurtenance thereto, admits of no controversy, and appellant concedes that neither the deed nor the appurtenance would be the subject of a separate levy and sale, since the right to the water for use upon the land must, upon such facts, be deemed part of the real estate. This being true, how could the ownership be terminated or the appurtenance severed by the mere substitution of the stock for the deed as evidence of ownership? The right to the flow of water was in no wise changed and the use thereof was identically the same after the issuance of the stock as it was prior thereto. The corporation was not created for profit and to pay dividends to the stockholders, but solely and alone for the convenient and more economical management of a common source of water in the distribution of and from which, according to their respective rights, the owners of these

several tracts of land were entitled to a supply of water for use thereon. While it is true that one owning a water right appurtenant to his land may, as held in Gould v. Stafford, 91 Cal. 146, 27 Pac. 543, convey it separate from the land and thus sever the connection, nevertheless the mere exchange of one muniment of title to the water right for another cannot be deemed a severance thereof from the land to which it was concededly appurtenant. As said in Estate of Thomas, 147 Cal. 236, 81 Pac. 539, where the facts were substantially the same as those here involved:

"There was a formal conveyance of the legal title of the several water rights to the corporation, but simultaneously the grantors received certificates of stock which constituted them the beneficiaries of everything so conveyed in the proportion of their original interests. As stockholders they became entitled to receive their proportionate share of all that the company was authorized to divide. It had nothing but water to divide, and of that they received the same share and in the same manner and order in which they had received it before the conveyance. And the successive owners of the six-acre tract applied it after the conveyance to that tract as they had done before. All that happened was that a right which they had held and exercised under one title before the conveyance was held and exercised under a (formally) different title afterwards. There was in fact no moment of time when they lost the right to use the water, and there was no cessation of its use on the particular tract. Neither the corporation nor any other persons acquired any right to divert it to another use. And the question whether a water right is appurtenant to a particular tract does not depend in the least degree upon the source of title to the water right; it is made appurtenant to the land by use on the land for its benefit, and here the undisputed right of the Fullers and the decedent to receive eight hours' run of all the company's water out of every three hundred and sixty hours was made and continued appurtenant to the six-acre tract by use on the land in the irrigation of trees that greatly increased its value, and would perish without it. In view of these facts it is clear that the water right remained appurtenant to the land, that it would have passed by conveyance of the land, and, if so, that it passed by the devise to respondent (Civ. Code, § 1311), and did not fall into the residue distributable to the appellant."

The water right in question evidenced by the stock was an appurtenance of the land. The deed followed the foreclosure of a mortgage duly recorded long before plaintiff attached the stock and wherein the owner of the land mortgaged the same, "together with all water rights, pipe lines, ditches and appurtenances thereunto belonging." Hence it follows that Garland acquired title to the water right, and his ownership thereof is in no wise affected by any omission as to delivery or transfer of the stock prior to plaintiff's levy and sale thereof made subsequent to the execution and recording of the mortgage.

[3] Moreover, section 324, Civil Code, provides that a corporation organized for supplying water for irrigation purposes and domestic use may in its by-laws provide that such water shall only be sold and distributed to the owners of its capital stock, and that such stock shall be appurtenant to the lands, when described in the certificate issued therefor, provided such by-law be recorded in the office of the recorder of the county in which the lands are situated, and in such case the shares of stock so located on such land shall only be transferred therewith and pass as an appurtenance thereto. Now, while it appears the Dunsmore Canyon Water Company was a corporation of the description stated in said section, the record is silent as to whether it had complied with the provision in regard to adopting and causing to be recorded a by-law that the stock should be deemed appurtenant to the lands described in the certificate therefor. Nevertheless, conceding the ultimate finding, to the effect that Garland was the exclusive owner of the stock, depended solely upon a showing of compliance on the part of the corporation with the provision referred to, we must, in the absence of evidence to the contrary or anything appearing in the probative findings which negatives such fact (and there is nothing), assume, if necessary in support of the judgment, that proof of compliance was in fact made and the court based its conclusion thereon. In United States Film Co. v. United States Fidelity & Guaranty Co., 186 Pac. 364, this court said:

"Where an appellant complains of errors committed by the trial court, it devolves upon him to produce a duly authenticated record affirmatively showing the alleged error; otherwise the court on appeal must, if under any circumstances the ruling could be deemed correct, assume that such condition or circumstance was made to appear."

To the same effect are Escondido High School District v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401, and Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

Hence, for this reason alone, it cannot be said upon the record that the court erred in making the finding of ultimate fact upon which the judgment rests. If such compliance was not shown, then, in order to avail itself of the point, appellant should have brought up a record disclosing the want thereof.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 54

BRUSH v. SOUTHERN PAC. CO. et al.
(Civ. 3310.)

(District Court of Appeal, First District, Division 1, California. April 9, 1920. Hearing Denied by Supreme Court June 7, 1920.)

1. Evidence ⟸243(4)—Declaration of agent as to past event not part of res gestæ inadmissible against principal.

Declaration of agent that a bridge was faulty from the manner in which it had been constructed, not being made in regard to a transaction in the course of his agency depending at the time, so as to make the declaration a part of the res gestæ, is inadmissible against his principal.

2. Limitation of actions ⟸55(7) — Only on storm waters being backed by faulty construction of bridge does statute run.

Building of bridge by defendants not being a nuisance in itself or an invasion of plaintiff's rights, but becoming so only when, because of faulty construction, it diverted storm waters and débris from the channel onto plaintiff's land, the statute commenced to run only on the receipt of such consequential injuries.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Albert L. Brush against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

Bradner W. Lee, Kenyon F. Lee, and Bradner W. Lee, Jr., all of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action, alleging that the defendants so negligently constructed, and maintained, a bridge over a waterway, or "wash," extending from the San Dimas Canyon in the Sierra Madre Mountains, that during an unusually heavy rainfall, in the months of January and February, 1914, large quantities of trees, rocks, orchard cuttings, railroad ties, planks, and other débris were carried by the water, and accumulated against and between the piling of said bridge, clogging up the waterway, causing the water to dam up for a distance of 800 feet back of the bridge, destroying 75 orange trees, and injuring 500 others; also causing gravel to be deposited over about six acres of plaintiff's land, to a depth of one to three feet. Judgment was entered for the plaintiff for the sum of $7,200, after a verdict for that amount by a jury, and the defendants appeal.

In defense of the action the defendants set up that the lands described in plaintiff's complaint were as a matter of fact, part of the natural course and bed of the San Dimas wash, which the plaintiff set about to reclaim; that, by reason of the construction of a retaining wall by the plaintiff, along the natural line of the bank of the wash, in said work of reclamation, the water was prevented from following its natural course; and, further, that the bridge was of substantial construction, erected in 1884, permanent in its nature; and that any cause of action against the defendants by reason of the faulty erection of the bridge was barred by the statute of limitations. Defendants also alleged an unprecedented amount of rainfall as the cause of the excessive flow in the waterway.

[1] The judgment must be reversed. After the overflow W. H. Whalen, division superintendent of the Los Angeles division of the defendant Southern Pacific Company, made an examination of the bridge. Over the objection of the defendants, witness Carlson was permitted to testify that upon the occasion of this inspection Whalen stated that the bridge was not properly constructed because of the piling being driven diagonally across the stream. The purpose of the introduction of this testimony was to show that the bridge was an obstruction to the stream. The admission of this testimony was error. The conversation not being part of the res gestæ was inadmissible as a declaration by the employé against his employer. Silveira v. Iversen, 128 Cal. 188, 191, 60 Pac. 687. The bridge was constructed many years before the division superintendent became in any way connected with defendant, and the declaration, if made by him concerning it, was inadmissible as not made in regard to a transaction in the course of his agency, depending at the very time of the declaration. Beasley v. San Jose Fruit-Packing Co., 92 Cal. 388, 28 Pac. 485; Umstead v. Automobile Funding Co. of America, 185 Pac. 1011.

Respondent seeks to justify the admission of this testimony upon the theory that it was alleged in the complaint, and denied in the answer, that the defendants knew, or could have known by the exercise of ordinary diligence, that it was necessary for them to keep said bridge open, and free and clear of all débris, in order that the natural flow, and free passage, of rain and storm water, and such débris, would not be prevented. It is also urged that Whalen's declaration should not have prejudiced defendants, because they themselves developed that the wooden pile bridge had been removed and a steel span bridge suspended, after the damage. Whalen was, himself, called to the stand and denied Carlson's testimony. Respondent argues, therefore, that it was for the jury to decide which of the two men to believe. None of these contentions remove the testimony from the application of the rule adhered to in the foregoing authorities.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[2] Appellants contend that the cause of action of the plaintiff is barred by the statute of limitations, not having been begun within either two or three years following the erection of the bridge which was proved to be a permanent structure. They take the position that the limitation period for injury to land, under such circumstances, begins to run from the completion of the structure, although the injury may occur during periods of high water, during successive years thereafter. Appellants have misconstrued the nature of the present action. It is not one to recover for an injury, direct and resulting immediately, from the construction of the bridge, but relates to damages which were an after-result from the erection of that structure. In other words, the action for damages for the injury to the plaintiff's land, caused by the obstruction of the storm waters in San Dimas Canyon, as the result of the construction of the bridge by the defendants, is not for a trespass upon real property, but it is in the nature of an action upon the case at common law for a consequential injury. Daneri v. Southern California Railway Co., 122 Cal. 507, 55 Pac. 243; Hicks v. Drew, 117 Cal. 305, 309, 49 Pac. 189.

The true rule as to the application of the statute of limitations in such cases is stated by Mr. Redfield, in his work on Railways (6th Ed., vol. 1, p. 595), as follows:

"The general rule in regard to the time of the accruing of the action is that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act; but where the act is injurious only from its consequences, as the undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury."

The case at bar falls within the decision of St. Louis, etc., Co. v. Biggs, 52 Ark. 240, 244, 12 S. W. 331 (6 L. R. A. 804, 20 Am. St. Rep. 174), where the Supreme Court of Arkansas said:

"Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be, at once, fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. Railway Co. v. Morris, 35 Ark. 622; Railway Co. v. Chapman, 39 Ark. 463. But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of. [Citing cases.]"

The building of the bridge by the defendants was not of itself a nuisance or an invasion of plaintiff's rights, but became so only when, by reason of its alleged faulty construction, it diverted the storm waters and débris from the usual channel, upon plaintiff's land. International & G. N. R. Co. v. Kyle, 101 S. W. 272; St. Louis, I. M. & S. Ry. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207; Texas & P. Ry. Co. v. Ford, 54 Tex. Civ. App. 312, 117 S. W. 203; Hill v. Empire, etc., Co. (C. C.) 158 Fed. 881. Suit in the instant case having been commenced within two years after the receipt of these consequential injuries by plaintiff, his causes of action were not barred by the statute of limitations. Daneri v. Southern California Railway Co., 122 Cal. 507, 55 Pac. 243; Hicks v. Drew, 117 Cal. 305, 309, 49 Pac. 189.

The authorities relied upon by appellants to the contrary deal with cases where injuries caused by permanent structures infringed immediately upon plaintiff's rights. Such instances are, where water is permanently polluted, streams immediately caused to flow back on adjacent land, and currents of a river turned aside by permanent dikes, at once begin to cut into the opposite bank. They do not deal with cases similar to the one at bar, where a permanent and lawful structure has, for many years, existed without any consequential injury resulting from its construction.

The appellants complain of the giving of certain instructions and of the refusal of the trial court to give others. Taking the charge as a whole, we think the jury was properly instructed.

The judgment is reversed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 95

BLEDSOE v. STUCKEY. (Civ. 2540.)

(District Court of Appeal, Second District, Division 2, California. April 13, 1920. Rehearing Denied May 12, 1920.)

1. Account stated ⊂=4—Execution of note was stating of account.

Execution of a note was the stating of an account between the parties.

2. Evidence ⊂=469—Payments on note prior to execution inadmissible as varying writing.

In an action to recover a balance due on a note and to foreclose a chattel mortgage securing it, evidence of payments prior to execution of the note applying towards its satisfaction was inadmissible as varying the terms of the instrument by parol.

3. Payment ⊂=21, 67(1) — Receipt of check, though not payment, presumptively so where check not returned.

The mere receipt of a check by the creditor from the debtor does not operate as payment,

but where the creditor fails to return it, or to make any protest of nonpayment, and in no way questions the transaction, he will be presumed to have collected the money.

4. Set-off and counterclaim ⊂=29(1)—Overpayment held proper matter for counterclaim.

In action to recover balance due on promissory note and to foreclose chattel mortgage securing it, facts alleged by defendant in his cross-complaint as to overpayments, all growing out of a transaction of which the note sued on was a part, *held* to constitute proper matter of counterclaim, under Code Civ. Proc. § 438, subd. 2.

5. Pleading ⊂=148—Cross-complaint for overpayments insufficient without averment of demand or failure to repay.

In action for balance due on a note and to foreclose chattel mortgage securing it, cross-complaint by defendant for certain overpayments made by him *held* insufficient, in the absence of allegation of either demand for or failure to repay.

6. Appeal and error ⊂=1170(3)—Overruling of demurrer to cross-complaint harmless.

In an action to recover a balance on a note and to foreclose chattel mortgage securing it, overruling of plaintiff's demurrer to defendant's cross-complaint for certain overpayments on the note, insufficient in the absence of an averment, *held* harmless to plaintiff, and to be disregarded by the appellate court under Const. art. 6, § 4½.

7. Pleading ⊂=403(2)—Omission from complaint may be aided by answer despite erroneous overruling of demurrer.

An express denial by answer of matter omitted from the complaint cures the omission —a rule which applies even though a demurrer to the sufficiency of the complaint has been erroneously overruled.

8. Interest ⊂=47(1)—Maker of note cross-complaining for overpayments not entitled to interest before filing cross-complaint.

In absence of showing that payee of note willfully or wrongfully received overpayments from the maker, in absence of demand upon him for repayment by maker prior to filing of maker's cross-complaint in payee's action on the note for a balance due, the maker was not entitled to interest on any amount of his recovery under his cross-action prior to the date of filing his cross-complaint.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by James B. Bledsoe against L. C. Stuckey. From judgment for defendant, plaintiff appeals. Reversed.

Bledsoe & Phipps, of San Bernardino (Leonard, Surr & Hellyer, of San Bernardino, of counsel), for appellant.

A. C. Galloway, of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover an alleged balance of $313.30 on a promissory note for $2,675, and to foreclose a chattel mortgage securing the same. Defendant by his answer pleaded payment of the note in full, and by cross-complaint seeks to recover from plaintiff the sum of $546, which defendant claims to have paid by mistake in excess of his indebtedness on the transaction. The judgment was that plaintiff take nothing by his action, and that the defendant recover the amount of overpayment alleged in his cross-complaint. The main contention on the appeal is as to the application of two payments, aggregating $700, made by defendant to the plaintiff prior to the execution of the note sued on.

The transaction out of which the entire controversy grows was substantially as follows: In May, 1911, an agreement was entered into between the parties whereby the plaintiff sold to the defendant a lot of cattle and all of plaintiff's interest under a certificate of purchase from the state of California in 280 acres of land in Kern county. The price to be paid for the land was $400, as a fixed sum, with a further payment of $600 if plaintiff's interest in a portion of the tract should be confirmed by the courts in pending litigation with certain adverse claimants. The number of head of live stock purchased was not specified in the original agreement, further than that defendant was to take all of plaintiff's cattle at $22.50 per head, excepting some 15 or 20 head, which plaintiff reserved. There is conflict in the evidence as to how many head of cattle were actually sold and delivered to defendant. The evidence taken on the trial shows that at the date of the original agreement defendant paid to appellant on account of the transaction $200, and in December of the same year the further sum of $500. Subsequently, on January 15, 1912, by way of an adjustment of his indebtedness, defendant executed the promissory note sued on for the principal sum of $2,675, and a chattel mortgage securing the same on 120 head of the cattle purchased from plaintiff and 100 additional cattle of his own. The defendant testified that he only received 120 head of cattle from the plaintiff, and that this note and mortgage for $2,675 covered the price he was to pay for them. It is conceded that the land litigation was determined later in plaintiff's favor, and that defendant, subsequent to the execution of the note, became liable for the additional $600 agreed to be paid for the land, making a total liability on the entire transaction, according to defendant's contention, and as the court found, of $3,675. Defendant claims credit on this amount for the two payments aggregating $700 made prior to the note and mortgage, which, if allowed, with the subsequent payments shown in evidence, would leave the balance in de-

fendant's favor as claimed under his cross-complaint. Plaintiff's testimony is to the effect that there were at least 140 head of cattle sold to defendant, besides one or two horses; that the entire indebtedness was several hundred dollars in excess of $3,675; and that the $700 paid prior to the execution of the note and mortgage left a balance of $2,675 for which the note was given, besides the contingent balance of $600 on the land.

[1, 2] If the only question involved was the sufficiency of the evidence to sustain the findings of the court, we would be compelled under this conflict in the testimony to uphold the findings under the contention of defendant that his total indebtedness amounted to only $3,675, and that he was entitled to credit thereon for the $200 and $500 payments made prior to the execution of the note. But it is contended on behalf of appellant that the admission of evidence of these prior payments as applying toward the satisfaction of the note was error. This testimony was objected to by appellant on the ground that it was an attempt to dispute the terms of a written contract; that by the terms of the note, executed long after these payments were made, it was stipulated and agreed that at the date of the execution of the note defendant was indebted to plaintiff in the sum of $2,675; and that an attempt to reduce the amount by credits arising from previous transactions between the parties was varying the terms of a written instrument by parol evidence. We do not see how this conclusion is to be avoided. The execution of this note was the written declaration, in the most decisive manner, of a present indebtedness of $2,675. It was, moreover, a stating of account between the parties. Kinley v. Thelen, 158 Cal. 175, 183, 110 Pac. 513. There is no attempt to avoid it by any allegation or showing of fraud or mistake; and we do not see on what theory defendant could be permitted to say that the amount of his liability was not what the note called for, but $700 less than that sum. It cannot be shown by parol that the sum to become payable under the terms of the note is different from that specified, nor that a certain prior account was to be deducted from the note. Daniel on Neg. Insts. § 81. Parol evidence cannot prove a contemporaneous condition which might reduce a specified sum payable on the note. 2 Parsons on Bills and Notes, p. 506. In Eaves v. Henderson, reported in 17 Wend. (N. Y.) 190 the defendant sought to set off on a suit upon his promissory note certain amounts due him on account with the plaintiff prior to the execution of the note. The court held this to be an attempt to contradict the amount expressed in the note, and that the evidence was inadmissible, even though in that case it was claimed that at the time the note was executed it was agreed by the payee that the items of the account should apply on the note.

If it be argued that if these disputed payments of $200 and $500 should be held to be not applicable in reducing the amount due under the note sued on they at least represent a liability for money had and received by the plaintiff without consideration, and hence recoverable by cross-complaint in this action, the answer to this is the plea of the statute of limitations set out in plaintiff's answer to the cross-complaint; these payments having been made upwards of four years prior to the filing of the cross-complaint. Of course, the payments made after the execution of the note, and properly applicable as payments thereon, to which plaintiff also pleads the statute of limitations, are not subject to the bar of the statute, for the reason that they applied as payments as of the date of their receipt by plaintiff. We think, too, in further bar of the claim that these two payments are applicable in reduction of the amount of the note and mortgage, that paragraph 2 of defendant's cross-complaint is in effect an admission of a balance of indebtedness owing to plaintiff at the time of the execution of the note and mortgage of $2,675. This indebtedness being evidenced at a date long after the payments were made, they clearly cannot be allowed in reduction of the amount so admitted to be owing by the cross-complaint and by the note itself.

Our conclusion on this point is, therefore, that on January 15, 1912, defendant's indebtedness to plaintiff was fixed, beyond evasion by parol evidence, at the sum of $2,675, as shown by the note of that date. It also appears by undisputed evidence that subsequently, by a favorable termination of the litigation on the land, the further contingent sum of $600 became due from defendant to plaintiff. This last amount, as the admitted facts show, was increased by certain accruals of interest and installments on the land to the sum of $692. This sum was paid on April 19, 1915, however, thus disposing of that item. It only remains to be seen what payments are properly to be credited on the promissory note, and to any overpayment which defendant may be entitled to recover.

[3] From June 12, 1911, to October 27, 1914, payments were made in an aggregate amount of $3,000, which, it clearly appears, are rightly credited to defendant. In addition to proof of these payments, defendant introduced a letter from plaintiff of date August 24, 1914, in which the latter acknowledges the receipt, on or about that date, of another check from defendant for $300. None of the witnesses seemed to have a very distinct knowledge as to this check, and the check itself, canceled or otherwise, was not produced. Defendant had no definite recollection regarding it, and stated that he did

not know whether it was his own check or one drawn in his favor by some one else and indorsed over to plaintiff. Plaintiff does not deny having received it, or that he collected on it. Appellant is supported by the authorities cited in the contention that the mere receipt of a check by the creditor does not operate as payment. But in a case where, as here, the creditor acknowledges the receipt of the check, does not deny that he cashed it, fails to return it or make any protest of nonpayment to the debtor, and in no way questions the transaction, he will be presumed to have collected the money. The court was justified in crediting the defendant with the amount. These payments applicable on the defendant's account aggregate a total amount of $3,300. The total sum due under the terms of the note, including interest calculated on the basis of the various partial payments, is $3,104.49. This leaves an overpayment of $195.51 subject to recovery under defendant's cross-complaint, if properly pleaded, instead of $546, as allowed by the judgment.

[4] Appellant, however, contends that his demurrer to the cross-complaint should have been sustained, both on the ground that the facts pleaded were not proper matter of cross-complaint, and on the ground that the facts alleged were not sufficient to constitute a cause of action. We think the facts alleged constitute a proper cross-complaint. They all grew out of a transaction of which the note sued on in the main action was a part. This is at least true as to all moneys paid by defendant to plaintiff on which credits are herein allowed to respondent. Treating the land purchase as entirely a separate transaction from the liability arising on the note, as contended for by appellant, it appears to have been adjusted separately between the parties. The $692 payment made April 19, 1915, is conceded to have been in settlement of the balance due on the land trade. All the other payments made subsequent to the execution of the note were properly credited thereon, and any overpayment made by respondent is included in the $1,000 payment of October 27, 1914, which was admittedly made on the note; and the claim to recover the amount of overpayment arises on an overpayment on the note—the contract sued on in plaintiff's action. In any event, defendant's action upon his affirmative pleading is in effect for money had and received by plaintiff, and arises on an implied contract to repay. The facts alleged constituted proper matter of counterclaim under subdivision 2 of section 438, Code of Civil Procedure, if not of cross-complaint. We see no reason, nor any prejudice resulting to appellant, to prevent treating it as a counterclaim. "It is not what a pleading is called, but the facts which it sets up, that determines its character. Its character and sufficiency will be determined by the court from the facts alleged in it." McDougald v. Hulet, 132 Cal. 155, 160, 64 Pac. 278, 280; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Gregory v. Bovier, 77 Cal. 121, 19 Pac. 232; Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764.

[5] The demurrer, for want of facts in the cross-complaint, however, we think should have been sustained. There is no averment of either demand for or nonpayment of the overpayments claimed by the defendant. There is nothing in the cross-complaint to indicate that the excess payments on the plaintiff's demand were made or received other than through mutual mistake of the parties. As is said under a similar state of facts in Dunham v. McDonald, 34 Cal. App. 744, 168 Pac. 1063:

"He does not allege that the cross-defendant had any better knowledge of the circumstances and facts than he had. Under such circumstances we think that a demand for payment was a prerequisite to the filing of the cross-complaint. * * * It seems too clear for argument that it was necessary also to show by appropriate allegation in the cross-complaint that the money claimed by the defendant of the plaintiff had not been paid."

[6] While, however, the overruling of plaintiff's demurrer was error, we think it was error without prejudice, and may be disregarded under the provisions of section 4½ of article 6 of the Constitution.

[7] In the first place, the failure to allege nonpayment, and perhaps, also, the failure to allege demand before bringing suit, was cured by defendant's denial, in answer to the cross-complaint, that there had been any amount paid in excess of the balance due on the note and mortgage, or that there was any amount whatever due or owing the defendant. While the more common application of the rule of curing defects in a complaint by averments in the answer contemplates an affirmative allegation in the answer of the precise fact omitted from the complaint (Pomeroy on Remedies, § 579), it seems to have been the practice in this state to treat an express denial by answer of the omitted matter as curing the omission. Vance v. Anderson, 113 Cal. 537, 45 Pac. 816; Abner Doble Co. v. McDonald, 145 Cal. 641, 79 Pac. 369; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434. This rule that omitted allegations of a complaint may be aided by averments in the answer applies even though a demurrer to the sufficiency of the complaint has been erroneously overruled. Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Savings Bank v. Barrett, 126 Cal. 413, 58 Pac. 914; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; Donegan v. Houston, 5 Cal. App. 632, 90 Pac. 1073. Moreover, the cross-defendant was clearly not taken at a disadvantage or in any way prejudiced by failure to allege nonpay-

ment of money he denies ever having received or owed; and it is a fair presumption that it would have been a futile act on the part of defendant to have demanded payment of this claim before filing his cross-complaint. This is not a case where a demand was a necessary prerequisite to the accrual of the cross-defendant's liability. The only object of the demand in such a case as this is to give the adverse party an opportunity to make settlement, if he desires, without being subjected to a suit; and where, as here, the action between the parties is already pending, and the cross-demand arises from the same transaction, it is questionable if a demand is necessary (Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161), and in any event, the failure to plead it is of trifling consequence.

[8] We are of the opinion, however, that in the absence of a showing that the plaintiff willfully or wrongfully received these overpayments from defendant, and no demand having been made prior to filing the cross-complaint, defendant was not entitled to interest on any amount of his recovery under the cross-action prior to the date of filing his cross-complaint, and as already indicated, there was error in crediting certain payments on the note.

The judgment is reversed, with directions to the trial court to retry the issues as to amount of recovery on the cross-complaint.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 79

STERN, State Supt. of Banks, v. McDONALD et al. (Civ. 3197.)

(District Court of Appeal, First District, Division 1. California. April 12, 1920. Rehearing Denied May 12, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Bills and notes ⊂=92(1)—Transaction held sale of bonds which amounted to consideration for note.

Where bonds held by a bank depreciated and the bank examiner demanded as a condition to its continuing in business that directors and stockholders pay the bank a large sum of money and take up the bonds, the transaction whereby such persons gave their note, pledging the bonds as collateral, was a sale, and the note will be deemed supported by the consideration.

2. Bills and notes ⊂=92(1)—Note executed by directors to make good impairment of bank's assets supported by consideration.

A note executed by bank directors to make good impairment of bank's assets so as to enable the institution to continue in business is supported by a consideration, and recovery cannot be denied on the ground of want of consideration.

3. Bills and notes ⊂=477—Answer setting up misrepresentation insufficient, without stating reliance on fraud.

In an action on a note executed by defendants, bank directors, etc., to make good an impairment of the bank's assets, answer setting up that the superintendent of banks in procuring the note made fraudulent misrepresentations is insufficient, where it was not alleged that defendants relied on such representations.

4. Appeal and error ⊂=1011(1)—Finding on conflicting evidence not disturbed.

The trial court's finding of facts on conflicting evidence will not be disturbed on appeal.

5. Estoppel ⊂=68(2)—Intervention of superintendent of banks to protect bonds deposited as collateral did not estop him from asserting that bank directors had purchased bonds.

Where the superintendent of banks as a condition to a bank continuing in business required defendants, directors, etc., to buy bonds which had depreciated, and they executed their note for a large amount, depositing the bonds as collateral, the fact that the superintendent later intervened in litigation affecting the bonds, setting up that the bank was a holder thereof, was not a rescission or repudiation of the transaction which would estop him from asserting defendants had purchased the bonds, for though the bank was a mere pledgee, it had a special property in the bonds which the superintendent should protect.

6. Bills and notes ⊂=30—Note to cover impairment of assets binding though not joint and several as directed.

Where the superintendent of banks required the directors, etc., to make good an impairment of assets, and, while they executed a note, they did not execute a joint and several one, as directed, that fact did not render invalid the note actually executed, which they listed as an asset and on which they paid interest; the detriment, if any, being to the bank's creditors.

7. Bills and notes ⊂=452(1)—Directors' note to take up depreciated bonds binding, though sale not authorized by resolution.

Where a bank's assets suffered impairment on the depreciation of bonds, and the bank examiner required the directors, etc., to purchase a number of bonds, whereupon they gave their note, which was secured by a pledge of the bonds, they cannot, after insolvency of the bank, defeat recovery on the note on the ground that they did not, by resolution, authorize the sale.

8. Pledges ⊂=55—Possession of pledge does not preclude judgment in first instance against debtor.

That bonds were deposited as collateral security of a note will not render judgment for recovery on the note against the makers, without reference to the collateral, invalid, for the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge, for it is only collateral.

Appeal from Superior Court, Kern County; Howard A. Pearis, Judge.

Action by Charles F. Stern, substituted for W. R. Williams as Superintendent of Banks of the State of California, against Ronald McDonald and others, and Sarah L. Conner, executrix of the last will and testament of C. L. Conner, deceased. From a judgment for plaintiff, the defendants first named appeal. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellants.

Raymond Benjamin, of San Francisco, for respondent.

KNIGHT, Judge pro tem. The superintendent of banks of California, on behalf of the Kern Valley Bank, an insolvent corporation, obtained a judgment against the above-named defendants, severally, in amounts aggregating $85,000, from which all of said defendants appeal except the defendant Sarah L. Conner, the executrix of the last will of C. L. Conner, deceased. The action is based upon a promissory note, dated October 15, 1909, drawn in favor of said Kern Valley Bank for the aggregate sum of $105,000, payable in the amounts and in the manner following: Ronald McDonald, $40,000; C. L. Conner, $20,000; P. L. Jewett, $10,000; S. Wright Jewett, $10,000; L. P. St. Clair, $20,000; George W. Price, $5,000. All of the payors named therein signed the note except L. P. St. Clair. The plaintiff alleges that the payment of said note was secured by a pledge of 95 bonds, of the par value of $1,000 each of the Sunset Road Oil Company, a corporation, and prays judgment against the payors, severally, for the amounts for which they respectively obligated themselves on the note, and that "said bonds be sold according to the usual course and practice of this court, and that the proceeds thereof be applied to the payment of said promissory note."

C. L. Conner died prior to the commencement of suit, and his executrix was made a party defendant. She filed no answer. The other defendants joined in an answer, in which they urged the defenses of no consideration, fraud and estoppel. The court found against the defendants on those issues, and further found that said note was given in payment of the purchase price of the bonds which had been pledged as security for the payment of the note, and which the court found had been previously sold to the defendants by the bank. The judgment made no disposition of the pledged bonds. At the time of the execution of the note all of the payors were directors and principal stockholders of said Kern Valley Bank, and Conner and McDonald were, respectively, its president and cashier, and S. Wright Jewett and George W. Price were its assistant cashiers. On May 12, 1911, the bank became insolvent, and W. R. Williams, as superintendent of banks, took possession. The note in question and the pledged bonds were among the bank's assets.

The record discloses abundant evidence to support the findings and judgment. It shows that immediately prior to October 15, 1909, said Sunset Road Oil Company bonds, of which the bank owned a large number, had depreciated in value to the extent that the bank's capital had become impaired; that Alden Anderson, then superintendent of banks, demanded that defendants, who, as above stated, were the directors and principal stockholders of the bank, pay $105,000 into the bank, in cash or its equivalent, and directed that this should be done by means of a sale from the bank to the defendants of 95 bonds of said Sunset Road Oil Company, at par and accrued interest, and stated that the joint and several promissory note of defendants, properly secured by the bonds so purchased, would be accepted in payment of said bonds. Anderson informed defendants that unless this arrangement was carried out he could not allow the bank to continue business. The transaction was consummated in accordance with Anderson's directions, except that a several note was executed and delivered to the bank instead of a joint and several note, and that St. Clair did not sign the note, thereby reducing the aggregate amount of the note from $105,000 to $85,000. Subsequently one J. W. Harper, a bank examiner, acting under the direction of Anderson, visited the bank, and verified the fact that the note had been executed and the bonds pledged. Harper at that time was informed that St. Clair had not signed the note because he was out of town, but that he would do so upon his return. Across the bottom of the note was indorsed, in the handwriting of the defendant McDonald:

"Secured by 95 bonds of $1,000, being bonds No. 645 to 740, inclusive, of the Sunset Road Oil Co."

These bonds were afterwards listed by the defendants, as officers of the bank, in the bank's reports as pledged bonds, and the interest on the note was paid monthly by defendants up to and until one month before the bank closed, in May, 1911.

[1, 2] The evidence above narrated clearly shows a legal sale of said bonds from the bank to the defendants, and that said sale constituted a valid consideration for the note. The conceded purpose for which the sale was made and the note given was that the bank might be allowed to continue business. There was an impairment of the bank's assets, for which the bank could have been closed, and in order to relieve that embarrassment and to insure the bank's continuance in business the directors, at the direction of the superintendent of banks, purchased said bonds and executed said

note. This was done to bring up the amount of the bank's depreciated capital to the standard fixed by the superintendent of banks. That of itself constituted a valuable consideration for the note. It has been held by numerous authorities that a note or bond, executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration. Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449; First Nat. Bk. v. Felt, 100 Iowa, 680, 69 N. W. 1057; Hurd v. Kelly, 78 N. Y. 588, 34 Am. Rep. 567; Murphy v. Gumaer, 18 Colo. App. 183, 70 Pac. 800; Nat. Bk. of Salt Lake City v. Nelson, 38 Utah, 169, 111 Pac. 907.

[3, 4] The defense of fraud urged by defendants is based upon certain representations claimed to have been made by Anderson to the defendants at the time of the execution of the note, to the effect that one W. S. Tevis would also purchase a like number of bonds, and in payment thereof would execute a similar note, but that he had failed to do so, and that defendants were unaware that he had not done so until after the bank had been closed in May, 1911. This defense is insufficiently pleaded, for the reason that there are no allegations made by defendants that they relied upon said representations, or that they believed them to be true. However that may be, a consideration of this defense seems quite unnecessary, for the reason that both Anderson and Harper denied that any such representations were made, and the court found that their testimony was true. Any evidence to the contrary would raise a mere conflict, and would not justify an interference with the findings of the trial court.

[5] The defense of estoppel is based upon an alleged rescission or repudiation of the sale of the bonds by Superintendent Williams. In this respect it is alleged and was proved that in an action independent from this one, commenced by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company, a corporation, involving the bonds of said Sunset Road Oil Company, Williams, as superintendent of banks, intervened, and filed a cross-complaint, alleging "that said Kern Valley Bank was the owner of the specific bonds here involved." The fact that he did so, however, utterly fails to prove rescission or repudiation. As holder of the pledged bonds it was his duty to protect them and to controvert any claim made by third persons claiming ownership or seeking to obtain possession of said bonds, and it was not necessary in such a proceeding that Williams should allege and prove that he held said bonds merely as a pledge. As pledgee he was vested with a special property in said bonds sufficient to maintain an action against third persons for the recovery of said bonds. 31 Cyc. 824; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Thompson v. Toland, 48 Cal. 99; Merced Bk. v. Price, 9 Cal. App. 177, 98 Pac. 383. Therefore the allegations of Williams in that action that the bank was the owner of said bonds was in accordance with the law and the facts.

[6] Appellants' contention that said note was invalid because it was not a joint and several note, as Anderson had directed it should be, is also without merit. Appellants knew of the purpose for which the note was given, and as officials of the bank they were presumably familiar with the form of the note signed by them. They afterwards recognized the validity of the note by listing it among the bank's assets and by paying interest on it monthly for a year and a half. Furthermore, it is not apparent wherein appellants have been prejudiced by the execution of a several note. If it had been a joint and several note the individual defendants under the law could have been called upon to pay the full amount of the note. If anybody has suffered by the oversight it is the bank's creditors and not the appellants.

[7] Appellants also claim that the sale of the bonds was not valid because it was not authorized by a resolution of the board of directors, but that it was made merely upon an order issued by the superintendent of banks, in whom, it is claimed, the power to authorize such sale was not vested. The answer to that is that it does not appear from the record whether or not such a resolution was in fact passed, but, assuming that it was not passed, it does not lie with the defendants to take advantage of the point, for the reason that as payors of the note the law will not allow them to relieve themselves of their obligation to the bank because they, as directors of the bank, in dealing with the bank, may have willfully or otherwise exceeded their lawful authority.

[8] Appellants' final point is that the judgment is erroneous because it merely provides for the recovery of the note without reference to the security. It is contended that the judgment should direct that the security be sold and the proceeds applied to the payment of the note. The authorities, however, do not support appellants' contention. It has been repeatedly held that in the absence of statute or stipulation to the contrary, the possession of pledged property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledge, for the reason that the security is only collateral. Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532, wherein the authorities are reviewed.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 66

OAKDALE IRR. DIST. v. BEARD et al.

(Civ. 2099.)

(District Court of Appeal, Third District, California. April 12, 1920. Hearing Denied by Supreme Court June 10, 1920.)

1. Waters and water courses ⊂228½, New, vol. 10A Key-No. Series—Evidence held to sustain finding of damages in amount of bond to irrigation district from improper work.

In an action by an irrigation district against its contractor and the surety on his bond, evidence of improper performance of the work and as to damages *held* to sustain judgment for plaintiff district for $10,000, coincidently the exact amount of the bond.

2. Waters and water courses ⊂228½, New, vol. 10A Key-No. Series—Defects in irrigation district contract not defense to contractor and surety sued on bond.

Though there were certain defects in the steps leading up to an original contract by an irrigation district for certain work, and though the law was not complied with in all respects, such defects are no defense to a suit on the bond securing the work by the district against the contractor and his surety.

3. Estoppel ⊂22(3) — Waters and water courses ⊂228½, New, vol. 10A Key-No. Series—Recitals of second bond evidence that contractor had not performed.

If the contractor with an irrigation district had fully performed his original contract, he was entitled to be paid the agreed amount without giving a new bond that he would complete it, and the recitals of a second bond signed by him and his surety that certain parts of the work were unsatisfactory to the directors and engineer of the district are conclusive, or at least very strong, evidence that when it was executed the contractor had not performed.

4. Principal and surety ⊂138 — Compliance with arbitration clause of the contract not condition precedent to action on bond.

It was not necessary that an arbitration clause in a contract be complied with as a condition precedent to bringing of an action on the contractor's bond, the bond containing no arbitration clause, and not being worded to oust the courts of right to entertain the case.

5. Arbitration and award ⊂8 — Arbitration clause not construed to oust courts of jurisdiction where it can be avoided.

An arbitration clause of a contract will not be construed as ousting the courts of jurisdiction unless such construction is inevitable, so that, unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause and is no bar to an action without an award.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by the Oakdale Irrigation District against T. K. Beard and the Ætna Accident & Liability Company. From judgment for plaintiff, defendants appeal. Affirmed.

L. L. Dennett, of Modesto, Redman & Alexander, of San Francisco, and Dennett & Zion, of Modesto, for appellants.

Griffin, Carlson & Boone, of Modesto, for respondent.

ELLISON, Presiding Judge pro tem. The plaintiff brought this action to recover a money judgment upon a bond executed by the defendant T. K. Beard, as principal, and the defendant Ætna Accident & Liability Company, as surety therein.

The record shows that on the 25th day of February, 1913, the defendant Beard entered into a contract with the plaintiff in and by which he agreed to construct for the plaintiff certain ditches, pipes, etc., as part of an irrigation system belonging to the plaintiff. The work referred to was the building of the Paulsell canal, Paulsell laterals, the Orange Blossom laterals, the Grey laterals, the Clavey siphon and Booster plant, the River road siphon, and the South lateral siphon, according to plans and specifications prepared by George L. Dillman, engineer for plaintiff. The defendant Beard agreed to do said work in a workmanlike manner and to the satisfaction and approval of said engineer and of the board of directors of plaintiff "in conformity in all respects with the annexed specifications, which are hereby made a part of this contract." The specifications are quite full and complete, and are annexed to the contract. The defendant Beard was to receive for performing the work specified in such contract a sum of money estimated to be about $85,616. Before entering upon the work he was to give a bond, to be approved by the board of directors of the plaintiff, in an amount estimated in the contract, based upon a percentage of what the work would cost as per the specifications. Having executed the contract and the bond, the defendant Beard proceeded with the construction work agreed to be done by him, and continued therein until on or about the 15th day of May, 1914. At that time he appeared before the board of directors of the plaintiff and expressed his desire to have the large bond which he had been carrying canceled and a new bond given in lieu thereof in the sum of $10,000 and an additional payment made to him of $10,000, it being claimed by him at the time that there was something more than that amount due to him for the work performed. This proposition was accepted by plaintiff, and a new bond executed with the defendant Ætna Accident & Liability Company, as surety. The $10,000 requested was paid over to him and the old bond released. The new bond, and the one upon which this suit is brought, stated quite fully the mutual understanding of the parties

as to the conditions then existing. It recites that there is now due from the plaintiff to the defendant Beard on the contract, dated February 25, 1913, the sum of $11,280; that such portions of said work as had been tested are unsatisfactory to the board and its engineer, because of small leaks that had developed; that Beard desired a payment of $10,000 be made to him, the balance of said contract price to be held by plaintiff until Beard should complete said work in a workmanlike manner to the satisfaction and approval of the engineer of said district and the board of directors of plaintiff "in all respects in conformity with the specifications in the original contract." It recited that plaintiff was willing to make said payments of $10,000 upon the defendant Beard giving a new bond in the sum of $10,000 "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract at the earliest possible moment, and that said concrete pipes will all be constructed and repaired within three months after the time of said test." The bond was to be void if the defendant Beard complied with the terms and conditions of a certain resolution of the plaintiff's board of directors, passed May 5, 1914, otherwise to remain in full force and effect. The resolution referred to provides for the payment of the $10,000 upon the execution of the bond conditioned as subsequently on the bond stated. Thereafter, this action was brought upon the bond last referred to; it being alleged in the complaint with much fullness that the defendant Beard had failed to perform his contract and failed to complete said work to the satisfaction of the board or of its engineer, and failed to complete it in accordance with the terms and specifications of the original contract. The defective construction was alleged to be in that part of the work designated as the Clavey siphon and Booster plant.

The court finds that this work had not been completed in accordance with the contract and the specifications attached thereto, and that by reason of such failure plaintiff had been damaged in the sum of $10,000 and that it would cost the plaintiff at least $10,000 to complete said Clavey siphon and Booster plant according to the specifications annexed to said contract, and entered judgment against both defendants for that amount. This appeal is from the judgment.

[1] 1. The appellant claims that the court accepted the amount of the bond as the measure of damages, and that in doing so it committed a very serious error. An examination of the record convinces us that this contention cannot be sustained. It is true the judgment is for the same amount the bond was given for, but an examination of the record shows that this is merely a coincidence. The court could not render any valid judgment against the surety company for more than the penal sum of the bond. The finding of the court that it would cost the plaintiff at least $10,000 to complete the work according to the specifications has evidence to support it. The witness Finney testified:

"Q. Now what in your opinion would be the value of the Siphon as it now stands? A. Well, it would be—I can't just state right now the exact cost for the reason that the pipe isn't doing its duty and as time goes on it will do less, so that in getting at the cost, about the only way that I could figure the value would be that there would have to be as much money spent on it as the original cost."

The total contract price for this part of the work was about $23,335.67.

The witness Burton Smith testified:

"The condition of the pipe is bad due to the fact that it has many leaks in it, and the fact that there is not a foot of the pipe but what—the length of it but what leaks."

He testified that, in his opinion, the present pipe could not be fixed:

"Q. You can't make any improvements in that pipe so it would carry the water without it costing as much as if you laid new pipe, or the original cost of the pipe? A. I think that it would be fully the original cost of the pipe. In my opinion it would be necessary for the district to put in a new pipe."

There is other evidence as to the defective condition of the pipe, in addition to what has been referred to, to show that the findings of the court as to the defective condition of the pipe and the amount it would cost to put it in good condition have evidence to support them.

2. Appellant claims that the original contract between the plaintiff and Beard is void. It is not clearly stated in the brief for what reason the original contract was void. This action is not brought upon the original contract, but upon the new bond. By its terms the plaintiff paid to Beard $10,000 upon his written promise to perform certain work, and his bond was that if he did not perform this work the bond should be good. He did not perform it, and therefore he and his bondsmen became legally obligated to make payment to the plaintiff. The original contract is referred to as containing a description of the work that the defendant Beard was to perform, and to this extent only it has a bearing upon the decision of the case.

[2] Conceding that there may have been certain defects in the steps leading up to the making of the original contract, and that the law was not in all respects complied with, still, such defects are no defense to a suit upon the bond involved herein.

The case of Peoples Lumber Co. v. Gillard

136 Cal. 55, 68 Pac. 576, is decisive of this matter, wherein it is said:

"It appeared that after the bids were all in for the building it was found that they exceeded the money provided—to wit, $7,000—and the bids were all rejected, and the plans were then gone over and certain changes made to bring the cost down to $7,000, and Gillard and Leary agreed to build the structure for that sum without further advertising, and thereupon the contract in question was made and the sureties then signed the bond. As to these facts it is sufficient to say that they do not furnish any ground of defense. The bond was executed with reference to the contract annexed to it, and not with reference to any advertised proposals.

"If the board had no authority to make the contract without re-advertising for bids, that fact would not discharge the sureties from their obligations under this bond."

3. Appellants claim that Beard performed the conditions of the original contract, and that the finding of the court that he did not is not sustained by the evidence.

In the bond upon which this suit is brought (and the bond is signed by both defendants), it is recited that—

"Whereas of such portions of said contract as has been tested certain parts are unsatisfactory to the board of directors and the engineer of said district, because of the fact that small leaks have developed."

It is also in said bond recited that plaintiff is willing to pay Beard $10,000 if he will execute a bond "conditioned that he will faithfully perform and complete all of said concrete pipes which were constructed under said contract."

[3] If he had fully performed his original contract, as now claimed, he was entitled to be paid therefor the amount agreed upon without giving a new bond conditioned that he would complete it. The recitals of the bond signed by the defendants are conclusive, or at least very strong, evidence that at the time it was executed the defendant Beard had not constructed the work in accordance with the terms of the contract.

4. The original contract contained the provision:

"If in the execution of this contract there shall be any ruling of the engineer alleged by either party hereto to be erroneous or unfair, each party shall immediately appoint an arbiter, and the arbiters so appointed shall within four days after their appointment, unless such time is extended by mutual agreement of the parties hereto, render their written agreement in the premises."

Counsel claims that this clause in the contract must be complied with as a condition precedent to the bringing of an action. There are several answers to this contention:

[4] (1) This action is not brought on the contract, but the bond, and the bond contained no arbitration clause, and is not so worded as to oust the courts of the right to entertain the case. There are no express words making the submission to arbitration a condition precedent to the bringing of the suit and no language used therein from which such intent can be inferred.

[5] (2) In Ruling Case Law, vol. 2, p. 363, it is said:

"But the courts generally will not construe an arbitration clause as ousting them of their jurisdiction unless such construction is inevitable, and consequently when the arbitration clause is not made a condition precedent by express words or by necessary implication, it will be construed as merely collateral to the liability clause, and so no bar to an action in the courts without an award."

See, also, Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, where the same ruling is stated in very clear and strong language.

We have now noticed all the points raised by appellant upon which he claims a reversal of the judgment should be had, and it is our opinion that none of them is sufficient to justify a reversal of the decision of the lower court. The findings are supported by the evidence, and, no reversible error appearing in the record, the judgment is affirmed.

We concur: BURNETT, J.; HART, J.

183 Cal. 39

NEWELL-MURDOCH REALTY CO. v. WICKHAM et al. (S. F. 8725.)

(Supreme Court of California. May 22, 1920. Rehearing Denied June 21, 1920.)

1. Evidence ⊜574—Conclusions and probabilities not substantial contradiction of positive testimony.

Witness' statements of conclusions and probabilities of information having been given cannot be considered as a substantial contradiction of positive testimony that it was not given, so as to sustain a finding that it was given.

2. Brokers ⊜31—Must inform principal of interest on the side of the proposed purchaser.

Real estate agents when becoming agents for sale are under duty to inform their principal of their being financially interested on the side of the proposed purchaser.

3. Brokers ⊜94—Sale may be avoided for failure of agent to disclose his interest in purchaser.

Contract of sale may be avoided by the vendors because of the broker, their agent, failing to inform them, as known by the purchaser,

that he was financially interested on the side of the purchaser.

4. Brokers ⟸31—Must inform principal that they are stockholders in proposed purchaser.

Interest of brokers as stockholders in the proposed purchaser is such an interest as to require them to inform their principal, the vendor, thereof.

5. Corporations ⟸428(6) — Charged with knowledge of its managing officers making sale to it as agents of vendor.

The brokers who made sale to a corporation being its managing officers, it is charged with knowledge of the equities of the vendor, because of the brokers not informing him of their interests as stockholders in the purchaser.

6. Specific performance ⟸12—Avoidance of contract by agent not disclosing interest available as defense without revocation.

Option of vendor to avoid contract of sale because of the brokers, his agents, not disclosing to him their interests as stockholders in the purchaser, remains complete till purchaser brings action for specific performance, and then is available as a defense without prior revocation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by the Newell-Murdoch Realty Company against Jessie E. Wickham and others. Judgment for plaintiff, and defendants appeal. Reversed.

Ornbaun & Fraser and John W. Preston, both of San Francisco, Robert Duncan, of Ukiah, Lovett K. Fraser, of San Francisco, and Abe P. Leach, of Oakland, for appellants.

Walter H. Linforth, of San Francisco, for respondent.

SHAW, J. The defendants appeal from a judgment directing the specific performance of an agreement to exchange real property, alleged to have been made between the plaintiff and the defendants.

The complaint alleged, in substance, that the agreement to exchange real properties, which is set forth in full therein, was made between the parties on August 11, 1916; that it was fair and reasonable in its terms; that plaintiff had offered to perform; but that the defendants, although duly requested so to do, had refused to perform their part thereof. The property of plaintiff consisted of a number of lots in the Forest Hill tract in San Francisco. The property of the defendants, which it is claimed they agreed to exchange for said property of plaintiff, consisted of an improved corner lot at Jones and Jackson streets in San Francisco.

We are of the opinion that the findings and judgment are contrary to and unsupported by the evidence upon certain points essential to the judgment. The question involved is the duty of the agent of the vendor to disclose to such vendor everything within his knowledge relating to the advisability of the sale of the property which the agent is employed to sell for the vendor and whether or not a sale can be enforced by the vendee against such vendor when the agent who makes the sale is himself interested with the vendee in accomplishing the same, but fails to fully inform the principal of such interest and the vendee had knowledge of such failure at the time.

During the time of the transactions under inquiry the Newell-Murdoch Realty Company was a corporation, having 2,000 shares of stock outstanding, and the Newell-Murdoch Company was a partnership of which R. C. Newell and William C. Murdoch, Jr., were the only members. This partnership was also the owner of 1,050 shares of the stock of the Newell-Murdoch Realty Company being a majority of the outstanding issue thereof. Newell was the president and Murdoch the secretary of the corporation, and under the resolutions and by-laws of the corporation they were in control of its affairs and were authorized to contract in its behalf for the purchase or sale of real estate. They were also the actual managers of the corporation and in control of its affairs. The three defendants were brother and sisters and owners in common of the Jackson and Jones streets property. An agent of the firm of Newell-Murdoch Company proposed to them an even exchange of the Forest Hill lots for their property aforesaid. Because of this proposal, the defendants visited the office of the Newell-Murdoch Company in San Francisco on August 11, 1916, and there signed a proposal to make such exchange. Murdoch then produced a blank form of agreement for exchange which they duly filled up and it was then signed by the defendants. This document in form was a proposal to be signed by one party to exchange the property, followed by a blank form of an acceptance of the proposal by the other party. The defendants signed the part constituting the proposal. It provided that "the undersigned hereby authorize Newell-Murdoch Company to act as their agents in negotiating an exchange, and agree that if they shall secure an acceptance of the above proposition to exchange the above described property on the above terms," each party should furnish an abstract of title within ten days and that the defendants should pay Newell-Murdoch Company $525 as commission for such services and "it is understood that said agent may also act as agent for the owners of the above secondly described property, from whom they may also receive a commission." The said agents were allowed four days within which to procure the acceptance of the proposal by the owners of the Forest Hill lots. This document, so signed, was delivered by the defendants to said Newell-

Murdoch Company, as agents as aforesaid, about 4 o'clock in the afternoon of August 11, at which time a carbon copy thereof was delivered by said agents to the defendants. The part of the document providing for the acceptance of the owners was not then signed or filled in. No consideration was paid or rendered at the time of this transaction. Upon reaching home the defendants decided not to carry out the contract, whereupon Jessie E. Wickham, wrote and mailed a letter to the Newell-Murdoch Realty Company, stating that she could not sign any deed for her undivided interest in the Jackson street property and "hence we will consider the matter closed." All this occurred on a Saturday. The letter was received by Newell-Murdoch Realty Company early on the following Monday morning. The Newell-Murdoch Realty Company and the Newell-Murdoch Company were both managed and operated by Newell and Murdoch, and the offices of the two concerns were in the same rooms. Immediately after the departure of the defendants from the office, Murdoch filled up the form for the proposed acceptance on behalf of the plaintiff and signed the same as secretary thereof. It was afterwards signed by Newell as president, but whether before or after the receipt of the letter from Jessie E. Wickham revoking the agreement does not appear.

[1, 2] During the interview in which the proposal was made by the defendants, they were not informed by Newell-Murdoch Company, or either of them, that the Newell-Murdoch Company owned stock in the Newell-Murdoch Realty Company, or that that firm had any interest in the property in the Forest Hill lots, except as agents for the owner. It is claimed by the plaintiff that there is a conflict of evidence on this point. Each of the three defendants testified positively that no statement of that sort was made and that they knew nothing of the interest of Newell and Murdoch in the plaintiff corporation until the suit was begun. Murdoch, when questioned about the matter as a witness and asked if he told defendants that he had any interest in that corporation, said:

"I don't know—I don't believe that the subject was touched on at all. I don't remember that it was."

Asked if he disclosed to them what connection the partnership had with the corporation, he said:

"I don't know that we did. It may have come out in the general conversation; it probably did; I told them we were interested in the company I am sure. I didn't say to what extent. Our names were—the names were exactly similar; it was generally known, and they knew, I am sure, that Newell-Murdoch Realty Company was the product of this company."

These statements of the witness, which are but statements, of conclusions and probabilities, following his emphatic statement that the subject was not touched upon, cannot be considered as a substantial contradiction of the positive testimony of the defendants that nothing of the kind was said. Furthermore there were other statements made in the course of conversation indicating that they held out to the defendants throughout the interview that it would be necessary for Newell-Murdoch Company to enter into some negotiations with the owners. Neither before nor after the delivery of the proposal appointing the firm agents of defendants to negotiate the exchange did that firm disclose the fact that they were themselves officers of the Newell-Murdoch Realty Company and that they could, as such, then and there immediately close the transaction. There is no pretense whatever that they ever stated to the defendants that they were the owners of the majority of the stock of the corporation and to that extent interested in the purchase of the property and personally benefited by the transaction. The similarity of names did not put the defendants on inquiry, under these circumstances. The moment the firm became agents for defendants, if not before, its duty arose to inform defendants of the interest it had in the corporation, which was adverse to the interests of the defendants. The findings were contrary to these facts, and to that extent they are not sustained by the evidence.

[3] A contract made under these circumstances cannot be specifically enforced. Where an agent is employed by a vendor to negotiate a sale, and he is himself financially interested on the side of the vendee, by reason of a direct or indirect property interest which he has or will have in the property when it is acquired by the vendee, or in the price to be paid by the vendee, he must disclose that interest fully to the principal and the principal with full knowledge of all the facts known to the agent, bearing upon its advisability, and of such interest, must act freely and of his own volition in making the deal, and if the agent fails to make such disclosure, where, as here, the vendee is aware of such failure, the sale may be avoided at the option of the vendor. A similar question arose in Burke v. Bours, 92 Cal. 108, 28 Pac. 57. The court said:

"Where a person buys for himself as the agent of his principal, danger surrounds the best interest of the principal, and it is the policy of equity to remove every temptation from the agent, by rigidly discountenancing all such transactions; and under the broad principles heretofore referred to, relating to the duties and obligations of trustees and agents, defendant's purchase of the realty cannot be sanctioned. * * * It matters not that there was no fraud in this transaction, or that no injury resulted to Arguello from the sale. The rule is intended to prevent the possibility of wrong; and assuming that Bours paid full value for the property, and even acted in entire good faith throughout the transaction, still, such facts form no defense where the purchase was made

by the agent without knowledge of his principal. * * * It necessarily follows that he is not the vendee under an executed contract of sale, is not in a position to enforce specific performance, and possesses no equity sufficient to defeat plaintiff's right to the recovery of the possession of this tract of land."

In that case the vendor had brought suit in ejectment against a subagent of his own selling agent, which subagent had purchased the property for himself, without informing the seller that he was doing so. He had paid in full the purchase price asked and he set up this equity in opposition to the suit in ejectment by the seller. The same question arose in Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 790, where the court laid down the rule concerning the relations of the principal and agent, trustee and beneficiary, as follows:

"For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the cestui que trust."

The proposition is too well settled to require further discussion or authority.

[4] A stockholder in a corporation has a beneficial interest, in proportion to the amount of his stock, in all the property of the corporation. While he has not the legal title thereto he has an equitable interest therein. It has been expressly held that this interest is sufficient to defeat an action for specific performance where the corporation, as the purchaser, is seeking to enforce a contract of sale negotiated by its own agent, acting as the agent of the vendor, whereby the latter agreed to sell to the corporation. Foss Investment Co. v. Ater, 49 Wash. 446, 95 Pac. 1017. In that case the court said:

"An agent to sell cannot himself become the purchaser directly or indirectly, without the knowledge and consent of his principal. Louis Foss, defendant's agent, was so closely identified with, and in such complete control of the plaintiff corporation, that practically he would have become the sole beneficiary of all profits and benefits that might accrue to the plaintiff as purchaser."

In that case Foss, the agent, was the owner of 998 of the 1,000 shares issued by the plaintiff company. In no other respect is there any difference between that case and this. The extent of the interest, however, is not to be weighed or measured in deciding a case of this kind. The agent must disclose his interest, whatever it be, or the deal will be voidable by the vendor whose property is the subject of the sale.

[5, 6] It matters not whether the revocation of the authority by the defendant Wickham was received by the plaintiff company before its president had signed the acceptance or afterward. The managing officers of the corporation were the persons who, as agents, procured the proposal to be executed. The corporation, therefore, must be presumed to have had full notice of everything which was known to said persons, if any notice was necessary under the circumstances. The corporation is chargeable with full knowledge of the equities of the defendants in the matter and can no more be allowed to enforce the contract than could the agents who attempted to negotiate the same. No revocation of the proposal was necessary to the defense pleaded. The option to avoid the contract remained complete until the action was begun and was then available as a defense to the action.

For these reasons the judgment of the court below cannot be sustained. Several other questions are argued in the briefs, but this conclusion renders it unnecessary to consider them.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; WILBUR, J.; OLNEY, J.; LENNON, J.

183 Cal. 51

KNAPP v. KNAPP. (L. A. 6084.)

(Supreme Court of California. May 26, 1920.)

Divorce ⟸124—Evidence held to show plaintiff wife at fault in associating with men.

In a wife's action for divorce for extreme cruelty, evidence that the wife was at fault, in that through association with her sister she acquired the habit of visiting cafés in company with men without her husband's knowledge or consent, remaining away from home until late at night, *held* sufficient to justify denial of divorce.

Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for divorce by Louisa M. Knapp against Michael Knapp. From judgment denying decree, plaintiff appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

William L. Kuehn, of Los Angeles, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District, who was sitting pro tempore at

the time of the hearing and order for submission of this cause, in place of Mr. Justice MELVIN of this court, is adopted as the opinion of this court in the cause.

This is an appeal from a judgment denying the plaintiff a decree of divorce, her alleged cause of action being based on the ground of extreme cruelty. A trial being had, the court found that the defendant had committed none of the acts of cruelty charged, except that on one occasion, when assaulted by the plaintiff, he took such physicial action as was necessary to compel her to desist, without, however, inflicting any injury upon her. On the other hand, the court found, as alleged by the defendant in effect, that much of the domestic trouble between him and his wife was caused by a sister of the latter, who came to live with them at their home about a year before the commencement of this action. The evidence in the case showed that this woman, though married, held herself out to be single, assumed a false name, and conducted herself in a manner widely at variance from the standard generally accepted as incumbent upon a married woman; that she exercised over the plaintiff an evil influence, as a result of which the plaintiff acquired the habit of visiting cafés in company with men and without her husband's knowledge or consent, remaining away from home until late and unusual hours of the night.

The sole point made by the appellant is that the evidence is insufficient to sustain the findings of the trial court. In this we emphatically disagree, but think a review of the evidence unnecessary. Some of the testimony given by the plaintiff for the purpose of sustaining certain of the allegations of cruelty was of a sordid character, and found no credence with the trial court, and justly so, the charges to which such testimony referred being apparently made for the purpose of intimidating the defendant in defending the action. Under the circumstances of this case we think it sufficient to say that we have carefully read the evidence, and are satisfied that it abundantly sustains the findings of the court.

Judgment affirmed.

183 Cal. 49

KIPP v. REED. (L. A. 6072.)

(Supreme Court of California. May 26, 1920.)

1. Judgment ⊂=948(1) — Plaintiff did not waive benefit of estoppel by failure to plead former judgment.

Plaintiff in an action to quiet title did not waive the benefit of any estoppel in his favor against the defendant, which might have been available to him under a judgment in a former action against the same parties to quiet title, by failing to plead such judgment; the defendant still being in possession of the premises.

2. Judgment ⊂=950(1)—In former case between same parties admissible as muniment of title.

Plaintiff, in an action to quiet title, was properly permitted to introduce in evidence the judgment roll in a former action against the same defendant to quiet title, though not pleaded; such former judgment being a muniment in plaintiff's chain of title, and admissible as such, defendant still being in possession of the premises.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Sylvester Kipp against David C. Reed, also known as D. C. Reed. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles C. Crouch and Crouch & Chambers, all of San Diego, for appellant.

Abram Rosenthal and Sylvester Kipp, both of San Diego, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District, who was sitting pro tempore at the time of the hearing and order for submission of this cause, in place of Mr. Justice MELVIN of this court, is adopted as the opinion of this court in the cause:

This action was brought to quiet title to the lands described in the complaint. The defendant filed an answer and cross-complaint, wherein he alleged himself to be the owner and in the possession of the premises and he prayed for judgment accordingly. At the trial the only evidence presented upon the issue of ownership was that offered by plaintiff. No evidence was offered by defendant. To sustain his alleged title, plaintiff introduced certain United States patents issued to defendant to the land in controversy. Over objection, he then offered in evidence a judgment roll in a former action to quiet title brought by him against the defendant concerning the identical lands described in complaint herein. Plaintiff then rested his case, whereupon defendant moved for a nonsuit, which was denied. Judgment went for plaintiff. As ground for reversal, it is claimed that plaintiff waived the benefit of any estoppel in his favor against the defendant, which might have been available to him, arising out of the former adjudication of the same issue between the same parties, for the reason that he did not plead or rely upon such judgment.

[1, 2] Under these circumstances, appellant claims the question of title should be relitigated upon the merits, without the aid of the former judgment. We see no merit in this con-

tention. The former judgment between the parties is dated July, 1909. The complaint in the present action was filed July 24, 1918. The verified answer of defendant alleges that at the commencement of the action he was the owner and in the possession of the premises. There is nothing before us to show why plaintiff did not rely upon his judgment as an estoppel against the defendant, but the recital in defendant's pleadings as to possession and ownership would indicate that defendant claimed some new right or title that had been acquired by him subsequent to the rendition of the former judgment. His pleadings, however, do not disclose the source of any new title, and he introduced no evidence upon the subject. But, in any event, so far as the record shows, plaintiff was entitled to maintain this action. In Southern Pacific R. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886, it is held that the fact that a former judgment in ejectment was given against a defendant in favor of a plaintiff did not prevent such plaintiff from bringing a second action against the defendant, if the latter was in possession of the property. The admission of the judgment roll in evidence did not, as claimed, constitute error. It was a muniment in plaintiff's chain of title, and admissible as such. Chapman v. Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130.

The conclusion we have reached makes it unnecessary to pass upon plaintiff's motion to dismiss the appeal.

For the reasons given the judgment is affirmed.

183 Cal. 61

In re HALL'S ESTATE.

Appeal of O'BRIEN.

(S. F. 9144.)

(Supreme Court of California. May 27, 1920. Rehearing Denied June 25, 1920.)

1. Wills ⟸832—Property not disposed of by will must first be resorted to for payment of claims.

Property not disposed of by a will must first be resorted to for the payment of demands against the estate because the law endeavors to carry out the intent of the testator as far as possible, and therefore property not disposed of by the will should be so applied as to render it certain that the dispositions actually made by testator will be effective.

2. Wills ⟸832—Charges against estate held properly deducted from lapsed legacies.

In view of Civ. Code, §§ 1357–1359, and Code Civ. Proc. §§ 1516, 1562, 1563, where the residue of a testator's estate is left to ten residuary legatees, three of whom have predeceased testator, so that their legacies have lapsed, charges against the estate are properly deducted from such lapsed legacies alone.

Department 2.

Appeal from Superior Court, City and County of San Francisco; J. T. Nourse, Judge.

In the matter of the estate of Margaret Hall, deceased. From a portion of the decree of final distribution, Michael O'Brien, by and through Eugene W. Levy, his guardian, appeals. Affirmed.

Shelton & Levy and Steinhart, McAtee & Levy, all of San Francisco, for appellant.

Stanislaus A. Riley and Robert C. Porter, both of San Francisco, for respondent.

LENNON, J. This is an appeal from that portion of the decree of final distribution in the estate of Margaret Hall which directs that the debts and expenses of administration be paid exclusively out of certain residuary legacies which failed of disposition by reason of the death of some of the residuary legatees prior to that of the testatrix. The will of decedent, after creating a number of specific and general legacies, contains the following residuary clause:

"All the rest, residue and remainder of my estate, I give, bequeath and devise in equal shares to the following ten persons. * * *"

Three of the ten persons named predeceased the testatrix. As they were not related to the testatrix, and there was no provision in the will for the disposition of their shares in the event of their death, the legacies lapsed, and as to three-tenths of the residue deceased died intestate. Estate of Kunkler, 163 Cal. 797, 127 Pac. 43. The trial court directed that the debts and expenses of administration be paid entirely out of the three lapsed legacies. Appellant is the brother of the testatrix and entitled as one of the heirs at law to participate in the lapsed three-tenths of the residue. The sole question presented on appeal is whether the debts and expenses of administration should be paid entirely out of the lapsed residue, or whether the shares of the seven surviving residuary legatees should abate equally with the three lapsed shares which go to the heirs at law.

Appellant asserts that the charges against the estate must be paid from the general assets of the estate, that it is a solecism to speak of paying debts and charges out of part of the residue because the residue cannot be ascertained until all debts and expenses of administration as well as legacies have been paid, and that, by charging the debts against the lapsed portion of the residue, the decree has, in effect, distributed to the surviving residuary legatees a substantial part of the shares which lapsed.

[1] The general rule is that property not disposed of by the will should be first resorted to for the payment of all demands against

the estate. This is so for the reason that the law endeavors to carry out the intent of the testator as far as possible, and therefore property not disposed of by the will should be so applied as to render it certain that the dispositions actually made by the testator will be effective. In re Bradley's Will, 123 Wis. 186, 101 N. W. 393, 3 Ann. Cas. 716. There are cases which hold, however, that, when the undisposed property constitutes part of the residue, there is an exception to the general rule that the demands against the estate are paid out of the property undisposed of by the will. In re Bradley's Will, supra; Tretheway v. Helyar, L. R. 4 Ch. Div. 53; Eyre v. Marsden, 4 My. & Cr. 231, 243, 41 Eng. Rep. 91. This exception does not prevail in California.

Section 1516 of the Code of Civil Procedure and section 1358 of the Civil Code of California make the entire estate chargeable with the debts and expenses of administration "except as otherwise provided" in the Civil Code or Code of Civil Procedure. In the absence of any other statutory regulation in regard to the payment of debts, it is apparent that all legacies would be reduced in equal proportion by the charges thus imposed. These sections, however, are supplemented and modified by other Code sections; the obvious aim of the arrangement being to satisfy the charges against the estate with the least possible interference with the express dispositions of the testator. Accordingly, section 1563 of the Code of Civil Procedure contains the provision that "specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." Section 1562 of the Code of Civil Procedure provides:

"If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter."

The most specific provision for the order of resort for the payment of debts and expenses of administration is contained in section 1359 of the Civil Code, and that order is as follows:

"One. The property which is expressly appropriated by the will for the payment of the debts;
"Two. Property not disposed of by the will;
"Three. Property which is devised or bequeathed to a residuary legatee;
"Four. Property which is not specifically devised or bequeathed; and,
"Five. All other property ratably."

A lapsed legacy, whether residuary or otherwise, is property not disposed of by will, and it is for that reason alone that it goes to the heirs. Section 1343, Civ. Code. It would therefore seem in consonance with the above Code provisions and the underlying theory of distribution and administration that the charges against the estate should be paid entirely from the lapsed residuary legacies.

The theoretical objection urged against this conclusion is that there can be no "residue" in an estate until all charges against the estate, as well as all specific and general legacies, have been discharged and satisfied. That this is not the necessary connotation of "residue" is evidenced by the Code definition of the term "residuary legacy." Section 1357, subd. 4, of the Civil Code defines a residuary legacy as follows:

"A residuary legacy embraces only that which remains after all the bequests of the will are discharged."

In other words, "residue" in its broadest sense includes all the property which is not otherwise devised or bequeathed. It is true that the term "residue" is often applied to "that part of it [the estate] left after paying the debts of testator and the expenses of administration and undisposed of by the rest of the will." Page on Wills, § 507. This is frequently the significance of the word, for the reason that in many cases there is a general residuary clause into which all of the property otherwise undisposed of falls. O'Connor v. Murphy, 147 Cal. 148, 153, 81 Pac. 406. In such a case there is no property undisposed of by the will, and, if there is no provision for the payment of debts in the will, property which would otherwise go to the residuary legatees is, under the law, appropriated to the payment of debts. However, section 1359 of the Civil Code, as we have seen, provides, in effect, that if there is any property not disposed of by the will, that is to be taken for the payment of debts before the property which is bequeathed to a residuary legatee. Under the definition adopted by section 1357, it is not necessary to deduct the charges against the estate before the residue is ascertainable.

[2] There is no inconsistency, therefore, in holding that portions of the residue undisposed of by the will must be used for the payment of charges before resort may be had to the residuary legacies effectually devised or bequeathed. The fallacy in the position of appellant arises from a failure to distinguish between the distribution of the property in accordance with the terms of the will and the payment of debts as provided by law. The court first determines the rights of the parties under the will, and then applies the law with relation to the payment of indebtedness. The latter is purely an incident of administration enforced by the law, and should so operate as to cause the minimum

amount of disturbance to the rights of the parties under the will.

The charges must be paid entirely from the property undisposed of by the will, namely, three-tenths of the residue, and the decree is therefore affirmed.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 65

WILSON v. TRAVELERS' INS. CO.
(S. F. 8881.)

(Supreme Court of California. May 27, 1920.)

1. Insurance ⟸451(1)—Clause in accident policy that it should not cover injury resulting from explosives did not apply only to voluntary exposure.

Clause in an accident policy, providing that it should not cover injury resulting wholly or partly from explosives of any kind, *held* not to apply only to voluntary exposure to explosives.

2. Insurance ⟸146(3)—Ambiguities in accident policies construed against insurer.

Ambiguities in accident policies are to be construed against the insurer.

3. Insurance ⟸452 — Injury occasioned by "wreckage" of passenger car and not explosion causing wreckage.

Under an accident policy, providing that it should not cover injury resulting from explosions, but should cover injury resulting from "wreckage" of a passenger car, where there was an explosion in toilet room, causing the walls thereof to burst and injure insured, who was sitting in the interior of the car, the injury was the result of the "wreckage" of the car and not of the explosion; the word "wreckage" implying that the car is a passive instrumentality, acted upon by some force which wrecks it.

4. Insurance ⟸530—Recovery could be had only on one daily ticket accident policy.

Only recovery on one ticket policy could be had by a passenger, although he had purchased two daily ticket policies, which overlapped at the time of the injury, where the policies provided that "insurance on any person under ticket policies is limited," etc., naming the amount of the policy.

5. Customs and usages ⟸19(2)—Subsequent acts not competent to prove uniform custom.

Evidence that an accident insurance company sold more than one daily ticket policy to a passenger in December, 1917, was not competent to show that it was the custom in 1916 to sell more than one daily ticket policy to a passenger.

6. Insurance ⟸530—Issuance of several accident tickets held not to estop insurer from limiting liabilities to one ticket; custom not influencing action does not estop.

An insurer engaged in selling daily ticket accident policies to passengers was not estopped by custom of selling more than one such policy to a traveler from setting up as a defense in an action on two policies a clause in the policies, limiting liability to the amount specified in one of them, unless the conduct of the insured in taking out more than one policy was in some manner influenced thereby.

In Bank.

Appeal from Superior Court, Alameda County; Denver Sevier, Judge.

Action by John H. Wilson against the Travelers' Insurance Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Coogan & O'Connor, of San Francisco, for appellant.

L. Ernest Phillips, of Oakland, for respondent.

WILBUR, J. Plaintiff recovered from defendant for bodily injuries, accidentally received, double weekly indemnity on each of two one-day ticket policies of accident insurance purchased by him for 25 cents each. The first was purchased at 6:30 p. m., June 29, 1916, and the second at 6:15 p. m., June 30, 1916, from a ticket agent of the Atchison, Topeka & Santa Fé Railway Company. The accident occurred at 7:30 p. m., June 30, 1916, while plaintiff was aboard a Southern Pacific passenger train. As each policy by its terms expired at midnight of the next day after date, both were in effect at the time of the accident. The amount recovered on each policy was $1,300, being double the weekly indemnity of $12.50 for 52 weeks. The defendant appeals from the judgment. The only fact in dispute is as to whether the injury resulted from an explosion within the meaning of that term as used in the policy. All other questions involve the interpretation of the policies and their application to the admitted facts. The plaintiff, a passenger, was seated in a passenger car which was standing at the Southern Pacific Company's Sixteenth street depot, in Oakland, when a violent explosion in the toilet room occurred, by which the car was wrecked. The trial court finds that—

"In and by the wreckage of said passenger car and by reason of the same and as a result thereof the plaintiff sustained bodily injuries;" "that such external and internal injuries of plaintiff were occasioned wholly and solely by the wreckage of the said passenger car."

The policies contained the usual terms insuring the holder against injuries effected by accidental means, "subject to the conditions herein contained, to wit." Then follow clauses lettered consecutively from (a) to (k). Clauses (a), (b), (c), fix the amount of insurance to be paid for injuries. The double indemnity clause (d) is as follows, to wit:

"(d) If the insured be a male, and such injuries shall be caused by the wreckage or burning of a railway passenger car or vessel licensed

for the transportation of passengers, provided in either case by a common carrier and propelled by mechanical power, while the insured is a passenger and actually within the car or on board the vessel, then the company will pay double the amount otherwise payable under clause (a), (b) or (c) of this policy."

Clause (g) contains the provision with reference to explosives, relied on by appellant to defeat plaintiff. This clause reads as follows:

"(g) This insurance shall not cover disappearance nor injuries of which there is no visible contusion or wound on the exterior of the body of the insured, nor shall it cover accident, injury, disability or death resulting wholly or partly, from any of the following, to wit: Voluntary overexertion, or voluntary exposure to unnecessary danger, medical or surgical treatment, hernia, disease in any form, fits, vertigo or sleepwalking, gas or poison in any form or manner or contact with poisonous substances, sunstroke or freezing, firearms, fireworks, or explosives of any kind, horse, automobile or bicycle racing, aerial navigation, lacrosse, football, dueling or fighting, war or riot, nor shall this insurance cover suicide sane or insane, or injuries, fatal or nonfatal, inflicted intentionally by the insured or by any other person, sane or insane, or sustained by the insured while insane or intoxicated, while violating law, resisting arrest or fleeing from justice, or while entering or leaving any moving conveyance or trying so to do, or happening while in or on any part thereof not provided for occupancy of passengers or while on the steps or platform of any moving car (street cars excepted) or while on the right of way or bridge of any railway."

[1] Respondent contends that this clause should be construed to apply only to the voluntary exposure to explosives. The policy is hardly susceptible of such construction. Omitting inapplicable clauses the proviso reads:

"Nor shall it cover injury resulting wholly or partly from any of the following, to wit: * * * firearms, fireworks, or explosives of any kind."

The punctuation as well as the context remove these clauses from the operation of the words "voluntary exposure."

[2, 3] The next question arises from the fact that the plaintiff was injured by the wreckage of a passenger car, to which clause (d) applies. This clause being specific and applicable by its terms to the manner in which the plaintiff was injured, it is claimed that it should control the general exception in clause (g) of injury by explosives. The point is not free from difficulty. "Wreckage" is defined as "the act of wrecking." The word implies that the car is a passive instrumentality, acted upon by some force which wrecks it. This force must always be a proximate cause of the injury. Therefore where an explosive wrecks the car, it is proper to say that an injury resulting from the wreckage of the car was "caused" by the explosion. This would be true if the explosion was only sufficient to derail a moving train. The difficulty with such a construction arises from the fact that it would completely nullify clause (d) which is evidently intended to secure the patronage of intending passengers. If we must look for the cause of the injuries to the first cause, it would never be the wreckage of the car, which is itself a result, and not a cause. In the case at bar, if the car had remained intact, that is, if the walls of the toilet room had been sufficiently strong to resist the explosion, or to have directed its force away from the interior of the car, the plaintiff would have suffered no greater injury than a bystander at great gun target practice. The wreckage of the car intervened between the explosion and the plaintiff. The defendant has chosen to use the phrase "wreckage of the car" as a cause of injury for which they hold themselves responsible. Although the explosion was the proximate cause of the injury, it was, by the peculiar terms of the policy, made a remote cause, or secondary cause where the wreckage of the car intervened. No doubt if an explosive bomb had been placed in the plaintiff's lap and there exploded, killing him and wrecking the car, the wreckage of the car would not be a "cause" of the accident within the meaning of the policy. But where it was necessary for the explosive to first destroy or wreck the car to reach the passenger, or where parts of the wrecked car striking the passenger cause the injury, the terms of the policy would warrant a recovery. The defendant is privileged to frame its contracts of insurance in any terms it may choose, and in the absence of ambiguity the courts enforce such contracts as written. But they are offered to the public, and are intended to be sufficiently attractive to secure purchasers. The established rule of construction of such contracts require us to settle the ambiguity arising from the inapt phraseology "caused by the wreckage or burning of a railway passenger car" against the insurance company, and therefore to hold that where the injury is caused by the "wreckage" of the car which is in turn caused by the explosion of an explosive, the insured can recover under clause (d), for the reason that such "wreckage" is itself a "cause" of injury within the meaning of the latter clause. In view of the foregoing conclusion, in which we have assumed that the explosion was that of an "explosive" within the meaning of that term as used in the policy, it is unnecessary to consider the points made with reference to the evidence or findings in that connection.

[4-6] It is contended by appellant that the plaintiff in any event is entitled to recover for his injuries on only one policy, and on the other to be refunded the premium, which

has been tendered to him, under proviso (e) which is as follows:

"(e) Insurance on any person under ticket policies is limited to the principal sum of $2,500.00 indemnity for injuries resulting in death, and to males, $1,250.00 for dismemberment, $12.50 weekly indemnity for wholly disabling injuries and the extra insurance provided for in clause (d); the company will return on demand to the insured or to his or her executors, administrators or assigns, all premiums paid for ticket policies in excess thereof."

In view of the fact that each policy provides for $2,500 for death, $1,250 for dismemberment, and $12.50 weekly indemnity, the words "ticket policies" must refer to other policies of the same company, for each separate policy is already so limited, and if this were doubtful the last sentence, by which the company agrees to return all premiums paid for ticket policies in excess thereof makes clear the purpose of the company to limit its liability to the face of the single policy. It is claimed, however, that the defendant is estopped to deny its full liability on the second policy because it is alleged to be the custom of the defendant to issue as many separate policies as may be requested, charging full premium for each. In proof of this alleged custom one witness testified that on December 12, 1917, he purchased four ticket policies from the defendant's agents, two at Seventh and Broadway, and the others at the main office at Thirteenth and Broadway. The policies were admitted in evidence, and it appears therefrom that two were dated 4 p. m., December 11, 1917, one 6:30 p. m., December 12, 1917, and another December 13, 1917. This evidence is far short of proving a uniform custom of the company or of its agents in June, 1916, at the time of the issuance of plaintiff's policies, or at any time, and was not competent evidence to show the custom in 1916, nor could defendant be estopped by such a custom, even if proved, unless the conduct of the plaintiff was in some manner influenced thereby, and no evidence was offered that he even knew of such custom. Plaintiff bought these two policies, each good for one day, at an interval of 24 hours, and by reason of the fact that the policies were good for more than 24 hours they overlapped for a period of 5½ hours. During that period he was injured. The policies make provision for such a contingency by providing for a refund of the premium on demand, a method of adjustment no doubt made necessary by reason of the fact that these tickets were issued to all applicants at every ticket office of the railroad company, and that a purchaser could for that reason secure a number of policies covering substantially the same period and loss. The plaintiff was entitled to recover $1,300 upon but one policy, and upon the other 25 cents.

The trial court is directed to modify the judgment by striking out the amount of $2,600, and inserting in lieu thereof the amount of $1,300.25, and as so modified the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J; SHAW, J.; LAWLOR, J.; OLNEY, J.

47 Cal. App. 142

SUMNER v. MOHN. (Civ. 2830.)

(District Court of Appeal, Second District, Division 1, California. April 17, 1920. Hearing Denied by Supreme Court June 14, 1920.)

1. Husband and wife ⇐23¾—Evidence held insufficient to justify finding wife authorized by husband to employ attorney.

Wife's testimony *held* insufficient to justify finding that she was authorized to act for defendant husband in employing plaintiff attorney as her attorney at the expense of her husband in matters adverse to him and to institute an action against him.

2. Husband and wife ⇐19(18)—Legal services not "articles necessary for wife's support," to render husband liable; "necessaries."

Legal services cannot be deemed "articles necessary for a wife's support," to render her husband liable therefor, under Civ. Code, § 174; "necessaries" at common law consisting only of necessary foot, drink, clothing, washing, physic, instruction, and a convenient place of residence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

3. Husband and wife ⇐19(18)—Code gives wife remedy for means to prosecute action for separate maintenance.

Civ. Code, § 137, providing that the court may require the husband to pay money necessary for prosecution of the wife's action for separate maintenance, guarantees the wife the means necessary for securing her rights, so that, in the absence of necessity for pledging the husband's credit for legal services, no implied power to do so exists.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Charles E. Sumner against George F. Mohn. From a judgment for plaintiff, defendant appeals. Reversed.

Adam Thompson, Iverson L. Harris, and Patterson Sprigg, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondent.

SHAW, J. In this action plaintiff sued for the reasonable value of legal services alleged to have been performed for defendant at his special instance and request. The case was tried by a jury, which gave a verdict in favor of plaintiff for $1,100. Judgment followed accordingly, from which defendant appeals, presenting in lieu of a bill of exceptions a typewritten record, as provided in section 953a, Code of Civil Procedure, and in their briefs the parties have printed portions of the record upon which they rely in support of their respective contentions.

Though nothing appears in the complaint or bill of particulars rendered by plaintiff on demand of defendant to indicate such fact, it nevertheless appears from the evidence received that plaintiff's claim for compensation is based upon services not in fact rendered to or performed for defendant, but for the latter's wife, who, as claimed by plaintiff, was agent of the husband, and being thereunto, at the expense of defendant, expressly authorized so to do, employed plaintiff as her attorney, from whom she sought advice as to marital differences existing between herself and husband, as a result of which, after some 80 or 90 separate consultations, covering a period of 3 or 4 months, plaintiff for the wife brought an action against defendant for separate maintenance.

[1] The existing agency and the fact that the wife of defendant was by him expressly authorized to employ plaintiff as an attorney, and thus obligate him to pay for the services rendered his wife, depends solely and alone upon the latter's testimony, who, notwithstanding the provisions of section 1881, Code of Civil Procedure, was permitted to testify against her husband without objection interposed by defendant, who now for the first time claims that it was error. Without considering the point, we may say that her testimony is insufficient to justify the finding implied by the verdict that she was authorized to act for defendant in employing plaintiff as her attorney at the expense of her husband in matters adverse to him and for the purpose of instituting an action against him. Her testimony, after stating at great length the existing marital differences and causes thereof, is that on the evening of October 11, 1917:

"Dr. Mohn [the defendant] said to me, 'Well we had better settle up and separate.' He said, 'You go ahead and get your counsel and I will get mine.'"

And again:

"On the afternoon of October 15th, Dr. Mohn told me to go ahead and get an attorney, and we would settle this thing up."

This testimony, and this alone, not, however, communicated to the plaintiff, constitutes the only evidence in support of plaintiff's claim that, in employing him as an attorney against defendant, his client acted merely as agent of the defendant, who was obligated to pay for the services so adversely rendered. Conceding the statements, the making of which defendant denies, were in fact made, they could not under the circumstances have been reasonably understood by Mrs. Mohn or intended by defendant to have been made with the intent and purpose of conferring authority upon the wife as agent of her husband to obligate him upon the alleged contract. Suppose, in a dispute over a boundary line between A. and B., the former should say to the latter, "You go ahead and get your attorney, and I will get mine, and we will settle this matter," manifestly B.'s attorney could not recover from A. for services rendered B. upon the theory, based upon the language used, that in employing him B. was acting as the agent of A., having authority to engage counsel for himself at A.'s expense. This being true, it follows that since, as to existing differences between the husband and wife, their relation was that of strangers, what was said by Dr. Mohn cannot be construed as creating an agency in the wife, with power to make a contract in his name, and binding him to pay for services rendered to her alone and against the husband as principal.

Conceding the evidence insufficient to show express authority conferred upon defendant's wife to make the alleged contract, plaintiff nevertheless insists that the services rendered must be deemed necessaries furnished her, and hence, under the provisions of section 174, Civil Code, the husband is, regardless of the question of express agency, liable for the value thereof. The section provides that, in case the husband—

"neglect to make adequate provision for the support of his wife, * * * any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband."

The services rendered, according to respondent—

"were for investigation, consultation, preparation, and the beginning of a suit for separate maintenance, and covered a period extending from October 12, 1917, to April 3, 1918."

[2] While cases may be found tending to support respondent's contention, the overwhelming weight of authority is to the contrary. The statutory liability of the husband is for articles necessary for the wife's support. In our opinion, legal services cannot be deemed such articles. The common law defines necessaries to consist only of necessary food, drink, clothing, washing, physic, instruction, and a convenient place of residence. 2 Kent's Commentaries, 124; Shelton v. Pendleton, 18 Conn. 417; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769;

Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631, and cases referred to in note in L. R. A. 1915C, p. 467.

[3] Moreover, the services rendered pertained to the bringing of a suit for separate maintenance, and the statute (section 137, Civ. Code) provides that the court may require the husband to pay such money as may be necessary for the prosecution of the action. This statute guarantees the wife full and complete relief, and provides the means necessary for securing her rights, and hence, in the absence of necessity for pledging the husband's credit, no implied power to do so exists. Meaher v. Mitchell, 112 Me. 416, 92 Atl. 492, L. R. A. 1915C, 467, Ann. Cas. 1917A, 688. In the action for separate maintenance the court had before it the parties, their property, their merits and delinquencies, and was thus, as intended by the statute, not only in a position to fix the compensation of plaintiff for the services rendered to the wife, but presumably did require the husband to pay such sum as it deemed just and equitable therefor. In view of the Code provisions of this state, a wife has no implied power to make a contract for legal services to be rendered for her sole benefit in matters adverse to the husband. Hence it follows that the attorney rendering such service at her request cannot recover therefor in an independent action against the husband. To so hold would not only jeopardize the marital or separate estate of the husband, thus violating a sound public policy, but ignore the great weight of opinion elsewhere expressed upon the subject.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 162

MICHELS v. BURKHARD et al. (Civ. 3189.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1920. Hearing Denied by Supreme Court June 17, 1920.)

1. Homestead ⟹57(1)—Claimant has burden of proof.

In action to quiet title, a defendant, claiming homestead rights in property, has burden of showing, not only the declaration of the homestead and the recording of the declaration, but also that she was a resident on the property at time declaration was made and recorded.

2. Homestead ⟹57(3)—Facts held to show residence on property by person making and recording homestead declaration.

In action to quiet title, facts *held* to show that defendant, claiming homestead rights in the property, was a resident on the property at the time the declaration was made and recorded.

3. Homestead ⟹47 — Wife's declaration of homestead held sufficient, irrespective of her motive or absence of husband.

The making and filing of homestead declaration by wife, which fully complied with Civ. Code, § 1263, placed the property beyond the reach of husband's creditors, or sale on execution for his debts, etc., as effectively as though husband had filed same himself, though her purpose in so doing was to harass and annoy husband, and to cloud the title to the property, and though husband was not living on the property at the time of such declaration; wife's motive in making such declaration being immaterial, and husband's residence on the property being unnecessary, in view of subdivision 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by John Michels against John F. Burkhard and Emma A. Burkhard. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

W. S. Knott, of Los Angeles, for appellant.
Samuel D. Weil, of Los Angeles, for respondent.

THOMAS, J. This is an action to quiet title. The complaint is in the usual form. The answer of the defendant Emma A. Burkhard is a general denial of the material allegations of the complaint. By way of further defense she sets up an alleged declaration of homestead, made, executed and recorded by her in the year 1912, covering the property involved in this action, which declaration contains recitations that she is actually residing on such property with her family, a son, and that her husband has never made a declaration of homestead on said property, or "executed any document claiming a homestead" therein, alleging that there has been no abandonment or conveyance of the same, that it is in full force and effect, and that all the property described in said declaration of homestead is community property, having been acquired by defendants after their marriage otherwise than by gift, devise, or descent.

As a "third defense," defendant Emma A. Burkhard alleges that on January 6, 1914, a certain action was pending in the superior court of Los Angeles county, in which she was plaintiff and John F. Burkhard, her codefendant here, was defendant; that said action was an action for her own support and maintenance; that on said last-mentioned date said cause was tried; that the court gave judgment therein, decreeing that said defendant pay to said plaintiff the sum of $35 per month, and decreeing said judgment a first lien on the land referred to in the present proceeding as well as other real property not in controversy here; that said judgment was, on the 16th day of June, 1914,

duly recorded, etc.; and that the same has never been reversed, modified, or appealed from. Defendant John F. Burkhard did not answer.

The court found for the plaintiff, after trial of the issues so presented, holding plaintiff to be the owner of the land described in his complaint, "subject only to the lien of a certain decree"—the decree granting support, etc., above referred to. The findings further declare:

"That claim of defendants, and each and either of them, of any estate or interest in or to any" of said land, "except by virtue of said lien," is without any right whatever; that defendants are now, and at all times mentioned in the complaint were, husband and wife; that defendant Emma A. Burkhard executed said declaration of homestead; and "that all the facts stated in said declaration are true, except as follows: It is not true that the said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the said declaration with the intention that it was or should be for the joint benefit of herself and her husband, John F. Burkhard, but she made the said declaration for her sole benefit, and for the purpose of harassing and annoying her said husband, and to cloud the title of the real property therein sought to be claimed as a homestead."

Judgment was entered accordingly. Defendant Emma A. Burkhard appeals from that portion of the judgment adverse to her.

[1, 2] The only point before us is the validity of the alleged homestead. It is urged by appellant that the finding of the lower court that "it is not true that said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since, made the declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit, and to cloud the title to the real property therein sought to be claimed as a homestead," is not supported by any evidence and is against the law. Many cases are cited by appellant, presumably in support of this contention. All, however, go to the question of disclosing the object and purpose of the homestead laws, and give reasons why the description of the property in controversy in the various cases was sufficient—neither of which propositions is at issue here. We therefore consider none of the cases cited in point.

"The burden of showing not only the declaration of the homestead and the recording of the declaration, but also of showing that she was a resident upon the property at the time the declaration was made and recorded, rested upon the plaintiff." Machado v. Machado, 36 Cal. App. 646, 172 Pac. 1124.

We think this requirement was fully met in this case. It is stipulated that ever since November 6, 1901, up to and including November 30, 1912, the record and legal title to this property was in the said defendant husband, and that the latter had not at any time declared or selected the same as a homestead. The record shows that the defendant Emma A. Burkhard brought an action against her husband, John F. Burkhard, in August, 1912, and secured from the court an order excluding him from the premises occupied by them jointly as their home, and that he, the said husband, had complied with said order, having promptly left the premises in question. This order was in full force and effect in November, 1912, the date when the alleged declaration of homestead was executed and recorded by the defendant Emma A. Burkhard. The divorce case was tried in January, 1914, and by the trial court in that action the defendant Emma A. Burkhard, plaintiff there, was ordered from the premises in controversy here to other property, known as the "Elm property," and immediately thereafter she complied with such order, since when she nor her son, or either of them, has resided on said premises. On March 21, 1917, the defendant John F. Burkhard made, executed, and delivered to the plaintiff here a deed to the property in question, which instrument was recorded the next day.

[3] As we have already seen, the court found:

"That all the facts stated in said declaration are true, except as follows: *It is not true that said defendant Emma A. Burkhard, at the time she executed or acknowledged the said declaration of homestead, or at any time since made the said declaration with the intention that it was or should be for the joint benefit of herself and her said husband, John F. Burkhard, but she made the said declaration for her sole benefit, and for the purpose of harassing and annoying her said husband, and to cloud the title to the real property therein sought to be claimed as a homestead.*" (Italics ours.)

We think this finding in effect says:

"The declaration of homestead as made and recorded complied in every way with the statutory requirement, but the motive prompting the making of the same is questioned."

In our opinion it is immaterial what the motive of the wife may have been, as it is not legally incumbent upon her to give any reason for her action. All she needs to do is to comply with the statute. Farley v. Hopkins, 79 Cal. 203, 21 Pac. 737. This she unquestionably did. Even although we assume that the wife's motive was entirely bad, as found by the court, the fact still remains that, as a matter of law, when the said declaration of homestead was so made and recorded, it actually placed the property

described therein beyond the reach of creditors of her husband, or sale upon execution for his debts, etc., as effectively as though he had filed the same himself. To this extent, therefore, the declaration was made for their joint benefit. We think this legal implication, even standing alone, sufficient to support the statement that the declaration was made for their joint benefit. To hold otherwise would be tantamount to denying the very right vouchsafed the wife under the specific terms of the statute. Subdivision 2 of the section covering this phase of the matter, too, would seem to preclude the idea that residence on the property in question by both spouses is necessary. At any rate, it is conceded that the declaration here involved complies with section 1263 of the Civil Code in every particular.

For this reason we hold that the court erred in concluding from the legal facts found that the declaration in question was "null and void and of no effect," and that such error was prejudicial to the rights of this appealing defendant.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

47 Cal. App. 166

PRATT v. HARROLD. (Civ. 3188.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1920.)

1. Husband and wife ⇐333(4)—Defendant's letters to wife intercepted by husband admissible to rebut the claim that wife tempted defendant.

In an action for alienation of wife's affections, where defendant claimed that he was the victim of a conspiracy, and that the woman tempted him, letters written by him to plaintiff's wife, which were intercepted by plaintiff so that they could not have alienated the affections of the wife, were nevertheless admissible to corroborate the wife's testimony that defendant had made love to her and encouraged her to obtain divorce from her husband and marry defendant.

2. Witnesses ⇐53(1)—Wife's testimony in husband's behalf admissible to show alienation of affection.

If Code Civ. Proc. § 1881, disqualified the wife as a witness for her husband in an action for alienation of her affections, that disqualification was removed by the amendment of 1907, which permits such testimony in an action brought by husband or wife against another person for alienation of the affections.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Arthur H. Pratt against Alvin H. Harrold. Judgment for plaintiff, and defendant appeals. Affirmed.

Earl Newmire, of Los Angeles, for appellant.

Wm. M. Morse, Jr., and S. M. Johnstone, both of Los Angeles, for respondent.

SLOANE, J. This is an appeal by the defendant from a judgment for $1,500 for the alienation of the affections of plaintiff's wife.

The only points raised on the appeal are upon the rulings of the court in the admission of evidence. Exception is taken to the introduction of certain letters written by the defendant to plaintiff's wife, a number of which were intercepted by the husband before their delivery through the mails to the wife, and also to the admission in evidence of the wife's testimony. Appellant's brief is very meager in elucidating his points, and there is no brief for respondent.

[1] We think the letters were relevant and competent evidence. They, it is true, not having reached the wife, could not have been influential in diverting her affections from her husband, although they were fervently directed to that end. However, the defendant, for defense to the action, had pleaded and attempted to prove that he was the victim of a conspiracy, and that the woman had tempted him. These letters were calculated to show, by their ardent declarations and admissions, that he was and for some time past had been by no means a passive agent in the love-making, and tended to corroborate the wife's testimony that defendant had made love to her, gained her affections, and encouraged her in a plan to obtain a divorce from her husband and marry him.

[2] The objection that the wife was not a competent witness, under the prohibitions of section 1881 of the Code of Civil Procedure disqualifying a wife as a witness under certain conditions, is not well taken. If this section has ever applied to testimony such as here offered, the limitation has been removed ever since the amendment of 1907, which permits such testimony in an action brought by husband or wife against another person for alienation of the affections of either the husband or the wife.

The wife's testimony was rather perfunctory, and not very conclusive; but appellant concedes that it was, with other evidence in the case, sufficient, if admissible, to sustain the findings and judgment, and in this we agree with him.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

47 Cal. App. 190

SCHILLING v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3385.)

(District Court of Appeal, First District, Division 2, California. April 21, 1920. Rehearing Denied May 13, 1920.)

1. Master and servant ⊂420—Compensation act authorizes commission to fix fees of claimant's attorneys.

The Industrial Accident Commission has authority, under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1), and 24(d), to fix the fees of attorneys representing a claimant.

2. Master and servant ⊂420—Compensation act merely authorizes determination of reasonableness of attorney's fee.

In fixing the fee of claimant's attorney under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1) and 24(d), the jurisdiction of the Industrial Accident Commission is confined to determination of the reasonableness of the fee for the services in the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for services in independent proceedings, though the contract is made payable out of the award of compensation made by the commission.

3. Master and servant ⊂420—Compensation commission bound to give attorney fair hearing on question of reasonableness of fee.

If a claimant under the Workmen's Compensation, Insurance, and Safety Act, who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered, seeks to avoid the obligation of the contract after the services have been rendered and the profits retained by him, the attorney is entitled to a fair hearing before the commission on the question of the reasonableness of the fee agreed to be paid.

Proceeding by John B. Costello under the Workmen's Compensation Act to obtain compensation for personal injuries. Application by Frank Schilling for certiorari to review an order of the Industrial Accident Commission fixing his compensation for legal services. Order annulled.

Frank Schilling, of San Francisco, pro se.

A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. Petitioner instituted this proceeding in certiorari to review the order of the Industrial Accident Commission fixing his compensation, after rehearing, for legal services rendered to an applicant for compensation under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831).

It appears from the record that the applicant, having been injured while in the course of his employment, consulted petitioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again consulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner a settlement was made with the insurance carrier for $650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at $45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fee. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted that this contract should not be declared void in toto, and that in any event the allowance of $45 was wholly unreasonable in payment for the legal services which he had rendered in the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands, conducted their examination in his own way, refused to permit petitioner to cross-examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

[1, 2] Counsel for respondent states that there is but one question involved in this proceeding, "What was the value of the services performed by petitioner, * * *" or "Has the Industrial Accident Commission authority under sections 24 (b) (1) and 24 (d) of the Workmen's Compensation, Insurance, and Safety Act, to fix the fees of attorneys representing applicants before it?" This court is unable to determine the value of the services performed by the petitioner because the ref-

eree to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees can scarcely be questioned. Section 24, subdivision (b) (1), authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining to any claim for compensation or application filed therefor. No constitutional objection has been raised to this provision of the act, and it may therefore, in this proceeding, be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (d) of the same section provides that "no claim or agreement for the legal services or disbursements * * * in excess of a reasonable amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount." No constitutional objection has been raised to this provision of the act, and for the purpose of this proceeding it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract, is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

[3] An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compensation are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.

That petitioner in this case did not receive such a hearing is too plain to question. The award of $45 as compensation to petitioner for the services admitted to have been rendered by him in the proceedings before the commission is less than the ordinary charge made by attorneys for the collection of a promissory note without any form of legal proceedings. Upon the meager showing petitioner was permitted to make it is apparent that the fee allowed was unreasonably low for the services rendered. But, as heretofore stated, it is impossible for this court to determine what allowance should be made for the services rendered, because the referee failed to permit petitioner to fairly present his evidence on that issue.

For these reasons the order of the commission is annulled.

47 Cal. App. 150

DREW v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (Civ. 2126.)

(District Court of Appeal, Third District, California. April 19, 1920. Hearing Denied by Supreme Court June 17, 1920.)

1. Execution ⟸388 — Order of examination misnaming party to action held sufficient notice.

An order of examination after judgment entitled "Paul Lobree, Plaintiff," instead of "Phil" Lobree, *held* sufficient notice to the party sought to be examined; the error being merely clerical, and the papers served clearly identifying the action.

2. Pleading ⟸129(2)—Failure to deny in answer an admission of truth.

Where complaint alleged that defendant was a corporation duly organized and existing, such allegation was admitted by an answer of the corporation which failed to deny the same.

3. Contempt ⟸21—Judgment against corporation not open to attack in a proceeding against officer for contempt.

Where an allegation in the complaint that defendant was a duly organized and existing corporation was not denied in the answer, a judgment entered against the corporation was conclusive as to the corporate existence of the defendant and not open to attack in a proceeding in contempt against an officer thereof.

Petition by F. C. Drew for a writ of review to have an order of the Superior Court of the State of California in and for the County of Mendocino, Hon. J. Q. White, Judge, adjudging him guilty of contempt of court, annulled and set aside. Writ of review dismissed.

See, also, 185 Pac. 680.

W. H. Metson and R. G. Hudson, both of San Francisco, for petitioner.

Robert Duncan, of Ukiah, for respondents.

NICOL, Presiding Judge pro tem. This is a petition for a writ of review, by which the petitioner seeks to have an order of the superior court of Mendocino county, adjudging him guilty of contempt of court, annulled and set aside.

The material facts of the matter may be briefly stated as follows: On the 28th day of October, 1918, in an action then pending in the said superior court of Mendocino county, entitled "Phil Lobree, Plaintiff, v. L. E. White Lumber Company, a Corporation, and Goodyear Redwood Company, a Corporation, Defendants," judgment was rendered in favor of the plaintiff and against the defendants for the sum of $7,150, with interest and costs. On the 4th day of August, 1919, Robert Duncan, the attorney for the plaintiff in said action, filed and presented to the judge of said court his affidavit wherein he set forth the rendition of the said judgment; the issuance on November 30, 1918, of an execution against the property of the said judgment debtor, L. E. White Lumber Company, and that the execution was afterwards returned wholly unsatisfied; that the said L. E. White Lumber Company had its principal place of business in the city and county of San Francisco; that said F. C. Drew was at the time of the commencement of said action and at all times since has been the president and general manager of the said L. E. White Lumber Company, and that he resides in and has his office in the said city and county of San Francisco; that the said company owned property and had it in its possession or under its control, not exempt from execution, which it unjustly refuses to apply to the satisfaction of said judgment, and that said Drew, as president and general manager, had property of said company in his possession and under his control, which he unjustly refuses to apply to the satisfaction of said judgment; that the said company had books of account, which were in the possession and under the control of the said Drew, as president and manager thereof, showing the properties belonging to the said company, and also showing the receipts and disbursements of said corporation, and particularly showing the receipts of moneys from the sale of its properties to the Goodyear Redwood Company and the amounts and disbursements thereof; that the said L. E. White Lumber Company claimed to have received from said Goodyear Redwood Company a large amount in cash within two or three years before the making of said affidavit; that the said company and its said president, F. C. Drew, claimed that the said company was solvent and able to pay all its debts, including the said judgment. The said affidavit prayed for the appointment of a referee in the city and county of San Francisco, and that an order be made requiring said judgment debtor L. E. White Lumber Company, by its president and general manager, F. C. Drew, and by its other officers and directors, to appear before the said referee, and to answer concerning the property of said company, and to produce before the referee its books showing the property and moneys belonging to the said corporation.

Upon the presentation of this affidavit the court on the 4th day of August, 1919, made its order appointing one Casper A. Ornbaum referee, and ordered the said judgment debtor L. E. White Lumber Company, by its president and general manager, F. C. Drew, and said F. C. Drew, to appear before the said referee on the 14th day of August, 1919, at 2 o'clock p. m., and submit to examination and make discovery under oath concerning the property of the said company, and to bring before the referee the books of account of the said company. This order of the court, together with the said affidavit of Robert Duncan, was duly served on F. C. Drew on the 9th day of August, 1919, and he failed to appear for examination and no appearance was made for or on behalf of the said L. E. White Lumber Company. The petitioner, F. C. Drew, was thereafter adjudged guilty of contempt of court for failing to obey said order.

The petitioner claims that the superior court of Mendocino county was without jurisdiction to render its judgment in contempt against him, because: (1) The order made by the court for him to appear and submit to an examination was entitled in an action not pending in said superior court, in this, that the said order was entitled "Paul" Lobree v. L. E. White Lumber Company, a Corporation, et al.; (2) because the judgment sought to be enforced in the supplement proceedings, in which petitioner was adjudged guilty of contempt, was null and void by reason of the fact that said judgment was made and entered in an action brought against L. E. White Lumber Company, which action was instituted after the said company had forfeited its charter by reason of its failure to pay its annual franchise tax, which forfeiture occurred on March 3, 1917.

[1] 1. The affidavit of Robert Duncan above referred to, and upon which the said order to appear for examination was based, was properly and correctly entitled, as follows, to wit: "Phil Lobree v. L. E. White Lumber Company et al." This affidavit gave the correct date of the judgment and the amount thereof, and also the date when the judgment was entered and docketed. It recited also the date of the issuance of the execution and the fact that the execution was returned wholly unsatisfied. The order of examination made on this affidavit, as before stated, was entitled "Paul Lobree, Plaintiff,"

instead of "Phil Lobree, Plaintiff." This error in the title of the cause did not, in our opinion, render the order void, and no one could be misled by reason thereof.

It is perfectly clear from the statements contained in said order that it was an order for examination made in the case of Phil Lobree v. L. E. White Lumber Co., a Corporation, et al.; that such is the fact is plain from the following statements contained in the order: It refers to the said affidavit, giving the name of the affiant and stating that he was the attorney for the plaintiff, and further stated that it appeared by the said affidavit "and by the records on file in said action that judgment was recovered therein against the defendant L. E. White Lumber Company, a corporation, on the 28th day of October, A. D. 1918, for the sum of $7,150, with interest and costs; that said judgment was duly entered and docketed in the office of the clerk of this court on said date; that an execution against the property of said judgment debtor was on the 30th day of November, A. D. 1918, duly issued to the sheriff of the city and county of San Francisco, state of California, the county where said judgment debtor and its president and general manager, F. C. Drew, had their and each of their principal places of business at the time of the issuance of said execution and ever since have had and still have"; and also states that said execution was returned wholly unsatisfied.

It likewise appears from the affidavit of the petitioner filed in the superior court of Mendocino county, in answer to the order to show cause why he should not be punished for contempt, that there was served upon him on the 9th day of August, 1919, a certified copy of said affidavit of Robert Duncan, and also of said order, and "that to said affidavit there was attached a certificate of Hale Prather, county clerk and ex officio clerk of the superior court of the county of Mendocino, certifying that he had compared the foregoing copy of an order and affidavit in the case of Phil Lobree, plaintiff, v. L. E. White Lumber Company, a corporation, et al., defendants, with the original records, as the same remained in his office, and that the same were correct transcripts thereof and of the whole of said original documents."

There can be no question from the foregoing statements contained in the order that it was made in the case of Phil Lobree v. L. E. White Lumber Company et al., and that the error in the title of the cause is wholly immaterial, as all the information concerning the action and judgment was fully and accurately given in the order and in the affidavit of Robert Duncan, certified copies of which were served on petitioner on the 9th day of August, 1919. The error was merely a clerical error, and no one could be deceived or misled thereby. It was held in Ex parte Gordan, 95 Cal. 374, 30 Pac. 561, that an order that the husband pay a monthly allowance for the support of a minor child designated as "Lina" or "Lena" Gordan was not void as being an order for the support of a different person from "Leah" Gordan, though the names are not the same, nor are they idem sonans, when it appears that the child is referred to throughout the proceedings as the sole issue of the parties to the action, and is thereby identified.

[2, 3] 2. The claim of the petitioner that the judgment is void because the action in which it was rendered was instituted after the defendant L. E. White Lumber Company had forfeited its charter, by reason of its failure to pay its franchise tax for the year 1916, cannot be sustained. It appears from the record that the action was commenced on the 25th day of June, 1917. The complaint was verified and alleged:

"That said defendant L. E. White Lumber Company is now, and was at all the times in this complaint mentioned, a corporation, duly organized and existing under and by virtue of the laws of the state of California."

This allegation of the complaint was admitted by the answer of said corporation in failing to deny the same, and the court found that the said allegation of the complaint was true. The corporate existence of said company being thus established by the said admission of the pleadings, the judgment entered thereon is final and conclusive upon said matter and is not open to attack in this proceeding.

In the case of Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac. 454, there was a special defense in which it was alleged that the plaintiff was a corporation, organized, existing, and doing business under and by virtue of the laws of the state of California; that at all times from its incorporation it has wholly failed to comply with the provisions of the act imposing a license tax upon corporations and had wholly failed to pay its license tax. No evidence was introduced in support of this plea, and judgment was entered in favor of plaintiff. The court said that—

"The answer itself avers that the plaintiff is a corporation and is engaged in business as a corporation. This is an admission of the plaintiff's corporate capacity to sue. * * * The corporate existence and general capacity of the plaintiff thus being established by the admission of the pleadings it was a matter of affirmative defense for the box company to have shown the extraneous fact that plaintiff had failed to comply with the corporation license tax law. * * *"

And the judgment in favor of the plaintiff was sustained.

It follows that the petitioner was in contempt of court in failing to obey the order of

August 4, 1919, directing him to appear before the referee for examination, and the court was in the exercise of its jurisdiction in holding him guilty of contempt.

It is therefore ordered that the writ of review be, and the same is hereby, dismissed.

We concur: BURNETT, J.; HART, J.

47 Cal. App. 147

WRIGHT v. BALDWIN. (Civ. 3351.)

(District Court of Appeal, First District, Division 2, California. April 19, 1920.)

1. Libel and slander ⟸120(2)—Malice essential to recovery of punitive damages.

Since punitive damages in an action for slander are allowable under Civ. Code, § 3294, as punishment for the motive of the act, they can only be allowed where there was malice, and an instruction authorizing punitive damages if the jury found defendants spoke words slanderous per se without requiring a finding of malice was erroneous.

2. Libel and slander ⟸112(2)—Malice may be proved indirectly.

Malice in the utterance of a slander which authorizes punitive damages may be proved either by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved.

3. Libel and slander ⟸123(6)—Inference of malice from unprivileged slander is for the jury.

Though malice may be inferred from an unprivileged utterance of a false charge slanderous per se, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make.

4. Malicious prosecution ⟸21(1)—Full disclosure to attorney on whose advice prosecutor acted in defense.

Where defendant in an action for malicious prosecution alleged full disclosure to and reliance upon advice by his attorney, the district attorney, and the deputy district attorney, he is entitled to a verdict if he made a full disclosure to any one of the attorneys upon whose advice he relied, and an instruction requiring a finding of full disclosure to each one of them is erroneous.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. E. Wright against James V. Baldwin for malicious prosecution and slander. Judgment for the plaintiff, and defendant appeals. Reversed.

Anderson & Anderson, of Sacramento, and Bert Campbell, of Los Angeles, for appellant.

John H. Miller, of San Francisco, and Edward C. Higgins, of Los Angeles, for respondent.

NOURSE, J. This is an appeal by defendant from a judgment, following a verdict, entered against him in favor of plaintiff in a joint action for malicious prosecution and slander. The complaint contained four causes of action, three for malicious prosecution growing out of the arrest and trial of the plaintiff upon a charge of embezzlement, and the fourth for slander growing out of statements alleged to have been made by the defendant in the courtroom of a justice of the peace who was conducting the preliminary hearing of the plaintiff upon the embezzlement complaint. Plaintiff was nonsuited on the second and third causes. The jury awarded him damages in the sum of $6,000, with nothing in the verdict to indicate what portion was allowed on each cause of action or what portion was allowed for either compensatory or punitive damages.

Various grounds for reversal have been urged by appellant; the most patent objections going to the error of the trial court in instructing the jury. Upon the cause of action for slander the court, after instructing the jury that the words charged as having been used were slanderous per se, and that the first duty of the jury was to determine whether those words were used by the defendant of and concerning the plaintiff, gave the following instruction as to the damages which might be awarded under this cause of action:

"If you believe from a greater weight of the evidence that they were so used, your verdict will be for the plaintiff, and you will assess such a reasonable sum as his damages as in your sound discretion you believe from the facts and circumstances in evidence will be just and right, and * * * will compensate the plaintiff for the injury to his feelings, etc. * * * You may also allow such a temperate amount by way of punitive or exemplary damages as will serve to prevent or deter said defendant from committing a similar wrong hereafter. If you believe from the evidence that defendant did not utter the words charged in the complaint of and concerning plaintiff, you will, of course, award no damages therefor."

[1-3] The foregoing were the only instructions given by the court upon the cause of action for slander. All the other instructions related solely to the first cause of action for malicious prosecution. That these instructions failed to present the issues fairly to the jury cannot be doubted. The effect was that, if the jury found that the defendant spoke the objectionable words of and concerning the plaintiff, they could award the plaintiff both compensatory and punitive damages without regard to any consideration of malice or motive, but that they could decline to award damages for the alleged slander only in the event they should find that defendant did not utter the words charged of

and concerning plaintiff. Punitive damages being recoverable under section 3294, Civil Code, as punishment for the motive of the act complained of after compensation for the injuries suffered by the act has been made, malice is essential to recovery. Such malice may be proved directly or indirectly by direct evidence of the evil motive or intent or by inferences which may be drawn from the facts proved. Davis v. Hearst, 160 Cal. 143, 163, 116 Pac. 530. Malice, therefore, is always an issue in an action for slander where plaintiff seeks punitive damages. And though, in awarding punitive damages, the jury may infer malice from an unprivileged utterance of a false charge slanderous per se, such inference must be drawn by the jury from the facts proved; it is not a presumption of law which the court itself can make. The failure to so instruct the jury was error.

[4] Criticism is also made of the instruction given at the request of the plaintiff relating to the special defense interposed by the defendant to the first cause of action that the prosecution was not instituted by him until after he had made a full and fair disclosure of all the facts relating thereto to counsel and had been advised by counsel that in his opinion plaintiff was guilty of the crime of embezzlement. The undisputed facts were that, prior to the institution of the criminal proceeding complained of, defendant consulted his own counsel and was by him advised that in his opinion the plaintiff was guilty of embezzlement, and that the defendant and his counsel then presented the facts in their possession to the district attorney of Los Angeles county, who gave defendant the same advice, but suggested that he also present the facts to one of his deputies in order that a thorough investigation might be made before a warrant should issue for plaintiff's arrest. This was also done, and the deputy district attorney gave defendant the same opinion as to plaintiff's guilt.

The instruction complained of was that the jury should disregard said defense "if you believe from the evidence that the said defendant did not state to his attorney or to the district or deputy district attorney, or any or either of them, all the facts within his knowledge," etc.

The vice of this instruction is that it required the jury to find that defendant had made a full and fair disclosure of all the facts within his knowledge respecting the transactions complained of to each one of the three attorneys consulted by him, whereas proof of a full and fair disclosure of such facts to any one of the three would have been sufficient to sustain this defense if defendant had acted upon the advice of the attorney to whom such disclosure was made.

Other errors complained of do not require discussion, as it is unlikely that they will occur upon a new trial.

For the reasons given, the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 184

COREY v. MATOT et al. (Civ. 2563.)

(District Court of Appeal. Second District, Division 2. California. April 20, 1920.)

Homestead ⇐117—Mortgage before declaration of homestead cannot afterwards be extended by husband alone.

Where a wife filed a homestead declaration on property covered by a mortgage given by herself and husband, a new estate was created which was subject to the mortgage, under Civ. Code, § 1241, subd. 4, but which could not be affected without the consent of the wife by any subsequent proceedings, so that an extension of the mortgage by the husband without the wife's knowledge or consent could not affect the homestead and would not permit foreclosure after the time limitations from the maturity of the original mortgage had expired.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Mrs. Manima Burton Corey against John E. Matot and others. From a judgment for plaintiff, defendants appeal. Reversed.

Kenneth E. Matot, of Los Angeles, Hert & Watt, and Porter, Morgan & Parrot, of Los Angeles, for appellants.

Allison & Dickson, of San Bernardino, for respondent.

SLOANE, J. In this case the defendants John E. Matot and Mary E. Matot, husband and wife, had executed to the plaintiff their promissory note secured by mortgage upon certain real property. Thereafter, and before the maturity of the note, the defendant Mary E. Matot declared and filed a homestead on the property in conformity with section 1263 of the Civil Code, for the benefit of herself and family. After the maturity of the note, but before the running of the statute of limitations, the defendant John E. Matot, without the knowledge or consent of his wife, entered into a stipulation and agreement in writing with the payee of the note and mortgagee of the property extending the time of payment on said note and mortgage. After the statute of limitations had run on the obligation as originally evidenced by the promissory note, but prior to the date of payment as covered by the extension, this action was brought to foreclose the mortgage, in satisfaction of the liability on the note.

The court found that the defendant John E. Matot was liable under the obligation of the note as extended, and decreed the foreclosure and sale of the property to pay the amount of such indebtedness. The appeal is taken by both defendants from the judgment of foreclosure. The only question to be decided is whether the extension of the liability of the defendant John E. Matot upon the promissory note preserved the lien of the mortgage as against the homestead after the statute of limitations, which was pleaded, had run against the liability as originally created.

The contention of appellants is that the husband alone had no right to extend or prolong the period of the lien, as affecting the homestead, beyond the liability as defined by the note and mortgage at the date of filing the declaration of homestead. In support of this contention they cite and rely upon the rulings of the Supreme Court in Barber v. Babel, 36 Cal. 11, Wells v. Harter, 2 Cal. Unrep. Cas. 52, Hart v. Church, 126 Cal. 476, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195, and Ainsworth v. Morrill, 31 Cal. App. 510, 160 Pac. 1089. Only the first of the decisions cited is closely in point. In Wells v. Harter, the facts are not very fully stated, but it appears from the opinion that the four-year period of limitation had run before the agreement for extension, by the husband alone, of the time of payment was entered into. Presumptively the bar of the statute, which was pleaded, applied. It is clear that an agreement made after the cause of action was barred by the statute of limitations was the creation of a new liability, not a mere extension of the old one, and would not be effective as to a homestead without the consent of the wife. Hart v. Church, while it quotes with approval Barber v. Babel, is quite different in its facts from those set out in that case or in the case at bar, and all that the court decides is that a homestead cannot be relinquished, alienated, or incumbered without the joint and concurrent act of both husband and wife. If the question here arose upon the admitted creation of a new lien, the citation would be conclusive against it. But the ground upon which the decree of foreclosure here is sought to be upheld is that the extension of the mortgage lien was not the creation of a new lien, but a continuance of the old. Ainsworth v. Morrill only declares the same rule, that the homestead right can only be affected by the joint act of husband and wife.

We are of the opinion, however, that the decision of the Supreme Court in Barber v. Babel, supra, is controlling in appellants' favor in this case. There, as here, the premises in question had been mortgaged by husband and wife to secure their joint note. They subsequently, before maturity of the note, filed a declaration of homestead on the property. Later, before the statute of limitations had run, the husband, without the wife joining therein and without her knowledge or consent, executed a new note and mortgage for the debt, and the old mortgage was satisfied of record. Suit was brought to foreclose the new mortgage after the statute of limitations had run on the old, and it was held that the new mortgage did not create a lien on the homestead. If this were the end of the matter, respondent's contention that the decision is not in point would be beyond dispute. The new mortgage was an attempt of the husband alone to create a new lien on the homestead property. But this case goes further. The plaintiff in the foreclosure action alleged fraud on the part of Frederick Babel, the husband, in securing the release of the old mortgage by representing that there was no homestead on the property, and it was sought to have the fraudulent satisfaction of the old mortgage disregarded and set aside and to grant plaintiff relief by foreclosure under the first mortgage. That the giving of this new note under the circumstances stated was in effect an extension of the old debt as to the husband, there can be no doubt, and the court in that case so recognizes it. But it further holds that the wife was not estopped by the acts of her husband, and that he could not by such means prolong the lien on the homestead. As is said by the court in this connection:

"The giving of the new note, and extending the time of payment, were, also, the act of the husband alone, to which the wife was no party. Under the authorities cited, he could no more * * * effect the same purpose by continuing the old lien beyond the time when the action would be barred, as to the wife, than in the direct mode attempted of executing a new mortgage and discharging the old."

And again:

"Had the suit now under consideration been brought before the action on the old note and mortgage was barred, and no question under the statute of limitations had arisen, then there would have been some analogy between the cases, for it could well have been said that the execution of the second note and mortgage, and surrender of the first, and cancellation of the mortgage upon the record, had been procured by fraud, and the transaction being void on that ground, the old note and mortgage would be still alive, and unaffected by it. The satisfaction being void, there would then have been a valid, live mortgage. * * * But in this case, if we consider the new note and mortgage, and the discharge of the old mortgage void, on the ground of fraud, the old cause of action is itself barred, by the statute, and no action can be maintained upon the mortgage, unless a new right has been acquired as against the wife and the homestead estate, and this new right could not be created by the act of the husband alone in any form."

Counsel for respondent, in contesting this doctrine, cite a number of decisions from other states: Jackson v. Longwell, 63 Kan. 93,

64 Pac. 991; Billingsley v. Niblett, 56 Miss. 537; Hambrick v. Jones, 64 Miss. 240, 8 South. 176; Roberts v. Roberts, 10 N. D. 531, 88 N.W. 289. The first of these does not involve a homestead right, and all the others are cases in which the mortgage was originally executed by both husband and wife after the homestead was created. These decisions do hold that a mortgage so executed may be foreclosed against the homestead so long as the principal debt exists against the husband, although barred as to the wife. To the contrary, in a Texas case (San Antonio Real Estate, etc., Ass'n v. Stewart, 27 Tex. Civ. App. 299, 65 S. W. 665), it is held that a husband cannot waive the wife's rights or extend a lien created on the homestead by a joint mortgage by an act in which the wife does not join. In none of these cases is the state law governing the homestead set forth, and their applicability under the homestead laws of California is therefore left somewhat obscure. They in no event touch the distinction which exists in the case at bar and in Barber v. Babel, supra. The opinion in the latter case is a well-considered discussion of the nature of the homestead estate by Chief Justice Sawyer, and the doctrine there laid down does not seem to have been questioned in any subsequent California decision.

The ground of distinction between a mortgage executed by both husband and wife upon an existing homestead and one where the homestead is declared subject to a previously executed mortgage would seem to be that in the instance of a pre-existing homestead the mortgage is an express incumbrance of the homestead interest, evidenced as required under the homestead laws. The homestead is thereby dedicated to the payment of the debt, and is subject to the continued existence of the debt as to either of the parties to the mortgage; while in the case of a mortgage made prior to the homestead declaration only the title as it then stands is pledged. The subsequent declaration of a homestead creates a new and distinct species of title in the property. This newly created interest is under the statute subject to the existing mortgage, but only within the application of the strict terms of the mortgage liability. It cannot be extended or prolonged by implication or by the acts of one alone of the makers, but only in the manner provided by the statute for incumbrancing or alienating a homestead. The effect of grafting the new homestead right upon the title is similar to the effect of a conveyance of the mortgaged premises to one not bound by the contract of the note and mortgage. The rule is stated, in discussing this point, in Barber v. Babel, supra, as follows:

"The cases of Lord v. Morris, 18 Cal. 482; Lent v. Morrill, 25 Cal. 499; Lent v. Shear, 26 Cal. 370; Low v. Allen, 26 Cal. 141, and other cases to the same effect, establish the principle that after a conveyance of the mortgaged premises, or the transfer of any interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises or interest therein, so conveyed or transferred, while such interest remains in another party. * * * The principles established by these cases directly apply to the case under consideration. The original note and mortgage were valid, but subsequent to the making of this mortgage the defendants duly recorded their declaration of homestead, and thereby became jointly vested with new and important rights, which were inalienable, except in the mode prescribed by the statute. The wife acquired a new, distinct, personal interest, which she did not before have, and which she could not afterward be deprived of by any act of the husband."

Under subdivision 4 of section 1241, Civil Code, the homestead is made subject to "debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The same is true of conveyances of estates subject to debts secured by mortgage; but in neither instance can the liability against the interest created by the homestead declaration or the conveyance be enlarged or extended without the consent f the parties in interest. And in the case of a homestead right, such consent can only be evidenced by writing, jointly and concurrently executed by the homestead parties. Sections 1242, 1243, Civ. Code.

We find nothing in the case of First National Bank v. Merrill, 167 Cal. 392, 139 Pac. 1066, cited by respondent, that affects our conclusion in this matter. In that case the alleged mortgage was executed in a manner to create a valid lien on the property described, which was not at the time of the execution of the instrument covered by a homestead. It was held that a subsequent homestead filing on the property was subject to this mortgage, although it had not been executed in a manner that would have created a lien had the homestead existed at the time of its execution. This view of the law is unquestioned. There is no claim, however, that the original lien in that case had expired or in any way become ineffective, and it does not involve the effect of any attempt to prolong or extend its operation.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 135

COHN v. THOMPSON et al. (Civ. 2083.)

(District Court of Appeal, Third District, California. April 15, 1920. Hearing Denied by Supreme Court June 14, 1920.)

1. Municipal corporations ⊜515(1)—Defect in street improvement proceedings relating to bonds relieved by curative provision.

Under the Bond Act of 1911, § 2, amending St. 1893, p. 33, § 4, a property owner who did not appeal to the board of trustees cannot complain of the action of the superintendent of streets in fixing in his warrant the period of time over which street improvement bonds should extend, it being the statutory duty of the board of trustees to fix such period; the curative provisions remedying the defect.

2. Municipal corporations ⊜488, 489(5)—Validity of bonds cannot be questioned by property owner who did not appeal.

A property owner, after failing to appeal and complain that the superintendent of streets in his warrant for expenses of a street improvement, and not the board of trustees, fixed the period over which improvement bonds should extend, cannot question the validity of the bonds.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. Cohn against C. M. Thompson and E. O. Thompson, as copartners doing business under the firm name of Thompson Bros., and others. From judgment for plaintiff, defendants appeal. Reversed.

Arthur M. Ellis, of Los Angeles, and Everts & Ewing, of Fresno, for appellants.

Matthew S. Platz and C. E. Arnold, both of Bakersfield, for respondent.

BURNETT, J. The appeal is on the judgment roll, and the contention of appellants is that, upon the findings, the judgment should have been in their favor. It appears that proceedings for certain street work in the city of Bakersfield were instituted and carried through under the provisions of the Vrooman Act (St. 1885, p. 147) and the Bond Act of 1893 (St. 1893, p. 33). All the proceedings were entirely regular, except that the city council did not definitely designate the period of time over which the bonds should extend, the declaration of intention simply stating as to this that "said serial bonds shall extend over a period not to exceed five years from their date." After the completion of the work the superintendent of streets made out an assessment, diagram, and warrant covering the expenses of the work, and recorded them in his office. The warrant contained the following:

"Serial bonds bearing interest at the rate of eight per cent. per annum and extending over a period of time ending four years from and after the second day of January next succeeding their date are to be issued to represent the cost and expense of the work described in the assessment," etc.

No person filed with the city clerk any objection in writing or appealed to the said board from or concerning said assessment or any act, or determination of the superintendent of streets concerning said assessment or otherwise. After the expiration of 30 days from the recording of the assessment, diagram, warrant and return of the superintendent of streets, he made out and certified to the city treasurer a complete list of the unpaid assessments, and thereupon the treasurer made out, signed, and issued to Thompson Bros., the contractors named in said warrant, bonds in proper form for said assessment on each lot of land designated. These bonds were issued August 23, 1912. The complaint herein was filed a few days later. A general demurrer to the complaint was sustained January 18, 1913, and an amended and supplemental complaint, bringing in new parties plaintiff and defendant, on account of the conveyance and transfer of the land and of the bonds, was filed March 13, 1916, more than three years after said demurrer was sustained. A general demurrer to the amended complaint was overruled. The defendants answered, and, upon a stipulation of the facts, the trial court concluded that the assessment was legal and valid, but that the warrant and the bonds were illegal and void for the reason that the city council never at any time fixed the term of the bonds. This view of the court that the bonds were invalid involves the only question on this appeal.

Two points are made by appellants.

"(1) The failure of any person to appeal from the action of the superintendent of streets in fixing in the warrant the period of time over which the bonds should extend constituted a waiver of the objection. (2) It being found that the assessment itself is valid, and that it still constitutes a lien, the irregularity with respect to the warrant was cured by the issuance of the bonds."

It is conceded that it was the statutory duty of the board of trustees to fix the period over which the bonds should extend, and that the superintendent of streets had no such authority. But it appears by the decision in Cohn v. Federal Construction Co., 171 Cal. 547, 153 Pac. 916, which involved a similar resolution by the board of trustees of Bakersfield, that said board had authority at any time to fix said period definitely, and that thereafter another warrant and bond of binding force and effect could be issued. Hence it is strongly insisted by appellants that the case falls clearly within the doctrine of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, stated as follows:

"By a long line of decisions it has become the settled doctrine that, with respect to any material defect or irregularity which could be cured by the council, the remedy by appeal is the only remedy; so that if the party does not appeal he waives the objection, and if he does appeal the judgment of the council is conclusive."

Herein, the defect was material, it could have been corrected by the trustees, and no doubt would have been if application had been made, but the property owner chose to sit idly by and decline to avail himself of the very remedy that has been provided to prevent such expensive and protracted litigation as this.

[1] But if the defect herein be considered too serious for the application of said principle, then, as we understand the decisions of the Supreme Court, it must be held that the situation is relieved by the operation of the curative provision of said bond act. Section 4 thereof, as amended by Stats. 1911, p. 1201, provides:

"Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent to the city treasurer, and of the validity of said lien up to the date of said list."

The effect to be given to such curative measures is very fully considered in Chase v. Trout, supra, and little more can be said. Therein it is stated:

"The correct proposition is that as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here. The conclusive evidence clause of section 4 of the Bond Act is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of these intermediate steps are directed, yet, if they are not performed as required, and the owner permits the matter to proceed until the bond is issued, he shall be thenceforth precluded from proof of such nonobservance and the requirements shall be conclusively presumed to have been complied with, excepting those which are necessary to comply with constitutional mandates."

The court proceeds to state with more particularity the essentials the nonobservance of which cannot be cured, but it is manifest that there has been herein no violation of any constitutional right, nor can it be said that the owner has not had the notice which constitutes due process of law. The defect herein had merely to do, as appellant suggests, "with the technical details of the process whereby the plaintiff was extended a substantial period of credit before meeting the obligation of an assessment regularly levied." Not one of his fundamental rights was violated or infringed, and it seems strange that he should attempt, upon the basis of an irregularity which has caused him no prejudice, to defeat these important memorials of a valid indebtedness held by purchasers for value, who had a right to rely upon said rule of the statute.

[2] The most recent consideration of the question by the Supreme Court is found in Watkinson v. Vaughn, 59 Cal. Dec. 76 (syllabus), wherein it is held that—

"In the matter of street improvement proceedings under the 'Improvement Act of 1911,' * * * the failure of the resolution of intention to expressly declare, as required by section 4 of the act, that the district described and to be assessed is the district to be benefited by the work of improvement is cured by the failure of the property owners, as provided by section 16 of the act, to make objection to such omission, and by the issuance, without objection, of bonds to pay for the improvement, which bonds, by section 66 of the act, by their issuance, are made conclusive evidence of the regularity of the proceedings."

Assuredly, the defect in that case was as serious as in this, and we feel no doubt that under the authorities and upon principle the respondent should not be permitted at this late date to question the validity of said bonds.

We think the judgment should be reversed as far as said bonds are concerned, and a judgment upon the findings be rendered, declaring said bonds to be valid and legal and for appellants' costs.

It is so ordered.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

47 Cal. App. 168

MAYR v. REYNOLDS et al. (Civ. 3353.)

(District Court of Appeal, First District, Division 2, California. April 20, 1920.)

Corporations ⊂=432(12)—Finding that pledge holder corporation and officer were estopped to claim prior lien proper under evidence.

Evidence *held* to sustain a finding that a pledge holder corporation was estopped to deny that it was bound by a contract made by its president to hold the pledge unconditionally for the pledgee, and that the president was also estopped to deny that he was bound to so hold for pledgee, in view of Code Civ. Proc. § 1962, subd. 3.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Walter A. Mayr against W. J. Reynolds and others. From a judgment in favor of plaintiff, defendants R. H. Raphael and the R. H. Raphael Realty Company appeal. Affirmed.

Hollzer & Greenberg, of Los Angeles, for appellants.

Stephens & Stephens, of Los Angeles, for respondent.

NOURSE, J. This is an appeal by defendant R. H. Raphael from a judgment in favor of plaintiff establishing a first lien in plaintiff upon certain automobile material, and decreeing foreclosure thereof to satisfy plaintiff's claim.

The facts material to the opinion are:

That on the 25th day of July, 1916, the Merchants' Finance Company, a corporation, loaned to the Beardsley Electric Company, a corporation, $1,926.45, evidenced by a promissory note in that amount secured by a pledge of the automobile material which by agreement of the parties was deposited with the defendant R. H. Raphael Realty Company, a corporation. That on the 25th day of August, 1916, a month after this property had been so pledged and stored in premises leased by and under the possession of the realty company, the Beardsley Electric Company borrowed from plaintiff the sum of $5,000, evidenced by its four promissory notes and secured by a pledge of the same material. That before this loan was made the plaintiff learned of the existing claim and lien of the Merchants' Finance Company, and demanded that the property be cleared either by payment of the existing loan or by release of the security. This he was assured had been done, and as evidence thereof a receipt in the words following was delivered to him by a representative of the Beardsley Electric Company upon his payment to that company of the sum of $5,000:

"Received of Walter A. Mayr $35.00, being one month's rent of one-story brick building located at Eighth & Kohler streets. In addition to the rental for the use of this building, I agree to act as custodian for the electric vehicle material stored therein with respect to count and delivery of it, and I agree to honor only such orders as said Walter A. Mayr may issue to me as to the delivery of said material. R. H. Raphael Realty Co., by R. H. Raphael, Pres."

That on the 20th day of March, 1917, the Merchants' Finance Company sold and assigned to the defendant Raphael as an individual the note of the Beardsley Electric Company which it held, together with its interest in the pledge of the security. That thereafter the Beardsley Electric Company became insolvent, and the defendants Raphael and Raphael Realty Company, without notice to plaintiff or to any other person than certain individuals who were acting as agents and employés of these defendants, caused a pretended sale of said property to be made to an agent and employé of said Raphael for $2,000, although on numerous occasions Raphael had represented to the plaintiff that the value of said property was more than $20,000. The trial court found that the Raphael Realty Company, without consideration and in violation of its duty to plaintiff, and for the purpose of defeating the rights of plaintiff, had parted with the possession of the pledged property; that by reason of the circumstances heretofore recited the pretended sale was void and of no effect; that the property was actually in the possession of agents and employés of the defendant Raphael; that said defendant was estopped to deny that he held the security unconditionally for the plaintiff; and that the defendant Raphael Realty Company, by its failure to repudiate the action of its president, and by its retention of the property without any attempt on its part to exonerate itself after having full knowledge of plaintiff's claims and the assurances given to him, was further estopped to deny the binding character of the contract referred to as the "receipt" executed in the name of the company by R. H. Raphael. Upon these findings the court drew the conclusion that plaintiff's claim constituted a lien upon the pledged material prior and superior to any lien of any of the defendants, and gave judgment accordingly. The defendant R. H. Raphael alone appealed.

He attacks the judgment upon the ground that the trial court erroneously held that he was estopped to deny the validity of the pledge of the property made to respondent. The position of the trial judge upon this branch of the case is made clear by his oral opinion rendered at the close of the trial as quoted in appellant's opening brief:

"Then the question as to the priority of liens—there is no conflict in the evidence. It appears, as it seems to me, without any conflict,

that at this time the Merchants' Finance Company did have a valid pledge of these goods which was made in good faith and for value. The Merchants' Finance Company itself has never done anything to surrender that pledge or to give any one else priority, and if it still held that note or if it had conducted that sale and bought in the property itself, or caused it to be sold by some process to any third party, who bought it without notice or knowledge of the peculiar circumstances existing between Mr. Raphael and Mr. Mayr, there would be no question in my mind whatever but that it took precedence of Mr. Mayr's claim here. But we have the curious circumstance that the only man claiming under or by virtue of that Merchants' Finance Company lien at this time is Mr. Raphael himself, and, as I have said, it appears to me that he is estopped to deny that Mr. Mayr's pledge was a valid pledge. He is estopped to deny that the Raphael Realty Company did take and hold this property as pledge holder for Mr. Mayr, undertaking to deliver it solely upon his order, which, as it now seems to me, would warrant this court in finding as against Mr. Raphael that the Raphael Realty Company was then the pledge holder for Mr. Mayr, and, if that finding is warranted, then it seems to me it follows, as a rule of law or a rule of equity rather, that not merely the Raphael Realty Company, but Mr. R. H. Raphael, as president of that company and the mouthpiece through which it spoke and the arm through which it acted, are estopped by the relationship of trust and confidence thereby created by them existing between him and his company, on the one hand, and Mr. Mayr, on the other, from secretly obtaining any advantage to himself adversely to Mr. Mayr."

The relationship of the appellant during the entire transaction is clearly presented by the evidence. He was vice president of the Beardsley Electric Company, the borrower of the first loan from the Merchants' Finance Company, of which he was also vice president. He was also vice president of the Beardsley Electric Company when it negotiated the loan from respondent. He was president of the R. H. Raphael Realty Company, the pledge holder under both pledges, president of the lessor of the warehouse where the goods were stored, member of the partnership whose employé was the nominal purchaser at the invalid sale, and was the real purchaser at that sale, which was conducted and participated in by persons wholly under his direction and control. Respondent knew of the relation of appellant to these various concerns, and had every reason to believe and rely upon the promises and assurances given him by appellant. That respondent made the loan only upon the written assurance of appellant that he would hold the material in controversy subject only to respondent's order, and upon the repeated assurances that the property was free from all other claims excepting freight and other minor charges which respondent was assured would be immediately paid, is not controverted. All the facts necessary to estop appellant were present.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. § 1962, subd. 3.

Appellant attempts to escape the unavoidable conclusion that he was estopped under these circumstances by the argument that, if any estoppel exists, the corporation realty company, and not the appellant individually, is estopped; but at the trial he urged that the realty company was not estopped because the receipt given respondent was executed by him without authority to the corporation. But the court found that he was the president of the corporation, and that the other stockholders left the affairs of the corporation to him, and that it was the custom and practice of the corporation not to question his acts; furthermore, in this particular instance, the corporation, well knowing that the receipt had been issued, made no attempt to repudiate it until an amended answer was filed in this proceeding by a minority stockholder acting without authority of the other stockholders, but under advice of counsel for the appellant. The corporation thus ratified the acts of its president and retained the benefits of his contract.

Upon this evidence the trial court correctly concluded that the corporation was estopped from denying the binding character of the contract made by the appellant as its president, and that appellant, as an individual, was estopped to deny that he was bound by the contract to hold the goods unconditionally for respondent.

For these reasons, the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

183 Cal. 71

TITLE INS. & TRUST CO. v. MILLER & LUX, Inc., et al. (two cases). (L. A. 4993, 4994.)

(Supreme Court of California. June 1, 1920. Rehearing Denied July 1, 1920.)

1. Waters and water courses ⟸152(8)—Evidence held to sustain conclusion plaintiff entitled to per cent. of waters allotted under settlement agreement.

In action to quiet title to water rights, evidence *held* to sustain court's conclusion that plaintiff was entitled to take 9.94 per cent. of the waters allotted to the first parties therein by a certain water settlement agreement of 1888, including waters accumulated by them in a reservoir, and to use them at any place it should think proper, either on lands riparian to the river or its branches or on other nonriparian lands, but that the use should be limited to lands owned by a party to the water settlement agreement, plaintiff's predecessor, on its date.

2. Waters and water courses ⟸158(1)—Agreement not describing land too uncertain to establish riparian rights.

Agreement between riparian owners, not describing any land, but merely showing the area signed for by the several parties, established no riparian rights of the parties in any land, being too uncertain, as such rights can exist only as part and parcel of specific tracts, and any contract must describe the land sufficiently for identification.

3. Waters and water courses ⟸39 — Only tracts acquired by single conveyance from state and abutting on stream entitled to riparian rights.

Only tracts acquired by single conveyance from the state and abutting on a stream are entitled to riparian rights.

4. Waters and water courses ⟸158(2)—Right to use water confined by agreement to land owned by party within certain townships.

Under provisions of water settlement agreement, right of a party thereto and of plaintiff as his successor to the use of water of a river *held* confined to its use on land owned by the party to the agreement on the date of its making and within certain townships.

5. Waters and water courses ⟸40—Right of riparian proprietor as against appropriators extends to entire stream.

The right of each riparian proprietor as against appropriators of water extends to the entire stream, however small a part of his land actually abuts thereon.

6. Waters and water courses ⟸152(5)—Defendant's claim of lien held proper for amendment in action to quiet title to water right.

In action to quiet title to water rights against claims of defendants, one of whom claimed that such rights as plaintiff had were part and parcel of plaintiff's land, either as a riparian right or as an appurtenance, it was proper for a defendant, if it had a claim, present or prospective, against plaintiff which would constitute a lien on the lands of which the water rights were a part, to assert the same by amending its answers and to have its lien established.

7. Pleading ⟸236(3)—Amendments during trial within discretion of court.

The matter of amending pleadings during trial is largely in the discretion of the trial court.

8. Executors and administrators ⟸315(5)—Decree of distribution established lien on land.

Decree of distribution in a decedent's estate declaring that a burden or charge in favor of the present defendant existed against certain land, and that it should run with and bind such land, established the claim in favor of defendant as a lien on the land described and declared to be subject thereto.

9. Executors and administrators ⟸315(1)—Probate court in distributing estate can declare lien in favor of third person.

The court in probate has power, in distributing the estate of a decedent, to declare a lien thereon in favor of a third person and that the distributee shall hold subject to such lien.

10. Executors and administrators ⟸315(1)—Lien imposed by distribution decree not void for uncertainty.

Decree of distribution of a decedent's estate declaring a lien on certain land in favor of a corporation which had a contingent claim against the estate for expenses to be incurred in certain water litigation *held* not void for uncertainty, in that the claim for which the lien was imposed was for moneys to become due in the future, whose amount could not be learned in advance, or as leaving it to the corporation to be the sole judge of the amount of expenses.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by the Title Insurance & Trust Company against Miller & Lux, Incorporated, and another. From portions of the judgment, both parties appeal. Judgment modified and affirmed.

Edward F. Treadwell and McCutchen, Olney & Willard, all of San Francisco, for appellants.

M. P. Frasier, Hunsaker & Britt and Le Roy M. Edwards, and Joseph L. Lewinsohn, all of Los Angeles, and Houghton & Houghton, of San Francisco, for respondent.

Case No. 4993.

SHAW, J. The defendants, Miller & Lux, Incorporated, and Kern County Land Company, separately appeal from portions of the judgment. They also respectively appeal from the order of the court denying motions to vacate the judgment and enter a different judgment on the findings and from the order

of the court denying motions for a new trial. All the appeals are presented in one transcript of the record.

The complaint alleges that the plaintiff is the owner of a certain proportion of the waters of Kern river; that the defendants each claim interests or rights in the waters belonging to plaintiff; that the claims of the defendants are without right and that none of the defendants has any interest therein. The prayer is that the plaintiff be declared to be the owner of said proportion of said waters; that its title thereto be quieted against the claims of the defendants thereto; and that the plaintiff be declared entitled "to use and dispose of its share of said waters as aforesaid in any manner, at any place, and for any purpose it may think proper." The judgment was in accordance with this prayer.

The claim of appellants is that plaintiff's right to use the water is a riparian right appurtenant to certain lands; that it has no right to use it on other lands; and that its use is subject to the reasonable use of other riparian owners along the stream, including the appellants. The question whether the water right of the plaintiff is that of a riparian owner only or is a right arising out of contract or appropriation depends on transactions and conduct during a period extending from 1879 to 1911, and it will be necessary to give as briefly as possible a history of the origin of the right and of the subsequent transactions throwing light upon its nature and character.

Kern river emerges from the foothills into the valley about 4 miles northeast of Bakersfield. From thence it now runs northerly of Bakersfield about 20 miles to the lower part of the valley, and there turns and flows northwest and north some 30 miles or more to Tulare lake. It has in the course of years changed its course from time to time. The water in times of flood will spread out of the regular channel and find its way in part through the sloughs or old channels. Formerly the main channel turned to the south shortly after emerging from the foothills and ran easterly of Bakersfield nearly south to Kern lake, thence westerly to Buena Vista lake and on to Tulare lake. In high floods it now divides near Buena Vista lake, part of the water flowing into that lake and another part running down Buena Vista slough toward Tulare lake. We speak, of course, of conditions as they would have been but for the changes which have been made by the several parties interested to control the course of the water. The interests of the several parties in the land involved in this action were acquired by them prior to the year 1879. Haggin, Tevis, Carr, and others had acquired large tracts of land, apparently, for the most part, not riparian to the stream, but which were irrigable by means of canals from Kern river, and they had made canals and thereby diverted a large part of the water of the river and were applying the same to the irrigation of lands situated in the vicinity of Bakersfield and south, southwest, and northerly thereof. Miller & Lux, Frederick Cox, C. W. Clarke, Reddington, Livermore, Cornwell, Bonestell, and Stebbins had acquired large tracts further down the valley, to which the water of the river, at least in times of flood, naturally would flow, if not intercepted. The diversions by Haggin and the others had the effect of preventing this flow. Thereupon Miller & Lux and others, on May 12, 1879, began the historic action of Lux v. Haggin, the decision of which by the Supreme Court is found in volume 69 of California Reports, extending from page 264 to page 439, 4 Pac. 919, 10 Pac. 674. Its object was to enjoin the diversions above mentioned, and it was based on the claim that the lands of the plaintiffs were riparian to the river or its branches and sloughs and that the diversions of the defendants were invasions of the riparian rights of the plaintiffs in the waters naturally flowing therein. The opinion in the case clearly shows that the principal question for decision was whether the right of a riparian owner or that of an appropriator or mere diverter was the superior right to the waters of the stream, under the law of California. On November 3, 1879, the plaintiffs therein, together with the said Frederick Cox and C. W. Clarke, executed an agreement relating to the prosecution of said action.

This agreement recited that—

the parties thereto, "being owners of land in Kern county, California, on and adjacent to Kern lake, Buena Vista lake, the slough connecting said lakes, and on Buena Vista slough, all of which said lands have a common interest in the assertion, preservation, and maintenance of the 'riparian rights' of the said land derived by the water of Kern river through and by Kern lake, Buena Vista lake, and Buena Vista slough, and whereas the said riparian rights are threatened and in danger by the diversion of the waters of Kern river by sundry adverse claiming parties, who are illegally diverting the said waters and preventing their natural and heretofore continuous flow through the above-described channels and the lands of the parties subscribing hereto; and whereas such damaging, and illegal diversion can best be met by united action in litigation of all the parties in interest for the establishment and maintenance of the riparian rights of the hereinbefore mentioned land:

"Now, therefore, the said parties do hereby associate themselves together for the prosecution of such litigation, and do pledge themselves each to the other that they will share all proper expenses of such litigation in the proportion of the number of acres of land set opposite to their respective signatures hereto, and that the association shall continue to exist until the final termination of all litigation necessary to establish the riparian rights of the said lands,

it being expressly stipulated that should any party or parties during the pendency of such litigation sell his or their lands or any portion thereof, he or they shall nevertheless pay his or their pro rata of cost of such litigation to the final end thereof, notwithstanding any such sale during the pendency thereof."

The parties signed this agreement and each wrote the number of acres claimed by him opposite his name, as follows:

Clarke & Cox	14,520	acres
Miller & Lux	36,644	"
John H. Reddington	13,283	"
George N. Cornwell	8,000	"
L. H. Bonestell	1,920	"
Horatio B. Livermore	22,541	"
Horatio Stebbins	1,280	"

The total number of acres was 98,188.

Thereafter the said action was prosecuted in the superior court and judgment was rendered therein in favor of the defendants. The appeal was taken by the plaintiffs and the final decision was made as above stated. The case attracted a great deal of attention throughout the state, and it is a matter of history that it was made an issue in the political campaigns of 1884 and 1886, and was a subject of agitation at the legislative sessions of 1885 and 1887, as a result of which section 1422 of the Civil Code, declaring that "the rights of riparian proprietors are not affected by the provisions of this title," was repealed by the Legislature of 1887 (St. 1887, p. 114). The judgment of the Supreme Court reversed the judgment of the court below and remanded the cause for a new trial. The opinion, however, settled the controversy between the parties as to the superiority of riparian rights in favor of the plaintiffs in the action, and the cause was not tried again. Reddington, Livermore, and Bonestell had in the meantime conveyed their lands to Miller & Lux. Instead of having a new trial, the parties settled their controversy by an elaborate contract executed on July 28, 1888, and known in that region as the "Lux-Haggin Contract," or as the "Water Settlement Agreement." It was signed by a large number of persons who were not parties to the action. The parties to this agreement designated as parties of the first part included all the persons who signed the agreement of November 3, 1879, except those who had sold their interests to some of the other parties thereto as aforesaid, and also the Kern Valley Water Company, a corporation which operated a canal to take water to the lands of said parties, or some of them, and which was apparently a mere agency for the use by them of the riparian rights or waters claimed by them. The parties of the second part were composed of two classes: First, corporations operating canals for the diversion and distribution of the waters of the river to others, under rights by appropriation; second, persons claiming rights to receive such waters from said corporations for use on their respective tracts of land. The agreement recited that the several parties executing it either claimed to own lands along the river and its branches, with riparian rights in the water, or other lands irrigated or susceptible of irrigation from water of said river, or claimed rights to divert water from the river and distribute and sell the same for the irrigation of lands not riparian to the river. One recital is as follows:

"All of the aforesaid owners of and claimants in said lands claim to have in connection with or as appurtenant to, or as a part and parcel of, said lands, certain riparian or other rights to the waters of said river, slough, or lakes, or some thereof."

The parties holding or claiming rights by appropriation took their water from the river at points above the lands claimed by the parties of the first part and above the head of the canal of the Kern Valley Water Company. The agreement provided that the water of the river should be measured at two places; one at a point where the river debouches from the foothills, called "the first point of measurement," a short distance above the headgate of the Kern Island Irrigating Canal Company; the other, designated as "the second point of measurement," located in the river some 20 miles or more further down the stream and below the intakes of all ditches owned by any of the parties of the second part. Of the water found to be at the first point of measurement 300 cubic feet per second was to be delivered to the Kern Island Irrigating Canal Company. Of the balance, one-third was allotted to the so-called parties of the first part, and two-thirds was allotted to the parties of the second part. The one-third to go to the first parties was to be delivered without diminution at the second point of measurement. This division was to continue during the irrigating season, that is, from March 1 to August 31 of each year. During the remaining months the second parties were to have all the water not taken by said Kern Island Irrigating Canal Company to use as they saw fit, but whatever they suffered to flow down through the second point of measurement was to go to the parties of the first part. The instrument declares that the shares of water thus allotted to the parties of the first part were "to be used and disposed of by them in any manner, at any place, and for any purpose they may think proper, or arrange or agree among themselves." The same language was used with reference to the rights of the parties of the second part in the waters allotted to them by the agreement, and the 300 cubic feet of said Kern Island Irrigating Canal Company was also "to be used and disposed of in any manner at any place, and for any purpose it should think proper." The agreement also provided that for the benefit of the

parties of the first part levees should be constructed around a large lake known as Buena Vista lake, into which a part of the water of the Kern river naturally ran, so as to make of said lake to some extent an artificial reservoir in which should be confined the waters of the river flowing at the second point, at times when there was more than was then in use by the first parties, to be there stored for use subsequently by the parties of the first part. The expense of constructing the levees and other works necessary for conducting the water in and out of the reservoir and for controlling the flow was to be paid one-half by the first parties and one-half by the second parties. A part of such expenses of maintaining such levees, canals, and other works, after the construction thereof, were, however, to be borne by the parties of the first part.

The agreement (paragraph 17) declared that it should be perpetual and should be construed "as a covenant running with all the land owned or claimed by any of the parties hereto which is situated in the following townships or portions of townships," here describing 30 congressional townships and portions of others, extending from township 25 on the north to township 32 on the south, and from range 22 on the west to range 28 on the east, embracing a large part of the valley land of Kern county. It also declared that the parties of the first part "do hereby grant and convey unto said parties of the second part" all the waters and water rights to which the second parties were declared to be entitled thereby, and that in like manner the parties of the second part "do hereby grant and convey unto the said parties of the first part * * * all and singular the waters, water rights, privileges, and easements to which said parties of the first part are respectively, by paragraph third of this instrument, declared entitled, or which are or are intended to be by said paragraph apportioned to them respectively." The waters to which the first parties were declared to be entitled by said third paragraph of the instrument was the one-third of the water flowing at the first point of measurement and delivered at the second point of measurement, as above stated, together with the surplus waters allowed to run by the second point of measurement during the six months following each irrigating season, as above stated. Paragraph third further declares that the second parties each "hereby acknowledges the right of the parties of the first part as riparian proprietors in Kern river, Buena Vista slough, Kern and Buena Vista lakes, and the slough connecting said lakes, to the proportion of the water flowing in Kern river hereinbefore agreed upon, and that as such riparian proprietors they shall at all times be entitled to receive at the second point of measurement during the months of March, April, May, June, July, and August, of each year, the amount of water they are so entitled to." It also provided that Henry Miller should act as the agent for the first parties in the construction of the reservoir. The evidence shows that by common consent, after the execution of the agreement of 1888, Henry Miller acted as the manager and agent of said first parties in the affairs of common interest connected with their water rights under said agreement, until after the commencement of the present action.

In 1879 Miller & Lux were partners and the property in controversy, so far as Miller & Lux were concerned, was the property of said firm. Lux afterwards died and the affairs of the firm were managed by Henry Miller as surviving partner until the settlement of the estate of Lux. In that settlement a corporation was formed under the name of "Miller & Lux" and the property of the firm was transferred to said corporation, which thereafter operated under the management of Miller. In our further discussion we shall use the name Miller & Lux to designate all that was done either by Miller personally or by Miller & Lux in the management of the common affairs of the first parties to said agreement of 1888.

The record does not show that any express agreement was ever made between said parties of the first part defining their respective shares or proportions of the waters allotted to them by said water settlement agreement of 1888. Nor was there any agreement between them expressly declaring the nature or origin of the water rights claimed by the first parties except as it is to be found in the aforesaid agreements of November 3, 1879, and July 28, 1888. The appellants claim that these agreements, when considered in connection with the matter in controversy in Lux v. Haggin, to which it referred, together with the subsequent conduct of the parties interested in the 98,188 acres of land referred to in the agreement of 1879, and the contents of other instruments of writing to which Cox was a party, conclusively establish the fact that the water rights secured by the parties of the first part in the water settlement agreement of 1888, and now in controversy, were riparian rights possessed by the parties, respectively, solely by virtue of the ownership of portions of the 98,188 acres of land, and pertaining only to those lands. They also claim that, even if the rights are not riparian in character, the evidence conclusively shows that the respective water rights of said parties so obtained are rights appurtenant to said 98,188 acres of land, and none other, and that none of the first parties or their successors in interest can rightfully apply the same to other lands without the consent of the others.

The respondent insists that from the several contracts made by the parties, together

with other evidence, there arises a necessary implication, or at least a reasonable inference, that the parties of the first part in said water settlement agreement of 1888 are each entitled to a share in the water allotted to them by that agreement in the same proportion as he was called on to pay the expenses aforesaid, that of Cox being equal to 9.94 per cent. of the whole allotment, and that this interest is not attached to any land as a riparian right, but that the water it represents may be used at any place to which Cox or his successors in interest may wish to take it. The respondent also claims that the water settlement agreement of 1888, if properly construed, constitutes a grant to each of the parties of the first part of his proportionate share of the water, for use at any place he sees fit.

[1] We think the evidence is sufficient to sustain the conclusion of the court below that the plaintiff was entitled to take 9.94 per cent. of the waters allotted to the first parties by the agreement of 1888, including the waters accumulated by them in Buena Vista reservoir, and to use the same at any place it should think proper, either on lands riparian to the river or its branches or on other nonriparian lands, but that the use should be limited to lands owned by Cox on July 28, 1888.

[2] The agreement of 1879 is not sufficient of itself to establish the riparian rights of the parties thereto in any land. It is too uncertain to have that effect. It does not describe any land, but merely shows the area "signed for," as one of the witnesses expressed it, by the several parties. Riparian rights can exist only as part and parcel of specific tracts of land, and any contract relating thereto would be void for uncertainty and of no avail unless it describes or refers to the land in a manner sufficient for identification. The number of acres "signed for" by the parties aggregates 98,188, Clarke & Cox signing for 14,520 acres. The evidence shows that Clarke & Cox at that time owned 24,880 acres of land in common, in Kern county, situated within the congressional townships enumerated in paragraph 17 of the agreement of 1888. The agreement of 1888 declares that it shall be construed as a covenant running with all the land owned or claimed by any of the parties thereto situated in said townships. It appears that Clarke & Cox made a partition of their lands. The court finds that Cox owned 30,940 acres of land in said townships at the time the agreement of 1888 was made. The evidence shows that a large part of it was the land owned by Clarke & Cox in 1879 and that only a comparatively small part of it, much less than 10,000 acres, was actually riparian to the river or its branches. Until the agreement of 1888 was made Cox contributed to the expense of litigation a sum equal to his proportion of the 98,188 acres "signed for" in the agreement of 1879. Thereafter he contributed in the same proportion to the expenses of the parties of the first part in constructing Buena Vista reservoir and to the expenses of its subsequent maintenance and operation. Miller & Lux, as managers for the parties of the first part, made contracts for the sale of water to other persons, receiving therefor several hundred thousand dollars and in some instances receiving monthly rentals of substantial amounts, for all of which it accounted to the first parties and paid to Cox his share thereof in proportion to his share of the lands aforesaid. Miller personally, as agent or trustee, also obtained title to the lands covered by said reservoir and conveyed to Cox and others of the first parties each a share therein, proportioned to his ownership in the acreage signed for in the agreement of 1879. The proportion of the expenses and receipts paid to and by Cox obviously was fixed by reference to his ownership of the part of the land owned by Clarke & Cox in 1879. The evidence identifies only 3,840 acres of this land, and it is impossible to determine therefrom whether the remainder of it is or was at any time riparian to said river or any of its branches. There is evidence as to the identity of the lands "signed for" in the agreement of 1879 by each of the other parties thereto, except Miller & Lux, and it appears therefrom that a large part of that land was not riparian to the stream or any of its branches.

[3] At the time the agreement of 1879 was made, the extent to which riparian rights attached to lands owned by one person, consisting of adjoining parcels, one of which, only, abuts upon the stream, was not well understood in this state. Many persons supposed that such rights extended to all the lands owned by a single person, although obtained by separate conveyances, some of which did not convey any land abutting upon the stream, providing all the parcels were contiguous. The land was for the most part swamp land which the parties had acquired from the state. It is not improbable that the parties to that agreement understood that they would have riparian rights in the stream for all of their lands if it was all contiguous to land which did abut upon the stream. When the contract of 1888 was made, however, the opinion in Lux v. Haggin had definitely declared that only those tracts which were acquired by a single conveyance from the state and which abutted upon the stream were entitled to riparian rights. 69 Cal. 424, 425, 4 Pac. 919, 10 Pac. 674. The parties must be presumed to have known this, since they were interested in that case, and the agreement of 1888 must be understood to have been made with knowledge of this principle. It is now well settled. Boehmer v. Big Rock I. D., 117 Cal. 27, 48 Pac. 908; Alta, etc., Co. v.

Hancock, 85 Cal. 227, 24 Pac. 645, 20 Am. St. Rep. 217; Anaheim, etc., Co. v. Fuller, 150 Cal. 331, 88 Pac. 978; Gallatin v. Corning I. Co., 163 Cal. 416, 126 Pac. 864, Ann. Cas. 1914A, 74. It is apparent from that document that the first parties intended to secure the water allotted to them for the benefit of all the lands they owned at that time to which it was feasible to carry the water. But they must have known that the riparian rights did not extend to a large part of those lands, and hence the court below might reasonably have drawn the inference that they intended that each of the first parties should have the right to use his share of the allotted water upon any land he then owned situated in the townships enumerated in paragraph 17 thereof, whether riparian or not. This being the case, it is obvious that the right in the waters so allotted was not exclusively riparian in character.

[4] It does not follow, however, that the plaintiff, as successor of Cox, has the absolute right to the share of water in controversy and is entitled to use it at any place or to sell it to others for use on lands not owned by Cox in 1888, or, if then owned by him, not within the townships enumerated in paragraph 17 of the agreement of 1888. That paragraph not only contains the statement above quoted as to its provisions running with all the land owned by any of the parties situated within said townships, but it also declares that all said land "shall be subject to" all its provisions, into whosoever hands it may come by transfer or otherwise from said parties. And paragraph 23 provides that the personal liability imposed under paragraph 17 should be deemed to be the liability of the person who should own the land at the time the liability should accrue, and the party who conveyed his interest "in said lands" should thereafter be freed from all liability under the agreement "to the extent and in the proportion" that the lands sold by him bear to the "whole amount of such lands * * * theretofore owned" by him. These provisions have the effect, by necessary implication at least, to confine the provisions of the agreement and the application thereof, so far as the first parties are concerned, to the lands then owned by them and situated within said townships. It follows that the right of Cox, and of the plaintiff as his successor, to the use of the water is confined to its use on land owned by Cox on July 28, 1888, and within said townships.

The subsequent conduct of the parties implies an understanding between them that there was an even narrower restriction, that is, a limitation of the use to the 98,188 acres "signed for" in the agreement of 1879. It is apparent that Miller and Cox must have known what lands were there referred to, for whenever by conveyances between them their comparative ownerships of that acreage were changed, the proportion of Cox in the common expense paid out by Miller & Lux in maintaining the reservoir was changed accordingly by Miller & Lux in rendering the account to Cox, always with the number 98,188 as the denominator of the fraction, and Cox acquiesced therein and paid his share so computed. Likewise, the distribution of the large receipts from sales of water or water rights was made in the same proportions, and Cox received his diminished share without objection. If the identity of the 98,188 acres had been shown, there might be good reason for such further restriction of the use, but as the case stands there is no means of ascertaining the lands comprising that acreage and that restriction cannot be declared or enforced, and we are bound by the broader area described in the agreement of 1888; it being the only writing on the subject which contains a description capable of being made certain.

The case is, we think, distinguishable in this respect from Calkins v. Sorosis, etc., Co., 150 Cal. 426, 88 Pac. 1094. In that case the court said that, while by the covenant in the agreement the water right was made an easement appurtenant to the land of the plaintiff, yet:

> "We look in vain to the agreement or to this covenant to find anything limiting or restricting the use of the water to the lands of plaintiff. It is not a case where, by the very terms of the conveyance, the right to use the water was expressly limited to lands to which the right was made appurtenant." 150 Cal. 431, 432, 88 Pac. 1096.

And so it was held that the plaintiff might sell the water to others for use on other land. In this case, as we have said, the agreement of 1888 necessarily implies such a limitation upon the use. Furthermore, it is to be remarked on this point that the agreement as a whole, in connection with the circumstances under which it was made and the object sought to be attained, thereby indicates strongly that such a limitation was understood.

We are therefore of the opinion that the court erred in adjudging to the plaintiff the unlimited right to use the water at any place it should think proper. It should have restricted the use to the lands owned by Cox on July 28, 1888, situated within the townships aforesaid.

The point just stated may not be of great importance. It does not appear that the plaintiff intended to make any other use of the water than we have held it has the right to make. But the future might develop other desires or interests on that subject, and it is proper that the judgment should be modified so as to state the rights of the parties accurately. This modification was not the object sought by these appeals, and we do not think it should have the effect of carrying costs in favor of the appellant.

[5] The clause in the third paragraph of the agreement of 1888, by which the second parties acknowledge the right of the first parties as riparian proprietors along the river and its branches to the proportion of water allotted to said first parties, is not sufficient to defeat the conclusion we have reached. Since the right of each riparian proprietor as against appropriators extends to the entire stream, the first parties would each have the right as riparian proprietors to all of the waters thereof, although only a small part of the land of each actually abutted upon the stream. The second parties all claim solely by appropriation. An acknowledgment by them of the riparian rights of the first parties would therefore be appropriate if any part of the lands of each of the first parties was contiguous to the stream, and it does not of necessity imply that all of it was so contiguous or was entitled to riparian rights.

There are other circumstances appearing in the evidence which are of some weight as tending to the conclusion that the right secured to the first parties in the agreement of 1888 was not considered by them as exclusively of a riparian character, and that they did not understand that they were not entitled to use it upon lands not in fact riparian to the stream. We do not deem it necessary to state these matters in detail. It is sufficient to say that upon the whole case we think the findings complained of, except as above stated, are sustained by sufficient evidence.

Case No. 4994.

The plaintiff has appealed from certain parts of the judgment entered in the court below declaring that certain lands owned by the plaintiff, as successor to Frederick Cox, are subject to a charge in favor of Miller & Lux for a portion of the expenses that might be incurred in future by that corporation in maintaining and operating the Buena Vista reservoir and in constructing other canals and works for the control of the waters owned in common by the parties of the first part to the agreement of 1888. This appeal is numbered L. A. 4994 and is presented upon the same record as case No. 4993.

The court found that the plaintiff had acquired all or a large part of the land formerly owned by Cox, situated in the townships enumerated in paragraph 17 of said agreement, and that it had afterwards sold a large part of said land to other persons, with reservations excluding from the conveyance whatever rights the plaintiff had in the water allotted to the first parties by the agreement of 1888 aforesaid, and that the plaintiff still owned certain parcels of said land, describing them, situated in township 27 south, range 22 east, aforesaid, containing 3,840 acres. The judgment declared that this 3,840 acres was subject to the charge aforesaid for the future expenses to be incurred and paid by Miller & Lux as aforesaid in the common enterprise of maintaining their water rights and works.

Frederick Cox died in the year 1906. Administration of his estate took place in the superior court of Sacramento county. The decree settling the final account and making distribution thereof was entered in that court on April 18, 1908. During the administration Miller & Lux presented a claim against the estate for the contingent expenses thereafter to be incurred by it in maintaining and operating said reservoir and waterworks. Said corporation also filed a contingent claim for moneys to become due to Miller & Lux under an agreement executed between Miller & Lux on October 6, 1898, providing for the construction of certain canals and the payment of rental therefor in case they were made use of by Cox and for the payment of part of the expense thereof by Cox. Both claims were duly allowed in the course of administration. At the time of the final settlement these claims had not been adjusted or disposed of in any way. As they must of necessity arise in the future and the amounts were not then determinable, they could not be adjusted by a present payment. Upon the hearing, all of the parties entitled to distribution were present in open court together with the attorney for Miller & Lux, and thereupon in pursuance of an agreement between them made in open court a decree of distribution was by consent of all parties made and entered distributing the aforesaid 3,840 acres of land to the residuary devisees and declaring that the same was subject to a charge and burden imposed thereon by the provisions of the agreement of 1888 aforesaid in favor of Miller & Lux, and that said burden and charge was "to run with and bind said lands," and imposing a charge upon the said land for the expense to be incurred and moneys to become due under said agreement of October 6, 1898, which also was "to run with and bind said lands."

During the trial of the present action in the court below the defendant Miller & Lux, by leave of court, filed an amendment to its answer setting up these charges and burdens as a lien against the aforesaid lands asking a judgment declaring the plaintiffs should hold said land subject to said charges and burdens. The court made findings in accordance with the amendment and judgment was rendered accordingly imposing upon said 3,800 acres of land a lien for the charges and burdens mentioned in favor of said Miller & Lux.

[6, 7] The plaintiff claims that the court erred in allowing the defendant to amend its answer in the manner above indicated. The object of plaintiff's action was to quiet its title to certain water rights and to certain

lands, including said 3,840 acres, against the alleged unfounded claims of the defendants. Miller & Lux claimed that such water rights as plaintiff had were part and parcel of the said 3,840 acres of land, either as a riparian right or as an appurtenance thereto. It was proper, therefore, for the defendant, if it had a claim, present or prospective, against the plaintiff which would constitute a lien upon said lands of which the water rights were a part, to assert the same and have its lien established in the action to quiet title. The matter of amending pleadings during the trial is largely in the discretion of the trial court, and we see nothing in the record to indicate any abuse of discretion in allowing the answer to be amended as aforesaid.

[8] Appellant also claims that the part of the judgment appealed from is based on the theory that the covenants of the agreement of 1888 were covenants running with the land, and that they are not of that character. We do not think this proposition is of any importance. It is immaterial what the nature of those covenants was. The judgment of the court below was obviously based upon the lien or burden established by the decree of distribution in the estate of Cox. That decree declared that this burden or charge existed against the land and that it should "run with and bind the land." By this language the claim in favor of Miller & Lux was established as a lien upon the 3,840 acres of land described therein and declared to be subject thereto. Fresno C. & I. Co. v. Rowell, 80 Cal. 116, 22 Pac. 53, 13 Am. St. Rep. 112; Fresno C. & I. Co. v. Dunbar, 80 Cal. 535, 22 Pac. 275. It is therefore immaterial whether the covenants of the agreement of 1888 were or were not covenants running with the land. Whatever their character, the effect thereof was adjudicated in the decree of distribution, which was binding upon the distributees to whose title the plaintiff has succeeded.

[9] Appellant insists that part of the decree of distribution imposing upon the land the lien above mentioned was void for two reasons: First, because it was beyond the jurisdiction of the court to make such a decree; second, because its provisions are so uncertain as to render it unenforceable. We think there is no doubt of the jurisdiction of the court to enter the decree. This is not a case where the court was endeavoring to determine a controversy between the distributees and third persons regarding the title to the land distributed, adverse to the title of the decedent or to the title of distributee. Cases holding that the court has no jurisdiction to determine such controversies upon the final settlement of the estate in probate are not in point here. Miller & Lux claimed that it had a contingent claim against the estate for expenses thereafter to be incurred, and that such claim was a charge or lien upon a part of the land about to be distributed. The court was making a final settlement of the estate. In order to do so it was necessary that it should make some provision regarding the payment of said claim. It had jurisdiction of the parties and of the property for all purposes necessary to the settlement of the estate. The residuary devisees, the only persons interested in the land as successors of Cox, were present in court and agreed to the distribution made and to the imposition of the lien. It has often been decided that the court in probate has power, in distributing the estate of a decedent, to declare a lien thereon in favor of a third person, and that the distributee shall hold it subject to such lien. Estate of Moore, 96 Cal. 530, 31 Pac. 584; Finnerty v. Pennie, 100 Cal. 407, 34 Pac. 869; Estate of Boyes, 151 Cal. 151, 90 Pac. 454; Estate of Clanton, 171 Cal. 386, 153 Pac. 459.

[10] The contention that the decree is void for uncertainty is also untenable. The claim for which the lien was imposed was for moneys to become due in the future, the amount of which could not be determined in advance. If the lien existed it could be enforced when the moneys became due to Miller & Lux under the provisions of the agreement of 1888 aforesaid and the agreement of October 6, 1898, aforesaid, both of which were referred to in the decree of distribution. The amount thereof could be established at that time, but not before. The plaintiff argues that the decree leaves it to Miller & Lux to be the sole judges of the amount of expenses to be incurred and therefore delegated to that corporation the functions of the court. This, however, is obviously not the case. The decree of distribution merely imposed the lien for whatever amount should legally become due thereafter to Miller & Lux on account of the agreements referred to. It would, of course, be necessary, if there was any dispute about these amounts, or their validity or legality, that Miller & Lux should resort to a court of competent jurisdiction to establish and enforce its lien. That corporation would not be the sole judge of the legality or extent of the charges to be imposed. If they were not justified under the contracts referred to, if they were improper charges, or if the contracts do not authorize Miller & Lux to charge the expenses claimed against the owner of the land, then, of course, the court to which the matter was submitted would refuse to declare or enforce a lien therefor. We find no merit in the points made in support of this appeal.

It is ordered that the judgment be modified by striking out the words "at any place within its lawful control, and for any lawful purpose it may think proper, whether on lands riparian to said Kern river, Buena Vista slough, Kern and Buena Vista lakes, the slough connecting said lakes, or elsewhere," found at the end of the first paragraph of the

part of the judgment declaring the rights of the plaintiff immediately following the words "and to use and dispose of the same in any lawful manner," and inserting instead thereof the following:

"Upon any lands owned by Frederick Cox on July 28, 1888, situated in any of the congressional townships and portions of townships described in paragraph 17 of the agreement of July 28, 1888, attached to the complaint and marked Exhibit A thereto, but not elsewhere."

As so modified, the judgment is affirmed. The court below is directed, upon the going down of the remittitur, to re-enter the judgment as thus modified. The respective respondents are to recover costs of appeal from the respective appellants in each case.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

Mr. Justice OLNEY does not participate herein.

183 Cal. 47

SEAMAN v. SUPERIOR COURT OF MARIN COUNTY et al. (S. F. 9331.)

(Supreme Court of California. May 26, 1920.)

1. Dismissal and nonsuit ⟸60(6) — Court properly refused to dismiss cross-complaint for failure to return summons.

The court was justified in refusing to dismiss a cross-complaint on the ground that summons had not been returned within three years, where the delay was occasioned wholly at the request of the movant and for his benefit.

2. Process ⟸150—Jurisdiction of cross-complaint not lost on failure to return summons within three years.

Code Civ. Proc. § 581a, under which court loses jurisdiction where summons is not returned within three years, does not apply to a cross-complaint, notwithstanding section 442 as amended by St. 1909, p. 966, providing for a summons on a cross-complaint.

3. Dismissal and nonsuit ⟸60(1) — Courts have inherent power to dismiss cross-complaint for lack of diligence in prosecution.

Courts have inherent power to dismiss a cross-complaint for lack of diligence in its prosecution.

In Bank. Petition by Russell G. Seaman, individually and as executor of the last will of George B. Seaman, deceased, for writ of prohibition prayed to be directed to the Superior Court of the County of Marin, and Honorable E. T. Zook, Judge thereof. Transferred from District Court of Appeal on respondent's motion. Application denied.

James H. Boyer, of San Francisco, for petitioner.

George H. Harlan, of San Rafael, for respondents.

WILBUR, J. [1-3] Petitioner applied for a writ of prohibition to the District Court of Appeal, and a peremptory writ was ordered. On respondent's motion the case was subsequently transferred to this court. Petitioner seeks to prohibit the respondent from proceeding with the trial of the issues on a cross-complaint in an action to foreclose a mortgage, in which the Bank of Sausalito, a defendant, had answered and filed a cross-complaint, September 14, 1915, for the foreclosure of a first mortgage; the original action having been begun October 13, 1913, to foreclose a second mortgage. Summons was issued upon the cross-complaint, and served September 23, 1915. The affidavit of service was immediately indorsed thereon. In order to allow the defendant, who had defaulted in the original foreclosure action and on the cross-complaint, an opportunity to try to sell the property and realize something out of his equity, and because of his earnest solicitation, and in accordance with a written stipulation to that effect, the summons was not filed until September 22, 1919; the defendant having agreed to pay the interest upon the mortgage of the Bank of Sausalito and to make efforts to sell the property. The defendant Seamans paid the interest to January 31, 1919, and a small amount ($25) on account of the principal. He died March 27, 1919. His son, having been appointed the executor of his estate, makes this application to prohibit the further prosecution of the cross-complaint on the ground that the summons, though served within time, was not filed within three years after the filing of the cross-complaint, thus depriving the court of jurisdiction to proceed thereon. So far as the trial court has any discretion in the matter, it has been already exercised against the petitioner by a denial of a motion to dismiss the cross-complaint, and the fact that the delay was occasioned wholly at the request of the defendant and for his benefit would amply justify such decision if the court has any discretionary power. The petitioner relies upon section 581a, Code of Civil Procedure, as construed in Vrooman v. Li Po Tai, 113 Cal. 305, 45 Pac. 470; White v. Superior Court, 126 Cal. 247, 58 Pac. 450; holding that the court loses jurisdiction where the summons is not returned within three years, and the question is as to whether the rule is different on a cross-complaint. At the time section 581a was enacted in 1907 the law did not require the issuance or service or return of summons upon a cross-complaint. White v. Patton, 87 Cal. 151, 25 Pac. 270; Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975. Consequently, at the time section 581a, Code of Civil Procedure, was enacted it did not apply to a cross-complaint. In 1909 (St. 1909, p. 966) section 442, Code of Civil Procedure,

was amended to provide, for the first time, for a summons upon a cross-complaint. The provision then added by amendment is as follows:

"If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

It is contended by petitioner that by reason of this amendment to section 442 the provisions of 581a now apply, to which the respondent replies that section 442 does not now require the summons to be "returned," and that section 442 does not change the previous meaning of section 581a. As 581a, at the time of its enactment, did not apply to an action upon a cross-complaint, it follows that it would apply thereto only because of the amendment to 442. It is true that, for some purposes, a cross-complaint is regarded as the beginning of an entirely new action, but it is nevertheless a part and portion of the original action, and differs from a new action in this essential particular, namely, that the cross-complainant is brought into court by the plaintiff and does not come of his own volition. The reasons for a dismissal in the latter case may be as cogent as in the former, but in the absence of legislation depriving the court of jurisdiction, it has still power to proceed, and the mere amendment of section 442, providing for a summons on a cross-complaint, would not have that effect. No harm can come from such a construction, because of the inherent power of the court to dismiss for lack of diligence in the prosecution of a cross-complaint; while an arbitrary rule requiring a dismissal might work great injustice, and would here, where the statute of limitations has run against a new action, or the period for filing claims against an estate has expired, as in this case.

Writ denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

183 Cal. 53

In re SIMONTON'S ESTATE.

SIMONTON et al. v. LEITER et al.

(L. A. 6259.)

(Supreme Court of California. May 27, 1920. Rehearing Denied June 24, 1920.)

1. Executors and administrators ⟸513(15)—Settlement of widow's account as executrix determined property not inventoried or accounted for was hers.

Presentation of widow's account as deceased husband's executrix and petition for its settlement presented, as between her and her husband's descendants and legatees, the question as to what property in her hands was part of the estate, so that settlement of her account involved a conclusive determination in her favor that certain property in her name at her husband's death, and not inventoried or accounted for by her as a part of his estate, was her own and not his or community property.

2. Executors and administrators ⟸513(9)—Order of settlement conclusive on executrix and persons beneficially interested.

Order of settlement of a widow's accounts as executrix of her deceased husband when it became final as between her and those beneficially interested in the estate was conclusive upon her as to the ownership of any property for which she was held accountable, and was conclusive upon those beneficially interested as to any for which she was not held and which she did not withhold from her accounts fraudulently or by mistake.

3. Executors and administrators ⟸513(9)—Settlement of executrix conclusive as between her successors and persons interested in estate.

Under Code Civ. Proc. § 1960, settlement of account of executrix, conclusive as between herself and persons beneficially interested in the estate, is conclusive as between such persons and the executrix's successors in interest.

4. Husband and wife ⟸274(1)—Code provision as to inheritance by persaons not relatives of decedent, but relatives of decedent's spouse, construed.

Civ. Code, § 1386, subd. 8, providing that if deceased is a widow and leaves no issue, and the estate or any portion was common property of decedent and her deceased spouse while he was living, the property goes in equal shares to the children of such deceased spouse, applies only to community property received by will or inheritance or retained by virtue of its character; if the husband is the survivor it applies to the community property which he retains as such without administration, and if the wife is the survivor it applies to such of the community property as she receives by will or as her share of the estate.

5. Husband and wife ⟸274(1)—Property received by widow as allowance and fees properly distributed to her next of kin.

Under Civ. Code, § 1386, subd. 8, property which widow received from deceased husband's estate as family allowance and as fees as executrix on her death was properly distributed to her next of kin, and not to her husband's descendants.

6. Homestead ⟸142(2)—Next of kin of widow entitled to proceeds of homestead set aside to her.

Under Civ. Code, § 1386, subd. 8, next of kin of deceased widow, and not the descendants of her husband, *held* entitled to proceeds of homestead set aside to widow on husband's death; property having vested absolutely in her as survivor, and order setting it aside to her having been unnecessary.

7. Husband and wife ⊂=274(1)—Property acquired by widow held not husband's descendants' as presumably community property.

Property acquired by widow after husband's death with funds, source of which was not traced, *held* not to go to husband's descendants on her death, as against her next of kin, on any ground funds must be presumed to be proceeds of community property; all in her hands not having been community property.

8. Husband and wife ⊂=274(4) — Burden on heir whose right depends on fact of relationship, and fact property was formerly community property.

Where the right of a person as heir depends not merely on the fact of a certain relationship, but also on fact property he claims as heir had formerly been community property of decedent and predeceased spouse, or else separate property of latter, burden of proof as to such fact rests upon him.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Jane Simonton, deceased. From final decree of distribution, J. G. Simonton and others appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

George W. Prince, Jr., Overton, Lyman & Plumb, and Wm. B. Himrod, all Los Angeles, for respondents.

OLNEY, J. This is an appeal from the final decree of distribution of the estate of Jane Simonton, deceased. The decedent by her will, after making certain specific bequests, left the residue of her estate to her "heirs at law as provided by the laws of succession of the state of California." She was the widow of one George W. Simonton, and left no descendants of her own, but there survived her a son and a daughter of her husband by a former marriage and three children of a deceased son of her husband by that marriage. She also left blood relations of her own.

The statute of successions in this state (section 1386, Civ. Code) provides, in brief (subdivision 8), that when a widow dies intestate and without issue such of her estate as was formerly either the community property of herself and husband or his separate property shall go to the descendants of her husband, if any there be, and the balance of her estate shall go to her next of kin by blood. In the present instance, upon the presentation of the petition for distribution, issue was made between the descendants of Mr. Simonton and the next of kin of Mrs. Simonton as to what portion of her estate had been formerly community property and should therefore go to Mr. Simonton's descendants, and as to what portion was not of this character and should therefore go to Mrs. Simonton's branch of the family. There was no contention that any portion of the estate had been formerly Mr. Simonton's separate estate. The probate court proceeded to determine the issue so made, found that a certain portion of the estate had been formerly community property and that a very considerable portion had not, and decreed distribution accordingly. From this result the descendants of Mr. Simonton, with the exception of his daughter, appeal, claiming that as to certain property found not to have been formerly community property the finding of the court is not sustained by the evidence.

The property as to which the finding of the probate court is attacked by the appellants falls into four classes: First, property which stood in Mrs. Simonton's name at the time of her husband's death and was not inventoried or accounted for as a part of his estate, but which the appellants claim was nevertheless community property; second, property received by Mrs. Simonton from her husband's estate by way of family allowance as his widow and by way of fees as his executrix; third, property which is the proceeds of certain real property, claimed by appellants to have been community property, which had been selected as a homestead by Mrs. Simonton and her husband while both were living and was set aside to her as such in the administration of his estate; and, fourth, certain property purchased by her after her husband's death with funds the source of which is not traced.

[1] As to the first class of property, that in Mrs. Simonton's name at the time of her husband's death and which was not inventoried or accounted for as a part of his estate, a complete answer to the appellant's contention is that the question is now concluded by the settlement of Mrs. Simonton's account as an executrix of her husband's will. As one of his personal representatives it was her duty to inventory and account in the administration of his estate for all of his property, either common or separate, in her possession, or of which she had knowledge. In particular, if the property here in question was common property as is now claimed, it was her duty to inventory and account for it. The appellants, on the other hand, were legatees under his will and the amount of their legacies depended directly upon the amount of the estate, so that they were directly interested in the executrix including in her inventory and account everything forming part of the estate. Under these circumstances the presentation of Mrs. Simonton's account as executrix and the petition for its settlement presented as between her and the appellants the question as to what property in her hands was part of the estate, and the settlement of her account of necessity involv-

ed a determination of this question. Estate of Hall, 154 Cal. 527, 98 Pac. 269; Stevens v. Superior Court, 155 Cal. 148, 99 Pac. 512.

[2, 3] The order of settlement, when it became final, was as between her and those beneficially interested in the estate conclusive upon her as to the ownership of any property for which she was held accountable. Estate of Burdick, 112 Cal. 387, 44 Pac. 734. Conversely, it was conclusive upon those beneficially interested as to any property for which she was not held accountable and which she did not withhold from her accounts fraudulently or by mistake. Tobelman v. Hildebrandt, 72 Cal. 313, 14 Pac. 20; Lataillade v. Orena, 91 Cal. 579, 27 Pac. 924, 25 Am. St. Rep. 219; Estate of Grant, 131 Cal. 429, 63 Pac. 731; Silva v. Santos, 138 Cal. 536, 71 Pac. 703. There is no showing of any sort that in the present case Mrs. Simonton failed to account for the property in question through fraud or mistake. The settlement of her account being conclusive under these circumstances as between the appellants and herself, it is likewise conclusive as between the appellants and her successors in interest, the respondents. Section 1960, Code Civ. Proc. It follows that the probate court properly found that the property which stood in Mrs. Simonton's name and of which she had possession at the time of her husband's death and which she did not account for as a part of his estate was not community property.

As to the second class of property in dispute, property acquired by Mrs. Simonton from her husband's estate by way of family allowance as his widow and fees as his executrix, the question is determined by a proper construction of the Code section. The material provision of the Code (section 1386, subd. 8) reads:

"If the deceased is a widow * * * and leaves no issue, and the estate or any portion thereof, was common property of such decedent and * * * her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse," etc.

Literally, this would include any property which had once been community property, no matter if it were not such at the time of the husband's death, as, for example, where the husband had in his lifetime given it to his wife for her separate property. But such a meaning is clearly not what was intended, and it has already been held that it is not the true meaning. Estate of McCauley, 138 Cal. 546, 71 Pac. 458.

[4] The only rational construction which can be given the provision is that it applies only to community property received by will or inheritance or retained by virtue of its character as community property. If the husband be the survivor, it applies to the community property which, as such, he retains without administration. If the wife be the survivor it applies to such of the community property as she receives either by will or as her share of the estate. This, and this alone, is undoubtedly what was in the mind of the Legislature when it adopted these provisions whereby those who are not the relatives of a decedent are yet made heirs by reason of their relationship to a predeceased spouse of the decedent.

The correctness of this construction is made doubly evident by the language of the second paragraph of the Code subdivision, that which deals with property which was the separate property of the predeceased spouse. There the language is that such property as "came to the decedent (the surviving spouse) by descent, devise or bequest" from the spouse first dying shall go to the latter's relatives. This language is specific as to how the property must come to the decedent in order that the provision apply. The equivalent provision in the case of community property would be one limited to property received or retained by the survivor of the community either by will or by inheritance or by virtue of its character as community property. There is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists. Furthermore, to place a broader construction upon the provision in regard to community property than the language of the provision in regard to separate property will permit as to it would be to place the relatives of a predeceased spouse in a more favorable position with regard to community property than with regard to such spouse's separate property, when, if any distinction were to be made, it would naturally be just the contrary. In this connection it may perhaps be worthy of note that in another respect, that of the matter of division between the two sets of relatives, a distinction is made between separate and community property, and that the distinction, as is natural, is in favor of the relatives of the predeceased spouse as to property which was his or her separate property. The Code subdivision provides that if neither spouse leave descendants the separate property of the spouse first dying shall go to his or her relatives exclusively, while the community property shall be divided between the relatives of both spouses.

[5] Our conclusion, as stated, is that the Code provision refers only to community property which the surviving spouse received by will or inheritance or retained by virtue of its character as community property. The property which Mrs. Simonton received as family allowance and as fees as executrix was not received by her in any of these ways, and it follows that the probate

court properly distributed it to her next of kin exclusively.

[6] What has just been said is likewise determinative of the question as to the third class of property in dispute, that which is the proceeds of the homestead set aside to Mrs. Simonton. Admitting the appellants' contention, which is very doubtful, that the property, when homesteaded, was community property, it was yet impressed with the homestead while both Mrs. Simonton and her husband were alive. It is familiar learning that under these circumstances the property vested upon Mr. Simonton's death absolutely in Mrs. Simonton as the survivor, and this not by way of inheritance or as in any way a part of her husband's estate. The order made in the course of the administration of his estate setting the property aside to her was wholly unnecessary and ineffective. Hart v. Taber, 161 Cal. 20, 118 Pac. 252, and authorities there cited. Practically the identical question here presented was presented in Estate of Beer, 178 Cal. 54, 171 Pac. 1062, where it was decided that the relatives of a predeceased spouse were not the heirs of the surviving spouse as to property which had been homesteaded and which came to the surviving spouse by virtue of the homestead. The only difference between it and the present case is that there the homestead was selected by the predeceased spouse out of her own separate estate, while here it was selected out of community property. But the difference is immaterial, since the right of the surviving spouse in the two cases is identical. Our conclusion, therefore, is that the appellants are not entitled to any portion of the proceeds of the homestead property.

[7, 8] As to the fourth class of property, that acquired by Mrs. Simonton after her husband's death with funds the source of which was not traced, the argument of appellants' counsel would seem to be that such funds must be presumed to be the proceeds of community property, since, according to their contention, practically all the property she had was community property. But since, as we have just held, a very substantial portion of her property was not community property, his argument fails. Furthermore, where the right of a person as heir depends not merely upon the fact of a certain relationship, but upon the fact of such relationship plus the fact that the property he claims as heir had formerly been either the community property of the decedent and his or her predeceased spouse or else the separate property of the latter, the burden of proof of showing such additional fact rests upon him. It is a fact which must appear in order that he be an heir and he is an heir only as to property as to which it does appear. It is an essential element of his claim of heirship and he must affirmatively show it, just as in the ordinary case, where heirship depends entirely upon relationship, the burden rests upon the claimant of proving the relationship which makes him an heir. In the present case the fact that the source of the funds with which Mrs. Simonton purchased certain property after her husband's death is not traced means that as to this property the appellants' claim of heirship was not made out. It follows that the property was properly distributed to the respondents who are heirs by virtue of their relationship alone.

The claim is also made on behalf of the appellants that the income received during administration from the portion of the estate which was determined by the probate court to be theirs was not distributed to them, but included in the cash distributed to the respondents. Of this claim respondents' counsel in their brief make what is apparently a complete refutation, and nothing in rebuttal appears in the appellants' reply brief. Under these circumstances we do not feel compelled to inquire ourselves into the correctness of the refutation, but will assume it.

Decree affirmed.

We concur: SHAW, J.; LAWLOR, J.

183 Cal. 99

BANCROFT et al. v. WOODWARD.

WOODWARD v. BANCROFT et al.

(L. A. 5309.)

(Supreme Court of California. June 4, 1920.)

1. Election of remedies ⊂=3(1) — Rescission held not barred.

Notwithstanding a party induced to enter into a transaction by fraud affirms it by an action for damages and loses the right to disaffirm subsequently, may, when sued on the contract, defend by counterclaim, and cross-complaint, filed at the same time, and say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former, without barring his right to disaffirm.

2. Landlord and tenant ⊂=34(1) — Lessee's rights to rescission lost by transfer of rentals and subleases to his wife.

If lessee, who was induced to execute a lease by fraud, previous to commencement of an action for rent, in which he sought rescission, actually transferred rentals and subleases to his wife, he alone could not rescind.

3. Landlord and tenant ⊂=34(2)—Lessee cannot rescind because false representations as to previous lease prevented building.

Lessee cannot rescind on the ground that false representations as to a previous lease for a part of premises prevented his construction of a building, requiring the execution of a new lease between the parties not made, since such

injury could not be predicated on the existing lease.

4. Landlord and tenant ⊜34(4)—Lessee must rescind promptly after discovering facts putting him on inquiry as to his rights.

Though Civ. Code, § 1691, provides that to rescind the party entitled "must rescind promptly upon discovering the facts which entitle him to rescind, if he * * * is aware of his right to rescind," a lessee is not justified in waiting 2½ years after discovering the facts, reasonably putting him on inquiry leading to discovery of ground for rescission, since he is chargeable with knowledge of his rights as of the time when he discovered such facts.

5. Contracts ⊜270(1)—Knowledge of right to rescind is imputed at time person is charged with discovery of facts.

The rule as to the time as of which a person seeking rescission will be charged with knowledge of his right is the same as in regard to the time as of which he will be charged with the discovery of facts which give him the right.

6. Landlord and tenant ⊜34(4)—Failure of lessee to learn of legal right to rescind held due to want of diligence.

In absence of explanation, lessee's failure to learn of his legal right to rescind for 2½ years after discovery of fraud affording ground therefor must be *held* due to his want of diligence.

7. Landlord and tenant ⊜31—Lessee held to have lost his right to rescind for fraud by dealing with property as if contract in effect.

Where lessee, after discovering facts warranting a rescission for fraud, dealt with the property as if the contract was still in effect, and subleased and collected rents even after filing a cross-complaint for rescission in a suit for rent, he must be *held* to have unequivocally affirmed the lease, and cannot rescind.

Department 1.

Appeal from Superior Court, San Diego County; Wm. A. Sloane, Judge.

Action by Paul Bancroft and another against Henry T. Woodward, with cross-complaint against the named plaintiff and others, seeking rescission of lease. Trial upon issues presented by cross-complaint. Judgment for defendant, declaring lease rescinded, and plaintiffs appeal. Reversed.

Haines & Haines, of San Diego, for appellants.

Wright, Winnek & McKee, of San Diego, for respondent.

OLNEY, J. The plaintiffs brought an action to recover certain installments of rent due them from the defendant according to the terms of a lease between the parties. The defendant answered, denying certain of the allegations of the complaint and, in addition, alleging that he had been induced to execute the lease through a certain fraudulent misrepresentation by one of the plaintiffs. He also, in his answer, set up by way of counterclaim the same fraud and his damage thereby in a very considerable amount. He also filed at the same time a cross-complaint in which he sought a rescission of the lease by reason of the same fraud. The plaintiffs answered the cross-complaint and upon the issues presented by it and the answer to it, the cause went to trial, a trial of the issues presented by the original complaint and the defendant's answer being postponed. The trial resulted in a judgment for the defendant declaring the lease rescinded, and the plaintiffs appeal.

[1] It is well, before proceeding with a further statement of the facts, to dispose of a contention of the appellants based on the facts already stated. It is urged on their behalf that a person induced by fraud to enter into a contract has his option upon the discovery of the fraud either to allow the contract to stand and obtain relief in damages for the wrong inflicted upon him or to disaffirm the contract and obtain what relief is necessary to restore him to his original position, but that he cannot both recover damages and be restored to statu quo; that the right of a party defrauded to disaffirm the contract and be restored to his original position is one which must be affirmatively exercised and consistently maintained and which is lost if he takes a position inconsistent with it as where he brings an action for damages. From these propositions as a premise, the conclusion is argued that the defendant here cannot at the same time seek the relief of damages by way of counterclaim and claim rescission by way of his cross-complaint, and that because he does ask for damages he cannot have rescission.

We may grant the premise, but the conclusion does not follow. While it is true that a party induced to enter into a transaction by fraud affirms the transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently (Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639), it is not true that if he seeks to disaffirm, but ineffectually, he loses the right thereafter to maintain an action for damages. The right to damages exists unless and until the transaction is effectually disaffirmed. It could hardly be questioned, for example, that under a complaint which, by proper and sufficient averments, set out that the plaintiff had been induced by fraud to enter into a contract and had endeavored to rescind it because of such fraud, and prayed relief upon the basis of a rescission, the plaintiff might be accorded damages in case the fraud were found but under such circumstances that the right of rescission did not exist. To put the matter in another way, it is wholly inconsistent for a party defrauded to ask for damages first

and a rescission if he cannot have them. But there is nothing inconsistent in his asking for rescission first and damages if he cannot have it. The defendant here by his counterclaim and cross-complaint, filed at the same time, has gone no further than to say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former. There is nothing in this that constitutes an affirmance so that his right to rescission is gone. Upon this point the case comes directly within the rulings of Glover v. Radford, 120 Mich. 542, 79 N. W. 803, and Richardson v. Lowe, 149 Fed. 625, 79 C. C. A. 317.

[2] Passing now to the further facts, much of what we are about to state is not in dispute. As to some of the facts, however, this is not true, and wherever it is not we have taken either the facts as found by the court or the defendant's own testimony upon which his case almost entirely depends. It appears that the plaintiffs were and are the owners of an entire block in the business district of San Diego, which, on October 7, 1912, they leased as a whole to the defendant for a period of 99 years, commencing the 1st of the following January, 1913. It is this lease for whose rentals the plaintiffs sued and whose rescission is sought by the defendant. The block was occupied by a number of different buildings leased, in whole or in part, to various tenants for various periods. The lease to the defendant, which we may call the ground lease, provided that it was subject to existing leases, and that the lessee should have the rents accruing from them after the commencement of his term, and should himself have the right to make leases. The negotiations for the lease were carried on by the defendant mainly with one of the plaintiffs, and during the negotiations this plaintiff handed the defendant a bundle of papers, and told him that it contained all of the outstanding leases, when, in fact, it did not contain one to a Mrs. Kinney, of which the defendant remained ignorant until after he had taken possession under his lease. The Kinney lease was of the upper floor of a two-story building occupying one-eighth of the block at the northwest corner. The floor leased was used as a rooming house. Mrs. Kinney was in possession at the time, but under another lease, of which the defendant was informed and which expired December 31, 1913. The lease complained of was an extension of this at an increased rental for three years, expiring December 31, 1916. Complaint is not made by the defendant as to the rental called for by the latter lease, but solely as to the length of its term. The lease to the defendant contemplated, and, in fact required, that the defendant erect new buildings on the property, and this was a feature of the negotiations between him and the plaintiffs. His complaint is that because of the length of the term of the Kinney lease negotiations which he had under way for financing the improving of the property failed, and he was unable to improve it as he desired.

The defendant's agent discovered the existence of the second Kinney lease almost immediately on taking charge of the property, and the defendant himself learned of it by the 1st of the following April, three months after the commencement of his term. He immediately complained to the plaintiff who had made the representation as to existing leases, who stated that he had forgotten about the extension, and would do all he could to get Mrs. Kinney out by the end of 1913, when the defendant had expected to be free to take possession. Nothing more occurred concerning the matter until some months later, and still in 1913, the defendant spoke to the plaintiff again about it. The plaintiff then told him that the lease to Mrs. Kinney was good, and he was unable to put her out, and expressed regret, and assured the defendant he would do all he could to rectify the mistake, presumably in the way of making some allowance to the defendant.

In the meantime the defendant had been going ahead with his negotiations for financing the construction of new buildings or rather a new building. The ground lease itself required the erection by the end of 1921 of buildings costing at least $200,000. It also provided that the building on the west half of the block, where the building occupied in part by Mrs. Kinney was located, should be of "Class A" construction, without similar provision as to the east half, and that no buildings should be torn down except those on the north half of the east half until at least $50,000 had been expended in new buildings on the last-mentioned portion. It must be taken that what the parties had in mind when they made the lease conformed with these provisions and the materiality of the misrepresentation must be judged by reference to them. Even these buildings the defendant had at no time the means to construct, although he could have obtained the money for a $50,000 building on the portion of the block to be first improved and which was not affected by the Kinney lease.

But the building whose construction the defendant was endeavoring to finance was of a much more ambitious character. It was to be a hotel known as the Royal Alexandria, which would cost $900,000 or more. It was the negotiations for financing the erection of this building which it is complained failed because of the Kinney lease. These negotiations were along the line of organizing a hotel company, which was to take the ground lease, the issuing by it of $2,000,000 in bonds, which, through the intervention of another company, were to be underwritten by still a third and disposed of by it abroad. The

scheme, however, involved the plaintiffs' modifying the terms of the ground lease. As it read, it provided for specified annual rentals for the first 10 years of the lease, and that thereafter the rental was to be 5 per cent. net on the value of the ground, as ascertained by appraisement immediately prior to the commencement of each 10-year period. The persons with whom the defendant was negotiating desired that the lease provide a fixed rental for the first 30 years of the term, and drafts of an agreement and new lease so providing were actually prepared, but were never signed. In other words, the success of the negotiations which it is claimed failed because of the existence of the Kinney lease and because of whose failure it is now sought to rescind the ground lease involved the obtaining by the defendant of the consent of the plaintiffs themselves to a modification of the ground lease, something which they were not obligated to give and did not give. On the other hand, the fact, according to the defendant's testimony, which must be taken to be true, is that the plaintiffs were ready to consent, and that the negotiations did not fail because of any unwillingness on their part in this respect.

The defendant's negotiations to finance the new building came to an end about September, 1913, while Mrs. Kinney was still in possession under her first lease of which the defendant was informed when he made the ground lease and which still had several months to run. The negotiations were never resumed. From time to time thereafter the defendant had conversations with the plaintiff who had made the false representation complained of. The two men saw each other frequently, but there was no suggestion of a rescission or cancellation of the lease, or that the defendant was not obligated thereunder. He informed the plaintiffs that the negotiations had failed because of the Kinney lease, and the plaintiff replied that he would use his best efforts with the other plaintiffs to obtain a reduction of rent on account of it. Matters ran along in this way for practically two years, until August, 1915. In the meantime the salability and rental value of the property had substantially diminished. The defendant failed to pay the rent due that month, and after several conversations with the plaintiff about the matter had an interview with him in company with his lawyer. The defendant stated that he was anxious to carry on the lease, but could not do so at the agreed rental, and asked for a reduction which the plaintiff rejected as unreasonable in amount. The defendant then offered to cancel the lease, and the plaintiff replied that he would do what he could to obtain a reasonable reduction in rent from the other plaintiffs, but they would not take the property back. It was then agreed that the plaintiff would communicate with his fellow lessors about a reduction in rent. Whether he did so or not does not appear, but, in any event, the present action was shortly thereafter commenced against the defendant without further communication with him.

During all this time the defendant was in possession of the property, collecting the rents from the various tenants, himself extending old leases and making new ones and in every way exercising full dominion under the ground lease. It is alleged in the cross-complaint, testified to by the defendant and found by the court, that while he personally discovered the fraud claimed to have been perpetrated upon him by April 1, 1913, and thereafter proceeded under the lease and retained dominion of the property, he did not learn of his right to rescind the lease until September, 1915, shortly after the commencement of the plaintiffs' action against him. Then he consulted a lawyer, and was advised of his supposed right, and thereupon filed his answer and cross-complaint, alleging the fraud, that he was ignorant of his right to rescind until about September 1, 1915, and offering to restore everything of value he had received from the plaintiffs under the lease. Even after this, however, he retained dominion of the property, collected the rents, and actually made a lease of a portion of it.

We say the defendant collected the rents advisedly, although the fact is that just previous to the commencement of the action he had assigned the accruing rentals for 3 years to his wife, and she thereafter collected them. But if the fact be that this assignment was a genuine transfer of interest so that the rents collected by the defendant's wife were not in effect collected for him, it is evident that the defendant had put it out of his power to surrender the lease and its benefits without the concurrence of his wife, which was not shown. If this were the situation, he alone could not rescind. The most favorable view for the defendant is therefore that it was he who was the ultimate collector of the rents.

[3] Upon the foregoing facts we can see but little question but that for several reasons the defendant did not have the right to rescind. In the first place, it is not shown that the defendant was materially injured by the false representation complained of, and it is conceded that in such a case as the present this must appear. As we have said, no complaint is made as to the amount of the rental reserved by the Kinney lease. The sole complaint is that because of the length of its term the negotiations of the defendant for financing the erection of the hotel building failed. But those negotiations involved the plaintiffs' consent to a new and different lease. As a condition of giving it the plaintiffs would have had the right to require an acquiescence by the defendant in the Kinney lease. In fact, the new lease which the

plaintiffs were apparently ready to sign did so provide, for it provided that it was subject to existing leases of which the Kinney lease was at that time known to be one. The situation is that the arrangement, the failure to consummate which is relied upon by the defendant as the injury done him by the plaintiffs through their false representation, was an arrangement which he was not entitled to make, and could not make except by the consent of the plaintiffs themselves, which they were not obligated to give. The defendant could complain of the wrong of the plaintiffs in case it worked injury to him in respect to some right which he had, not in respect to something to which he had no right unless the plaintiffs themselves agreed to it. The defendant could perhaps have complained if the false representation had interfered with negotiations, which would otherwise have been successful, for the construction of a building or buildings under his lease as he had it. But he cannot complain of the interference with negotiations for erecting a building under a lease which he did not have, and that is the only complaint made. The fact that the plaintiffs were willing to agree to such a lease is wholly immaterial. If they did agree, the defendant of necessity acquiesced in the Kinney lease. If they did not agree, the negotiations of the defendant were futile. In any case, the object of the negotiations, the failure to achieve which is alone complained of, was something which the defendant could not do under the lease which he had, and his right to rescind must depend upon his suffering loss under that lease.

[4] In the second place, there is no sufficient excuse presented for the defendant waiting 2½ years after discovering the fraud before endeavoring to rescind. It is true that the Code provides (section 1691, Civ. Code) that to accomplish a rescission the party entitled thereto "must rescind promptly upon discovering the facts which entitle him to rescind, if he * * * is aware of his right to rescind." It is true likewise that the complaint alleges and the court finds that the defendant was not aware of his right to rescind until just prior to the filing of his cross-complaint. But no reason whatever is stated in the cross-complaint, and no sufficient reason appears in the evidence or findings why he did not long before become aware of his right, assuming that he had one. It is well settled that where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so. Lady Washington, etc., Co. v. Wood, 113 Cal. 482, 45 Pac. 809; Harrington v. Patterson, 124 Cal. 542, 57 Pac. 476.

[5] The reason for this rule is that diligence throughout is required of one who would rescind. It is a reason which applies with equal, if not greater, force to the time at which such a person, after learning of the facts upon which his right is based, will be held to be aware of their legal consequence, his right to rescind. It is at least intimated in Ruhl v. Mott, 120 Cal. 668, 679, 53 Pac. 304, and Hannah v. Steinman, 159 Cal. 142, 153, 112 Pac. 1094, that the rule is the same in regard to the time as of which a person seeking rescission will be charged with knowledge of his right as it is in regard to the time as of which he will be charged with a discovery of the facts which give him the right, and the reason for this is so plain that we have no hesitation in declaring it to be the case.

[6] Applying this rule to the present case it appears that the defendant admittedly learned of the fraud which he claims was perpetrated upon him by April 1, 1913, and knew of the injury which he claims resulted therefrom by September, 1913. It is claimed, however, that he did not actually become aware of his legal right to rescind because of the fraud until September 1, 1915. In the absence of any explanation the permitting of this lapse of time before learning of his legal rights is wholly unreasonable. Fraud is no slight matter. Where, as here, a party claims to have been defrauded and to have been injured thereby very substantially any reasonable diligence at all would require of him that he proceed promptly to ascertain what his rights were. When he waits 2 years after learning both of the fraud and of his injury before making any attempt to do this there are but two conclusions which can be drawn from his delay in the absence of explanation. Either he was guilty of a complete lack of diligence, or the fraud and injury complained of were not important in his mind and were not in fact substantial.

No explanation whatever of the defendant's delay is attempted in the cross-complaint, and it was demurrable for that reason. Nor does the evidence show any explanation, or at least any sufficient explanation. It may be that upon his first discovery of the fraud in the spring of 1913, the defendant was justified in not seeking to learn what his rights were, because of the statement of the plaintiff with whom he dealt that he would endeavor to get Mrs. Kinney out by the end of the year. But in the fall of 1913 this plaintiff told the defendant that the Kinney lease was good, and that he could not get Mrs. Kinney out. At just about the same time the defendant's negotia-

tions for financing failed, so that he then knew both of the fraud and the supposed injury done him by it. Then certainly, if he were to act with reasonable diligence, he should have proceeded to ascertain what his rights were because of the wrong and injury done him. Instead he made from time to time requests for reduction of rent, which the plaintiff with whom he dealt would agree to take up with the other lessors but which were never agreed to. The defendant's own testimony would seem to make it pretty plain that a reduction was asked for not so much as a matter of right as it was as a matter of something which the plaintiffs should allow in fairness. But, however this may be, the only explanation for the delay of 2 years is these requests from time to time for a reduction in rent and the statement of one of the plaintiffs that he would endeavor to obtain one for the defendant. It certainly cannot be said that such conduct for such a length of time evidences the diligence which might reasonably be expected of a man defrauded and substantially injured.

The defendant in this connection relies upon the authority of Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. There the plaintiff and defendant had made a lease in mutual ignorance of a fact which rendered the lease practically valueless to the plaintiff, the lessee. The plaintiff discovered the mistake shortly afterwards in July, 1906. He at once protested to the agents of the defendant against going on with the lease, but was told the defendant was East and would shortly return, and he permitted the matter to remain in abeyance until the defendant's return. The defendant did not return until January, when the plaintiff immediately took the matter up with him, negotiating for a new lease which would obviate the result of the mistake. The negotiations lasted for about a month, the plaintiff asking that a new lease be given him or he be released. Upon the negotiations coming to an end the plaintiff immediately consulted a lawyer, was advised of his right to rescind, and at once gave notice of rescission. It was held that upon these facts a want of diligence on the part of the plaintiff did not appear.

That these facts, however, differ essentially from those of the case at bar is plain. In both cases the injured party was justified in first endeavoring by negotiation to see if the matter could not be satisfactorily arranged before inquiring as to his legal rights. But in the one case he took up and pushed the negotiations with diligence, insisting upon the matter being arranged. In the other case, the present one, he was satisfied to allow the matter to drift for 2 years upon conversations from time to time with one of the lessors, largely of a casual character, in which he would ask for a reduction of rent, and the lessor would reply that he would endeavor to get the other lessors to grant a reduction, and which never came to anything. Certainly, reasonable diligence required of him, the defendant here, that when after a reasonable time his negotiations with the plaintiffs, if his conversations can be considered as really amounting to negotiations, resulted in nothing, he should have acted if he had been really defrauded and substantially injured. This he did not do. If he had acted, the first step he would naturally have taken would have been to ascertain what his legal rights were and what redress he could obtain. We see no escape from the conclusion that the defendant's failure to learn of his right to rescind long before he did was due to his own want of diligence. This being the case, his right to rescind was lost.

[7] In the third place, the defendant's right to rescind, if he had any, was lost by his dealings with the property. The rule is too familiar to require the citation of authority that if a person entitled to rescind goes on, after he discovers the facts which give him the right and knows that he has the right, to deal with the property involved as if the contract or transaction were still in effect, he affirms the contract or transaction, and his right to rescind it is gone. That is exactly what the defendant here did. We need not go back to the time at which he should have known of his right to rescind but did not. It is necessary to consider only what he did after he filed his cross-complaint, when he was fully aware of his rights and was affirmatively seeking rescission. After this time he continued through the medium of his wife to collect the rents of the property, and in December, 1915 (the cross-complaint was filed in October, 1915), actually made a lease of a portion of the property for the term of 1 year, commencing the 1st of the following January, and granted an extension for the same period of another lease about to expire. He had no right to make either the new lease or the extension of the existing one, except under and by virtue of the ground lease which he was seeking to rescind. His action in doing so was alone an unequivocal affirmance of the latter, and as such destroyed whatever right of rescission he might previously have had.

It is true the trial court finds that all leases and extensions of leases made by the defendant were upon condition that the plaintiffs carry out what is found to be the promise of the plaintiffs that they would secure the removal of Mrs. Kinney or reduce the rent under the defendant's lease. In this connection it should be stated that no such condition was inserted in any of the leases or extensions made by the defendant. What is meant by this finding is that the defendant was acting upon a condition existing in his own mind. But even so, so far as any promise to remove Mrs. Kinney is concerned, the finding is with-

out support except as to the first conversation, or conversations, in the spring of 1913 between the defendant and the plaintiff with whom he dealt. In the fall of that year, this plaintiff definitely informed the defendant that he could not get Mrs. Kinney out, and thereafter their conversations were upon that basis, and were confined to a discussion of a reduction of rental. Furthermore, the finding must be confined to the period prior to the filing of the cross-complaint. It can have no application to anything occurring subsequently, since at that time the plaintiffs in the most positive way possible, by the commencement of their action, had already informed the defendant that they would insist on the rental called for by the lease without reduction. The defendant's action thereafter in making the lease and extension mentioned could be nothing but what we have termed it, an unequivocal affirmance of the ground lease.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

183 Cal. 112

THOMPSON et ux. v. MODERN SCHOOL OF BUSINESS AND CORRESPONDENCE.
(L. A. 5299.)

(Supreme Court of California. June 5, 1920.)

1. Judgment ⟸735—Former judgment not adjudication of question not in issue.

Former default judgment in favor of correspondence school against salesman for courses or scholarships claimed to have been purchased by him was not adjudication whether or not school had been guilty of deceit on him and his wife, now suing therefor; such question not being in issue.

2. Fraud ⟸31—Right to rescind contract or perform and recover damages.

Where one is induced to contract by deceit, he may, on discovery, repudiate and rescind, or may allow contract to stand and perform his part, and yet recover any damages, except so far as his own performance waives them.

3. Fraud ⟸58(1)—Evidence held to show fraudulent scheme of correspondence school.

In an action for damages for fraud against a school by one induced to contract with it as a salesman of scholarships and by his wife, who became surety for him, evidence *held* sufficient to justify finding school's whole scheme was founded in fraud of which plaintiffs were victims.

4. Fraud ⟸61—Exemplary damages recoverable.

Under Civ. Code, §§ 1709, 3294, a scholarship salesman for a school, induced to enter its employment through fraud, and his wife, who became his surety likewise under fraudulent representations, could recover actual as well as exemplary damages, though compensation of salesman was fixed by contract.

5. Fraud ⟸54—Evidence held admissible to show scienter.

In an action for fraud against a school by a scholarship salesman and his wife, his surety, evidence of other persons who had contracted with the school, tending to show its business of employing salesmen was fraudulently conducted, *held* admissible to show scienter and to lay foundation for exemplary damages.

Department 1.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by William L. Thompson and Laura P. Thompson, his wife, against the Modern School of Business and Correspondence. From a judgment for plaintiffs, defendant appeals. Affirmed.

Patterson Sprigg, of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondents.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiffs, William L. Thompson, and his wife, Laura P. Thompson in an action for damages based on fraud —for actual damages to plaintiff William L. Thompson in the sum of $235, for "community damage" in the amount of $2,500, and for exemplary damages in the same sum for him and his wife. The court made findings of fact and conclusions of law, and entered judgment for actual damages to William L. Thompson in the amount of $230 and for joint damages in the sum of $460.

The defendant, the Modern School of Business and Correspondence, is a corporation organized under the laws of this state and claiming to have its principal place of business in San Francisco. This is the way the organization was held out to the public: It was represented in an "annual catalogue" that headquarters were maintained in a pretentious building in San Francisco, where there was a "faculty," composed of thirteen "heads of departments." Besides this "faculty," there was a "superintendent of organizers," whose business, it appears, was to induce others to enter the school's employ as "field organizers." These "field organizers" were designated to solicit persons to become "students" in the school and to purchase "courses of instruction"; the instruction to be given through the United States mails. It seems that, according to the scheme, the purchaser of a "course of instruction" could pay in cash or in monthly installments, and was entitled to receive from the school "syllabi, summaries, suggestive outlines, and helps in study," and upon the successful completion of the course there would be conferred upon

the "student" a "handsome diploma." It was also represented in the catalogue that there was a "regular employment department to assist graduates of the school in securing desirable positions." The prices charged for the "courses of instruction" did not appear in the catalogue.

Thompson, having read in San Diego a newspaper advertisement of the school, addressed a letter to the headquarters, asking for information. The school replied, under date of June 3, 1915, that if Thompson were selected he would be engaged "on a guaranteed salary, based on education and previous business experience." Thompson filled out and forwarded the application blank which had been sent to him. In a letter dated June 8 the school informed Thompson that its "superintendent of organizers," Mr. Joseph H. Hill, would call on him in San Diego, and stating, "We are authorizing him to engage you on a guaranteed salary of $900 for the first year." In the interview that followed between Hill and Thompson on June 20 in San Diego, Hill told Thompson that he would be required to make a deposit of $10, which was, according to the latter's testimony, "returnable on the first sale." Thompson further stated that Hill told him that this deposit was "to cover the possible chance that I might not enter on the duties after he had spent his time educating me." Thompson was also required to furnish security—or, as Hill put it, a "credit blank" or "bonds"—for the faithful accounting of any collections from "students" which he might make on behalf of the school. Thompson paid the $10 deposit and "gave the name of my wife, Laura P. Thompson, as my security." Hill outlined to Thompson the duties of a "field organizer." On June 21 Thompson entered into a written contract of employment with the school, through Hill, under the terms of which Thompson agreed to devote his entire time to the work of "field organizer" for a period of one year. The contract was admitted in evidence and the provision for compensation was as follows:

"(11) If after this contract has been completed by the said party of the first part [Thompson] it be found that his profits on enrollments secured during the period of this contract, as shown by his own daily reports sent to said school, have not amounted to nine hundred dollars ($900.00) then said second party [school] agrees to make up in cash such deficiency."

On the same day Mrs. Thompson executed and delivered the "credit blank" or "bond" binding herself to pay to the school at San Francisco such amount as should be stipulated and agreed to be paid by her husband "for goods, supplies, stationery, scholarships, and certificates of membership as he may have ordered, or may hereafter order from time to time, not exceeding $250 in any one shipment." Thompson explained that he had his wife do this upon the representation of Hill that "it is simply a guaranty that, if you collect moneys for the company and you fail to return them, that Mrs. Thompson, or whoever signs this letter of credit, will make restitution." Thompson further testified:

That on the same date Hill presented to him an "order blank" to be used in ordering courses from the school and "at the time that he produced this * * * he brought up and mentioned the samples, * * * and he then produced this blank with two courses, the Commercial Scholarship and the Civil Service Scholarship, on it. I had, of course, been studying for several days prior to this under Mr. Hill, * * * and I had become very much pleased with their automobile engineering course, * * * and I told Mr. Hill that I thought I ought to have a sample of that course as well, * * * and so he said, 'All right, we will include that.' And that auto engineering course was then added. After that * * * he handed this order over to me, and I also signed this."

According to Thompson, Hill also told him that these scholarships were "to be used for demonstrating the course. * * *" On cross-examination he testified further as to this conversation with Hill:

"I said, '* * * These scholarships are to be paid for, whether sold or not,' and he said, 'No; that is referring to the matter of collecting the money.' "

It is alleged in the complaint, and evidence was admitted in support of the allegation, that the "order blank" was changed after Thompson had signed and delivered it to Hill. As introduced in evidence there appear thereon, opposite the designations "Commercial Scholarships," "Civil Service Scholarships," and "Auto Eng. Scholarships," the amounts "$27.00," "$23.00," and "$31.00," respectively; the sum "$81.00" appears as the total "amount"; opposite the words "Total amount which I am to pay for above order" is the sum "$81"; opposite the words "Total credits due me" the sum "$10.00" (being apparently the deposit made by Thompson); and opposite the words "Balance to be charged to my account" the amount "$71.00." Thompson's testimony in respect to this instrument was: "There were no figures on the paper at the time I signed it."

Hill did not appear at the trial, but in his deposition he testified that the "order blank" was entirely filled out, including the figures for the prices of supplies ordered, before Thompson signed it; that he never told Thompson, or gave him to understand, that the scholarships were for demonstrating, or were not to be paid for; that "the prices inserted in the order blank were written therein with the full knowledge and consent of the said W. L. Thompson"; and that he

made no change or alteration in the figures or prices in the "order blank" after Thompson had signed it.

According to the evidence, the "courses" or "scholarships" were all delivered to and accepted by Thompson, who testified that subsequently he worked faithfully for a period of 80 days trying to sell the "scholarships," but that he was unable to make a sale, and he estimated that additional expenditures incurred necessarily in the course of the canvass amounted to $28.50. About September 21, 1915, he returned to the school the three courses which he had received. The school refused to accept them, and demanded that he pay the balance of $71, which, with the deposit of $10, made the total of $81. On September 29 Thompson wrote to the school, declining to pay for the courses and claiming that he was not aware that they were "unreturnable." After some correspondence suit was commenced against the plaintiffs by one A. S. Cohn, assignee of the school, in the justice's court of the city and county of San Francisco, on February 24, 1916, to recover the balance of $71. The plaintiffs herein were defendants in that action, and judgment was entered against them by default. It was after the filing of the suit in the justice's court that the plaintiffs instituted this suit, alleging that the understanding between Thompson and Hill was that the scholarships were not to be paid for by him, but by the "students" who should buy them, and charging fraud in the insertion in the "order blank" of the figures for the price of each course or scholarship after Thompson's signature had been affixed thereto.

[1] 1. The first ground urged for a reversal of the judgment is stated in appellant's brief as follows:

"That plaintiff's amended and supplemental complaint admits the adjudication in the justice's court in San Francisco of all of the subject-matter herein pleaded, and by reason thereof this action is res judicata. * * * The defendants there and plaintiffs here had their remedy by counterclaim or any other defense. * * *"

The allegation of the complaint upon which appellant bases this statement is as follows:

"That thereafter, and on or about the 24th day of February, 1916, defendant transferred and assigned the said instruments and purported right of action thereon * * * to one A. S. Cohn. * * * That thereafter A. S. Cohn did file an action in the justice's court of the city and county of San Francisco, Cal., against these plaintiffs, * * * and that the same was founded upon the instruments in writing secured from these plaintiffs, namely, the letter of credit or credit blank and the order blank above referred to, but that the same did not present for adjudication the contract of employment secured from these plaintiffs. * * * That thereafter A. S. Cohn on the 26th day of May, 1916, secured a judgment valid upon its face."

The answer to this contention is that the former judgment is not an adjudication of the question whether or not the defendant is guilty of deceit. The question was not put in issue in that action.

[2] Where one is induced by deceit to make a contract, he has a choice of remedies: (1) He may, upon discovery of the deceit, repudiate and rescind the contract; or (2) he may allow the contract to stand and perform his part thereof, and may, notwithstanding such performance, recover of the other party any damages he may have suffered by reason of the deceit, except in so far as his own performance may operate as a waiver of damage. Hence it follows that a judgment against him, given upon his default, in an action brought by the other party to enforce the contract, does not preclude him from recovering damages for the deceit.

2. Appellant's second contention is that—

"There was no evidence of a conspiracy or scheme to extort money from plaintiffs by defendant. * * * The theory of plaintiffs' claim of damages seems to be that appellant, together with its agent, Hill, conceived a plot to entice plaintiff * * * into its employment; that the signing of the 'agreement, order blank, and credit blank,' required of respondents, was a part of the conspiracy."

In this connection it is claimed that finding III is not supported by the evidence. That finding reads as follows:

"That between the 30th day of May, 1915, and the 21st day of June, 1915, at San Diego, Cal., Jos. H. Hill as agent of said defendant solicited plaintiff William L. Thompson to enter into its employ as a field organizer in the county of San Diego, state of California. That in order to secure the consent of said plaintiff to such employment defendant made promises of payment to said plaintiff, and made promises for the furnishing of certain supplies and samples and report blanks, which promises were and each of them was made by the said defendant without any intention of performing the same and with the intent to deceive the said plaintiff and to induce him to enter the employ of defendant. That, except for the fraudulent statements and promises of said defendant, plaintiff would not have entered the employ of said defendant and would not have rendered the services or delivered the instruments or paid the moneys hereinafter set out."

The court further characterized in finding XI the actions of the defendant and its agent, Hill:

"That all of the dealings of defendant with said plaintiffs and each of them, and all the promises, representations, and demands made upon them and each of them, were with the premeditated purpose of defrauding each of said plaintiffs and of extorting money from each of them. That in all of such dealings, representations, and demands said defendant

was and is guilty of oppression, fraud, and malice, and that each of the said plaintiffs suffered actual damage thereby. That the said dealings were followed by said defendant in a course of conduct generally and usually practiced by said defendant upon such persons as it succeeds in inducing to enter its employ and were in accordance with a premeditated purpose to defraud these plaintiffs. That such of the acts hereinbefore set out as were performed by defendant through its agents were performed within the scope of such agents' actual authority, and were performed with the knowledge and consent of said defendant, and that said defendant thereafter accepted the fruits thereof with full knowledge of all the attending circumstances."

The Civil Code provides:

"Sec. 1709. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

"Sec. 1710. A deceit, within the meaning of the last section, is: * * * 4. A promise made without any intention of performing it."

"Sec. 1574. Actual fraud is always a question of fact."

"Sec. 1572. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 4. A promise made without any intention of performing it."

Does the evidence support the findings? There is the testimony of Thompson to the effect that, according to the representations of Hill, the "students"—and not Thompson—would be responsible for payment of the scholarships, and that no figures appeared in the "order blank" when Thompson signed it; in other words, that the "order blank" had been altered without the knowledge or consent of the plaintiff. It is clear, from the evidence already referred to, that the findings rest on the conclusion that the entire scheme, both in its conception and operation, was fraudulent. It is to be observed that the questions of fact whether the deposit of $10 was "returnable on the first sale," whether the "credit blank" or "bond" was a guaranty of the faithful remittance of collections from the "students" or was merely designed further to delude the prospective victims into the belief that the transaction was bona fide and regular, whether Hill represented to Thompson that the "scholarships" were to be paid for by Thompson or by the "students," whether the "order blank" was filled out when Thompson signed it or afterwards, and whether any "courses" ordered were returnable if they remained unsold, are all involved in conflict.

We must therefore assume that the court resolved the conflict on the side of the plaintiffs. And, in addition to the testimony already described, Paul E. Sloane and V. E. Standard testified that about the same time they had dealings of a similar nature with the school through Hill. There is a striking similarity between their testimony and that of Thompson as to the representations upon which they were induced to enter into a contract, to furnish a "credit blank" or "bond," and to sign an "order blank." Each of them also testified that the "order blank" which he had signed was subsequently filled in without his knowledge or consent, as was claimed in the case of plaintiff. The Sloane "order blank" was admitted in evidence. This showed that the figures opposite the scholarships were written in an ink of a different color from that used in writing the scholarships and in the signature of Sloane. It is significant that, according to the "credit blank," the payments were to be made in San Francisco, instead of San Diego, where Thompson resided.

[3] The court, too, may have inferred fraud from the fact that on the face of the catalogue appears the cut of a prominent business building in San Francisco under which cut is printed, "Home of the Modern School of Business and Correspondence, San Francisco, California, U. S. A.," in order, it would seem, to give the impression that the school occupied the entire structure. Manifestly, from all the evidence, the court could infer—and no doubt it did—that the whole scheme was founded in fraud, of which the plaintiffs were made victims.

[4] 3. Appellant's third point is that "there was no evidence of damages, either actual or exemplary, from which plaintiffs suffered by any acts of defendant," for the reason that the compensation to be paid to Thompson was fixed by contract. This is not an action on contract, but one for damages arising through fraud. We have already quoted section 1709 of the Civil Code. And section 3294 of the same Code provides:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[5] 4. The fourth contention of appellant is that "the court erred in admitting the testimony of Paul E. Sloane and V. E. Standard," already referred to. This testimony of independent acts was clearly responsive to the issue of fraud, first, to show scienter; and, second, to lay a foundation for exemplary damages. Kornblum v. Arthurs, 154 Cal. 246, 97 Pac. 420; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172.

5. This contention is disposed of in the discussion of appellant's second point as to the sufficiency of the evidence.

6. Appellant's sixth claim of error is:

"That as to finding No. 5 there was no evidence to support that portion of said finding as follows: 'Said defendant agreed to pay to plaintiff for such services the sum of $900, and to supply him with certain supplies, samples and report blanks.' "

This point does not call for discussion, for the reason that the eleventh clause of the contract, which we have already quoted, and the evidence in reference thereto, would alone support the finding.

Judgment affirmed.

We concur: OLNEY, J.; SHAW, J.

183 Cal. 91

DOWNING v. CUTTING PACKING CO.

(S. F. 8767.)

(Supreme Court of California. June 4, 1920. Rehearing Denied July 1, 1920.)

1. Contracts ⟸318—Forfeiture should be restrained to technical limits.

Where the right to a forfeiture is created by contract or by law, it has always been considered it should be restrained to the most technical limits of the terms and conditions on which the right is to be exercised.

2. Landlord and tenant ⟸94(1) — Notice to quit held not to terminate tenancy for years, and guarantor may still be held liable.

Where plaintiff deposited a large sum of money to guarantee payment of rent by a tenant for years, and on default in payment of rent the landlord, pursuant to Code Civ. Proc. § 1161, subd. 2, served notice to quit or pay rent, the mere service of notice did not of itself terminate the tenancy, for, as shown by the following subdivision, the purpose of such notice is a forfeiture of the lease; hence, where the tenant failed to vacate the premises, and the landlord, waiving the notice despite plaintiff's protest, etc., collected the rent out of the deposit, plaintiff cannot recover the amount, on the theory a new tenancy was created by acts of the parties, for which he was not a guarantor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George Downing against the Cutting Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

Lloyd Baldwin and John F. Cassell, both of San Francisco, for appellant.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

SHAW, J. The appeal is from the judgment. The material facts are as follows:

On October 31, 1914, Thomas W. Butcher leased to Ibos and Roche certain premises at the corner of Jackson and Drumm streets in San Francisco, for the term of five years, beginning December 1, 1914. The rental, after the first three months, was $500 a month, payable on the 1st day of each month, in advance. Thereafter in August, 1915, Butcher sold the premises to the Cutting Packing Company, subject to the lease. As a part of the consideration of this sale, the plaintiff, Downing, executed an agreement with the defendant in pursuance whereof the plaintiff deposited in the American National Bank the sum of $6,000, to be held by said bank for the purpose of securing the payment of the rents falling due thereafter from Ibos and Roche under said lease. The agreement provided that, if Ibos and Roche should make default in the payment of any monthly installment of rent, then "as often as payment of said installments of rent shall become in default the said American National Bank of San Francisco, upon the written demand of [Cutting Packing Company] shall pay to the said [Cutting Packing Company], out of the said moneys so deposited with it, the amount of the installment or installments of the rent so in default, until the whole of said sum of $6,000 is exhausted," and the said bank was thereby authorized and directed, upon receiving written notice that an installment of rent was due and unpaid, to pay to the Cutting Packing Company, out of said moneys, the installment so in default.

The installments falling due for October, November, and December, 1915, and January, 1916, were not paid by Ibos and Roche, but were paid by the said bank out of the fund deposited by Downing, as provided in said agreement. Because of this failure of Ibos and Roche, Downing became interested in obtaining a new tenant, and began negotiations with the Cutting Packing Company to that end. In pursuance of these negotiations, Downing procured one Webster as a prospective tenant, and an agreement in writing was proposed by the Cutting Packing Company to Webster, under which a lease of the premises was to be given to Webster as soon as the Cutting Packing Company could obtain possession thereof, either by the surrender of Ibos and Roche, or by proceedings to oust them under unlawful detainer proceedings. Webster proposed conditions to which the company would not agree and the negotiations ceased. The proposal, the counter proposal, and the rejection thereof all occurred on February 1, 1916.

Expecting that such agreement would be made, a notice from the company to Ibos and Roche to pay the rent or quit the premises was prepared by the attorney for the company for service. This notice was in the form required by subdivision 2 of section 1161 of the Code of Civil Procedure. It required Ibos and Roche to pay to the Cutting Packing Company, within 3 days after the service of the

notice, the sum of $500, due as rent for the month of January, 1916, or to deliver the possession of the premises to said company, and stated that, unless they so paid said rent or delivered the possession, legal proceedings against them would be instituted for the recovery of possession. This notice was delivered by the attorney of the company on February 1 to a clerk in his office for service, and it was served on Ibos and Roche on February 2, 1916. The date for the payment of the rent therein demanded expired on February 5, 1916. The Cutting Packing Company then decided to abandon the proceedings for restitution of the premises, and on February 4 it demanded of the said bank the payment of $500, due for rent for January, and also the $500 which became due on February 1, for the rent of that month, and in pursuance of said agreement, authorizing and directing said bank on such demand to pay said rents, the said sum of $1,000 was paid by it to the Cutting Packing Company on February 4. It does not appear that Ibos and Roche were aware of this payment, or consented thereto; but they continued in possession of the premises. On February 5 Downing demanded of Cutting Packing Company that it immediately proceed to oust Ibos and Roche by unlawful detainer proceedings he made similar demands on February 26, 1916, and March 1, 1916. The company did not comply with these demands, but suffered the tenants to remain in possession, and demanded and received from the bank the rent for the months of March, April, May, and June, amounting to $2,000, out of the fund so deposited by Downing as aforesaid, notwithstanding the continued objections of Downing to its so doing. This action is for the recovery by plaintiff of the said sum of $2,000.

The case presents the question whether or not, after having given the notice of February 2, 1916, to pay rent or quit, the Cutting Packing Company had the lawful right to abandon further proceedings under said notice and collect the rents for subsequent months from the fund deposited by Downing as security therefor, notwithstanding the protest of Downing against its so doing. The respondent contends that the company could not withdraw or waive the notice to pay rent or abandon the proceeding to recover possession, and hold Downing liable as surety, without his consent. He states his position as follows:

"Where a valid notice to quit is given by a landlord to his tenant, the effect of such notice is to terminate the relation of landlord and tenant between the parties as of the date limited in the notice; that a notice to quit is a notice that cannot be withdrawn or done away with, at the option of the party giving it, and without the consent of both landlord and tenant, and, even if so withdrawn, a new tenancy is thereby created; consequently a guarantor of the rent under the original tenancy is not liable for rent which becomes due after the time the notice would have expired or actually did expire."

The appellant calls attention to the fact that there are two classes of notices to quit: First. Where the tenancy is from year to year, from month to month, or at will, or where a clause in the lease provides for a termination by notice. Code Civ. Proc. § 1161, subd. 1. Second. Where the law allows the landlord to terminate the lease, because of some default by the tenant in the performance of its conditions or covenants, by giving a notice to the tenant to perform within a specified time or deliver the possession. Id. subds. 2 and 3. Its claim is that the authorities relied on by the respondent relate exclusively to notices of the first class, that a different rule is applied in those of the second class, that in such cases there is a forfeiture of the remainder of the estate, which forfeiture occurs only when a second condition or act has supervened in connection with the notice, and that such a notice may be withdrawn, and the proceeding for forfeiture abandoned by the party giving the notice, without the act or consent of the party to whom it is given, provided the withdrawal occurs before the expiration of the time therein fixed for the forfeiture. His theory is that, when a notice to pay rent within three days or quit, as provided by section 1161, is served, no change in the legal relations between the parties takes place at that time or during that period, that the tenant may pay the rent within the time, in which case the lease continues in force unchanged, or he may allow the rent to remain unpaid and thus terminate the lease at the end of the 3-day period; but that if, while the time is running, the landlord elects to recall or waive the notice and abandon the proceeding for a forfeiture, he may do so, and the lease will continue in force thereafter.

[1, 2] The language of the section shows that the appellant's theory is correct. Subdivision 1 applies only to cases where the tenant holds over "after the expiration of the term for which it is let to him" and to tenancies at will which have been ended by a 30 days' notice. Civ. Code, § 789. This would, of course, include all tenancies of the first class above described. The provisions governing notices of the second class are set forth in subdivisions 2 and 3. Notices to pay rent or quit are provided for in subdivision 2 and by a part of subdivision 3 referring thereto. They are as follows:

"2. When he continues in possession * * * without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant."

"3. * * * Within three days after the service of such notice, the tenant, or any sub-

tenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture."

The language of the last clause of subdivision 3, above quoted, shows that the object to be attained by a notice under subdivisions 2 and 3 is a forfeiture of the lease. If the tenant, or other person interested, shall "pay the stipulated rent," he may "thereby save the lease from forfeiture." The lease in such cases is not terminated by the expiration of the term fixed therein, or by any provision therein for a termination by the parties, but solely because of the default in the payment of rent, the subsequent notice, the lapse of 3 days, and the ensuing forfeiture. The established rule is that, where the right to a forfeiture is created by contract or by law, "it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised." Jameson v. Chanslor-Canfield, etc., Co., 176 Cal. 11, 167 Pac. 369; Randol v. Scott, 110 Cal. 596, 42 Pac. 976. Under this rule it must be admitted that the forfeiture does not occur until the last of the acts which are to create it has occurred. It therefore does not take place until there has been a failure to pay the rent during the 3 days allowed by the statute. It follows, also, that if the lease is not terminated by such forfeiture it remains in force for the remainder of the term, or until it is ended in some manner by some subsequent act or agreement. The respondent concedes that if Ibos and Roche had paid the rent themselves at any time within the 3 days following the service of the notice the lease would have remained in force to the same extent as if no notice had been given. The landlord could not have accepted the rent during that period and at the same time have claimed that the notice itself forfeited the estate and terminated the lease. Since forfeitures are not favored in law, the consequence of these principles would be that if the rent was paid in any manner or from any security provided therefor by Ibos and Roche, or by any other person for their benefit, during the three days, the forfeiture is thereby waived and the lease will remain in force.

The respondent claims that this result is avoided by reason of the fact that the deposit in the bank was not made by Ibos and Roche, nor at their instance, so far as appears, but was made by Downing at the time of the sale from Butcher to the Cutting Packing Company, and apparently for some purpose in the interest of Butcher or Downing. If it was done for this purpose, the fact is not fully disclosed by the record. But we regard the point as immaterial, for whatever the motive or inducement to Downing or Butcher may have been, the result was that the security inured to the benefit of Ibos and Roche and to their landlord, the Cutting Packing Company. Ibos and Roche remained in possession after the security was deposited, and availed themselves of the benefit thereof by allowing the rent to be paid out of that fund, instead of paying it themselves. After the giving of the notice to quit they still remained in possession, and continued therein until the payments here in controversy were made. It must therefore be presumed that they consented to such payments. The bank stood in the position of their agent with respect to the matter of making the actual payments of the rent, and the payments operated to their benefit. The forfeiture, as we have seen, had not occurred at the time the payment of February 4 was made. If the notice had terminated the lease or created the forfeiture, or if Ibos and Roche desired that it should have that effect, it was their duty to vacate the premises on or before the expiration of the 3-day period, and also to give notice to the bank to withhold further payments of rent accruing after the 1st of February. Since they did not do either of these things, the conclusion must follow that they acquiesced in the payment, and that the lease was not forfeited, but remained in force as completely as if no proceedings for forfeiture had been begun, and that the security deposited for the payment of rent remained available to the Cutting Packing Company for that purpose.

The respondent, in support of the position that the notice terminated the lease, cites 1 Wood on Landlord and Tenant, § 44; Woodfall on Landlord and Tenant, 423; Underhill on Landlord and Tenant, § 127; Alden v. Mayfield, 164 Cal. 11, 127 Pac. 45; Myers v. Herskowitz, 33 Cal. App. 581, 584, 165 Pac. 1031; Western Union Telegraph Co. v. Penn. R. R. Co. (C. C.) 120 Fed. 365; Wisner v. Richards, 62 Wash. 429, 113 Pac. 1090, Ann. Cas. 1912D, 160; Doe v. Calvert, 2 Camp. 388; Cheny v. Batten, 1 Cowp. 245; Fitzpatrick v. Childs, 2 Brewst. (Pa.) 367. An examination of these authorities shows that they all relate to notices to quit which did not involve a forfeiture, but which, either by reason of the law or of some clause in the lease providing therefor operated to terminate the tenancy between the parties. Thus, in Alden v. Mayfield, there was a tenancy from month to month, which had been terminated by a 30-day notice, as the law provides it may be. Civ. Code, §§ 1944, 1946. In Western Union T. Co. v. Penn. R. R. Co. the lease itself provided that it could be terminated by either party on 6 months' notice, and such notice had been given. Even in that case the court recognized the rule for which the defendant here contends by saying:

"It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both; and, when such joint assent is given, it creates a new tenancy." 120 Fed. 385.

In this way it distinguishes cases where the notice itself terminates the tenancy from cases where the tenancy is only terminated by the occurrence of a forfeiture. The passage quoted also recognizes the law to be that the forfeiture may be waived by the action of the party in whose favor it occurs, without the concurrence or consent of the party upon whom it is to be inflicted. In Wisner v. Richards the lease in question was terminable by its own provisions by a month's notice given by either party. The same is true of all the other cases, except Myers v. Herskowitz. That case is somewhat peculiar, but it is not authority in favor of the plaintiff. The lease there contained a covenant that the tenant should keep a certain passageway clear of obstructions. The notice to quit was given under subdivision 3 of section 1161, requiring the tenant to perform the covenant or quit possession. Suit was begun 10 days after the notice was served; the tenant continued in possession, and thereafter the landlord accepted rent from him during the pendency of the action until near the time of judgment. The court held that the acceptance of rent while the tenant so remained in possession was not a waiver of the forfeiture arising from the notice to perform the covenant or quit, unless it was received in such a manner as to imply that it was so intended by the landlord.

There are authorities in support of the contention of the appellant. In Tuttle v. Bean, 54 Mass. (13 Metc.) 275, it is held that if, after giving the notice to quit, the landlord told the tenant that he need not quit in pursuance of the notice, it constituted a waiver of the notice and prevented a forfeiture of the lease. In Hodgkins v. Price, 137 Mass. 13, it was held that where a notice to quit for nonpayment of rent was given, the forfeiture does not become absolute until the time given in the notice under the statute has run; the court saying:

"Until then the tenant has the right to pay or tender the rent, and reinstate himself in his rights. * * * The forfeiture is at most conditional, and may be purged and saved by the payment or tender of the rent due."

This language, it will be observed, is substantially the same as the above-quoted clause from subdivision 3, § 1161. The following cases are substantially to the same effect and support the appellant's claims: Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Norris v. Morrill, 43 N. H. 213.

The appellant also cites cases which declare the rule to be that, even in cases of the first class above described, where the notice operates to fix the end of the tenancy prior to the time it would otherwise expire, the notice can be waived by the landlord, and the tenant restored to his original term. This question, however, we need not consider. It is not involved in the case.

It is apparent, from these considerations, that the court erred in holding that the lease was terminated by the giving of the notice to quit, and that the security deposited was not available to the appellant as a fund for the payment of the subsequent rents.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

47 Cal. App. 173

McCAHAN v. McCAHAN. (Civ. 3320.)

(District Court of Appeal, First District, Division 1, California. April 20, 1920.)

1. Contracts ⇐111—Agreement of husband to pay fees and costs of divorce action contra bonos mores.

Notwithstanding Civ. Code, § 158, an agreement between husband and wife, in advance and in anticipation of a divorce action being brought, to pay the wife's counsel fees and costs, is void as contra bonos mores.

2. Divorce ⇐182—Court may compel husband to pay wife money to prosecute appeal.

Under Civ. Code, § 137, the court may, during the pendency of a divorce action, compel the husband to pay the wife any money necessary to prosecute or defend the cause; and this power is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of an appeal.

3. Divorce ⇐214(4)—Good faith and merit of appeal by wife determined from showing in lower court on application for suit money.

The question of good faith and merit of an appeal by a wife in an action for divorce is a matter to be considered and determined from the showing made in the lower court upon application for allowance of counsel fees and costs, under Civ. Code, § 137.

4. Divorce ⇐214(4)—Agreements as to counsel fees to be subjected to examination of trial court.

Ante-divorce agreements as to costs and counsel fees must be subjected to the examination of the trial court to see that they are fair and equitable, the matter being vested by Civ. Code, § 137, in the exclusive jurisdiction of the trial court.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Daniel F. McCahan against Lillian McCahan for divorce. Judgment for plaintiff, and defendant appeals. From an order directing plaintiff to pay to defendant a certain amount as costs and counsel fees on appeal, plaintiff appeals. Affirmed.

See, also, 190 Pac. 460.

Pierce H. Ryan, of Eureka, for appellant.

J. J. Cairns and H. L. Ford, both of Eureka, for respondent.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WASTE, P. J. This is an appeal from an order directing the appellant to pay to his wife, the respondent, $343 as costs and counsel fees, on appeal in a divorce action, in which judgment was entered in favor of the plaintiff, and from which judgment the respondent here appealed.

The complaint is on the ground of extreme cruelty. The defendant answered denying the allegations of cruelty, and filed a cross-complaint for permanent support and maintenance, and in which she also alleged that a certain contract of separation, theretofore entered into by the parties, was executed by reason of undue influence. This allegation plaintiff denied. The case was tried by a jury, which answered all of the special interrogatories submitted to it in favor of the plaintiff. These answers were adopted and approved by the court, which made certain additional findings of its own motion. With full knowledge of the facts, it sanctioned the agreement in part, and granted a decree of divorce to the plaintiff. That judgment was affirmed by this court. McCahan v. McCahan, 190 Pac. 460 (No. 3330), this day decided. A complete statement of the facts of the case is contained in that opinion.

After judgment the defendant moved the court, on affidavits showing she was practically destitute and had no means of her own, for an order directing plaintiff to pay her costs and counsel fees on appeal. The plaintiff filed a counter-affidavit in which he alleged the execution of the contract of separation referred to; that it provided for, and he had paid to the defendant, the sum of $100 for her costs and counsel fees in the action. He objected to making any further payments, and interposed the stipulation of the contract as a bar to the granting of the motion. The court overruled the objection, and, refusing to be governed by the provision of the contract relating to counsel fees and costs, made the allowance complained of. The question presented on this appeal is the right of the court to make the order, in view of the provision in the contract, which is as follows:

"(6) In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of one hundred ($100.00) dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only."

[1] Under our Code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. Civ. Code, sec. 158. Notwithstanding this freedom to so contract, it has been repeatedly held in this state that an agreement between husband and wife to do anything to facilitate procuring a divorce is illegal and void. Newman v. Freitas, 129 Cal. 283, 292, 61 Pac. 907, 50 L. R. A. 548. We think it requires no lengthy discussion to point out the circumstances under which an agreement in advance, and, in anticipation of a divorce action being brought, to pay the counsel fees and costs, may operate to facilitate a dissolution of the marriage tie. Such being its effect, it is void as contra bonos mores. Pereira v. Pereira, 156 Cal. 1, 5, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107.

[2-4] For another reason the trial court was warranted in disregarding the provision in the contract relating to counsel fees and costs. Our statute provides that during the pendency of a divorce action the court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the cause. Civ. Code, sec. 137. This power is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of the appeal. Bruce v. Bruce, 160 Cal. 28, 30, 116 Pac. 66. The question of the good faith and merit of the appeal is a matter to be considered and determined from the showing made in the lower court and upon which the order for the allowance is based. Gay v. Gay, 146 Cal. 237, 240, 79 Pac. 885. The courts of this state have consistently recognized and upheld the broad discretionary power vested in the trial judges by the above section of the Code in these matters. In refusing to sanction an agreement between an attorney and a plaintiff in a divorce action for a contingent fee, the Supreme Court pointed out that in such cases "the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. * * * The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law also ceases." Newman v. Freitas, supra. In yet another case the same court was called upon to construe a contract similar, in effect, to the provision in the agreement we are here considering. It was there said: "Nor in case of suit could the agreement control the action of the court in the exercise of its discretion in allowing alimony or counsel fees." In re Estate of Sloane, 179 Cal. 393, 177 Pac. 150. Assuming, as claimed by appellant, but not so holding, that it may have been unnecessary for the court, in deciding the case, to have used the language quoted, we consider the statement significant, as being in complete accord with what we conceive to be the consistent policy of the courts of this state in such matters.

Appellant relies upon the case of Lee v. Lee, 55 Mont. 426, 178 Pac. 173, as fully supporting his contention. While the court there takes a view contrary to that which seems to prevail in this state, we are unwilling to accept it as final authority. We are satisfied it is best to leave the matter of costs and counsel fees in divorce actions to the discre-

tion of the trial court, in whose exclusive jurisdiction it has been vested by legislative enactment. If it is desirable or expedient to settle these matters out of court, such agreements must be subjected to the examination of the court. Loveren v. Loveren, 106 Cal. 509, 513, 39 Pac. 801. If fair and equitable, the arrangement between the parties will no doubt receive its sanction.

The order is affirmed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

47 Cal. App. 176

McCAHAN v. McCAHAN. (Civ. 3330.)

(District Court of Appeal, First District, Division 1, California. April 20, 1920.)

1. Appeal and error ⊂=110—Order on motion for new trial is not appealable.

An appeal from order denying motion for new trial is not authorized under Code Civ. Proc. § 963, and will be dismissed.

2. Appeal and error ⊂=766, 767(1)—Brief not complying with rules may be stricken.

Where the opening brief is not typewritten, not indexed, only four copies are filed, and no attempt seems to have been made in its preparation to conform to the requirements of rule 8 of the appellate court (176 Pac. ix), and instead of calling the attention of the court to certain parts of the record, as directed in Code Civ. Proc. § 953c, contains merely portions of voluminous testimony, without any reference to the transcript, and with but little comment as to the nature and effect of the evidence, the appellate court would be justified in dismissing the appeal or striking brief from the files.

3. Appeal and error ⊂=771—Failure of husband to furnish counsel fees and costs no excuse for failing to file brief.

The fact that a wife is penniless, and that the superior court made an order directing the husband to pay appellant wife sufficient money to enable her to print her brief, and that husband appealed from this order and gave a bond staying execution of the order, is no sufficient justification for not filing a proper opening brief.

4. Divorce ⊂=93(3)—Not necessary to allege mental suffering was wrongfully inflicted.

In order to state a cause of action for divorce on the ground of extreme cruelty under Civ. Code, § 94, it is not necessary to state that grievous mental suffering was "wrongfully" inflicted, where the only rational inference from the allegations of the complaint is that the "infliction" was "wrongful."

5. Pleading ⊂=406(5)—Complaint held sufficient on appeal though subject to special demurrer if made.

Failure of a complaint in a divorce action, on the ground of extreme cruelty, under Civ. Code, § 94, to state that grievous mental suffering was "wrongfully" inflicted, was a defect which could have been reached by special demurrer, and not having been so attacked, must be held sufficient on appeal.

6. Divorce ⊂=27(1)—Mental suffering may be "extreme cruelty."

Grievous mental suffering may constitute and be the equivalent of extreme cruelty, under Civ. Code, § 94.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

7. Divorce ⊂=184(10)—What constitutes grievous mental suffering a question of fact not ordinarily reviewable.

Whether in any case the course of conduct complained of as a ground for divorce constitutes "grievous mental suffering" is a question of fact on which the trial court's finding will not be disturbed on appeal, unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion.

8. Contracts ⊂=111—Entered into to facilitate divorce void.

An agreement entered into between parties with the object of dissolving a marriage contract, or facilitating that result, is void.

9. Husband and wife ⊂=278(1)—May agree to immediate separation and provide for support of either.

Under Civ. Code, §§ 158, 159, either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which they might if unmarried, and they may agree in writing to immediate separation, and may make provision for the support of either of them, or their children, during such separation.

10. Contracts ⊂=111—Agreement to pay attorney fee to wife in anticipated divorce action void.

A portion of a separation agreement providing for the payment of an attorney fee to the wife in the event that either of the parties should ever institute a divorce action against the other was void.

11. Contracts ⊂=137(3)—Provision for payment of attorney fee to wife in event of divorce did not render entire separation agreement void.

A portion of a separation agreement providing for the payment of an attorney fee to the wife in event either of the parties should ever institute a divorce action against the other did not render the entire agreement void, relating to a different subject, and being entirely distinct, disconnected, and separable from the valid provisions of the contract.

12. Divorce ⊂=249(2)—Separation agreement considered in regard to disposition of community property.

Trial court in a divorce action has unlimited authority to make disposition of community property of the parties, under Civ. Code, §§ 146, 147; and, where it is made to appear that a division of property has been made in a separation agreement, the court necessarily has jurisdiction to consider the instrument, and to

affirm it or disregard it, if it is found to be void.

13. Divorce ⊂=249(2)—Trial court held to have ratified agreement as to division of community property.

Where the trial court, in its decree in a divorce case, made no division of the property of the parties, or provision for support of the wife, but recognized and expressly reserved to her the power to assert such rights and benefits as might accrue to her under a previously executed contract of separation, there was a ratification of the separation agreement to that extent.

14. Husband and wife ⊂=278(1)—Trial court may not interfere with valid separation contract dividing community property.

The trial court in a divorce action cannot interfere with a separation contract wherein community property was divided, under Civ. Code, §§ 146, 147, unless it was procured in violation of the general rules which control the actions of persons occupying confidential relations with each other, or was not fairly made, or was obtained by coercion, intimidation, or undue influence.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action for divorce by Daniel F. McCahan against Lillian McCahan. From a decree in favor of plaintiff, defendant appeals. Affirmed.

See, also, 190 Pac. 458.

J. J. Cairns and H. L. Ford, both of Eureka, for appellant.

Pierce H. Ryan, of Eureka, for respondent.

WASTE, P. J. [1] Defendant appeals from the judgment granting her husband, the plaintiff, a decree of divorce. She also appeals from the order of the court denying her motion for a new trial. The latter appeal was unauthorized and is dismissed. Code Civ. Proc. § 963.

[2] Were it not for the nature of the action and the situation of the appellant, we would feel justified in dismissing this appeal, or striking the opening brief from the files. It is typewritten, not indexed, only four copies were filed, and no attempt seems to have been made in its preparation to conform to the requirements of rule 8 of this court (176 Pac. ix). Instead of calling the attention of the court to certain parts of the record, as provided in section 953c of the Code of Civil Procedure, the brief appears to contain merely those portions of the voluminous testimony considered by the appellant to be favorable to her contentions, without any reference to the transcript, and with but little comment as to the nature and effect of the evidence.

[3] The failure and neglect of appellant in these particulars has not only obstructed our examination of the record, but has rendered it well-nigh impossible for us to use the brief for that purpose. In justification of her failure to print her brief, appellant makes it appear that she is penniless, depending for the greater part of her livelihood upon the charity of relatives; that on motion, and after taking evidence, the superior court made its order directing the respondent to pay to appellant sufficient money to enable her to print her brief; that from this order respondent appealed, and that appeal is now pending in this court; that the respondent gave a bond staying the execution of the order, thus completely denying appellant the means wherewith to comply with the rule of the court relative to printing her brief. This statement is borne out by the record, and for this reason we have refrained from dismissing the appeal or striking the brief from the files. There is not, however, sufficient justification for the manner in which the appellant's appeal is presented in the brief. Notwithstanding the labor involved, we have made a complete examination of the record in considering the points made by the appellant in seeking a reversal of the judgment and decree.

Defendant denied all the allegations of the complaint, filed a cross-complaint seeking a division of the community property and permanent alimony, and praying that a certain agreement whereby the parties agreed to live separate and apart from each other, providing for disposition of their property, and fixing an attorney fee in the event that an action of divorce should ever be instituted by either of the parties, be declared null and void. The case was tried with a jury, which decided in favor of plaintiff, and against the defendant, on all the special issues submitted to it. These answers were adopted by the court, which made additional findings of its own. The judgment and decree in favor of plaintiff followed, from which defendant appeals.

Appellant first attacks the sufficiency of the complaint. The plaintiff charged that the defendant secretly accepted the attentions of a man other than her husband, entertaining him in her home both in the daytime and in the nighttime, always in the absence of her husband; that she accompanied this man, without the knowledge and consent of her husband, to picnics and dances, and associated with him, in the privacy of her own home and in public places, to such an extent that her relations with said man became a matter of common gossip and scandal in the place where the parties resided, all of which became known to plaintiff; that she secreted stolen property in the house of plaintiff, and applied vile, insulting names and epithets to him; that she endeavored to strike him

with an iron; that she impugned the chastity of his female friends; that she laid down in the public streets, screeching and screaming at the top of her voice; that she frequently threw herself on the floor, remaining there screaming for hours at a time; that she repeatedly threatened to kill and murder her husband; that she frequently threatened suicide, and said she would cut her throat; that she endeavored to get hold of weapons for that purpose; that she quarreled with her husband until late hours of the night; that she attempted to tear out her own hair and to bite plaintiff's hands; that she did all these things and many others without cause or provocation, "all of which caused plaintiff great shame and humiliation, and inflicted upon him grievous mental suffering."

[4, 5] Appellant's contention is that, by reason of the failure to state that the grievous mental suffering was "wrongfully" inflicted, the complaint is insufficient to state a cause of action for extreme cruelty, under section 94 of the Civil Code. As was said in Nelson v. Nelson, 18 Cal. App. 602, 605, 123 Pac. 1099, 1101, "if this does not present a case of 'the wrongful infliction of * * * grievous mental suffering' we have totally misconceived the language employed." Furthermore, we do not understand that the pleader is required to adopt the exact language of the statute in pleading the cause of action, under the section mentioned. It is sufficient if, by appropriate averments, the proper qualification appears. As was said in the case last noted, the only rational inference from the allegation of the complaint is that the "infliction" was "wrongful." Furthermore, if there was any defect in the complaint it was one which could have been reached by special demurrer, and, not having been so attacked, it must be held to be sufficient. Mayr v. Mayr, 161 Cal. 134, 136, 118 Pac. 546.

[6] Appellant contends that the acts charged in the complaint, before summarized by us, even if true, did not constitute cruelty. She places her reliance upon the decision of Waldron v. Waldron, 85 Cal. 257, 24 Pac. 649, 858, 9 L. R. A. 487, wherein it was decided by a divided court that grievous mental suffering is not the equivalent of extreme cruelty, in a legal sense. The rule there laid down was criticized and overruled in Barnes v. Barnes, 95 Cal. 171, 175, 30 Pac. 298, 16 L. R. A. 660. The more rational rule laid down in that case has been universally and consistently followed in this state ever since. Fleming v. Fleming, 95 Cal. 430, 434, 30 Pac. 566, 29 Am. St. Rep. 124; Andrews v. Andrews, 120 Cal. 184, 187, 52 Pac. 298; Smith v. Smith, 124 Cal. 651, 652, 57 Pac. 573; Maloof v. Maloof, 175 Cal. 571, 573, 166 Pac. 330.

[7] We deem it unnecessary to here review the voluminous record of the evidence of some 30 witnesses who testified for the opposing side. No good can be effected by doing so, for the most that the appellant can urge in support of her contention that the findings and judgment are not sustained by the evidence is a conflict of testimony arising for the most part in the respective stories told by the plaintiff and the defendant. Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact. "The judge who tries the action, and has the parties before him for observation in the light of the evidence, is the one to whom the law commits the determination of this question in the first instance; and, as was said in Andrews v. Andrews, 120 Cal. 187, 52 Pac. 298, this court will not disturb a finding that particular acts constitute grievous mental suffering unless 'the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court.'" Avery v. Avery, 148 Cal. 239, 244, 82 Pac. 967, 969; McDonald v. McDonald, 155 Cal. 665, 670, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Dupes v. Dupes, 184 Pac. 425. We are fully satisfied that the conclusions of the trial court as to the weight and sufficiency of the evidence to support the allegations of the complaint, and the decree of divorce entered thereon, are correct.

Appellant sought at the trial to avoid the legal effect of the separation agreement entered into between herself and husband upon the ground that it was procured by undue influence. By this contract the parties agreed to live separate and apart, divided their property, provided for the custody and education of the minor child of the parties, stipulated an amount to be paid monthly for the support and maintenance of the defendant and the child, and relinquished to each other all obligations growing out of their marital relations, except as in the contract provided, including the right to inherit one from the other. The agreement also provided for an attorney fee of $100 "in the event that any action for divorce shall ever be instituted between the parties." This stipulation of the contract imposed no obligation on the wife to sue for a divorce; and the making of the contract was followed by the actual separation of the parties, during which the plaintiff paid the defendant the sum of $22.50 a month as therein provided for the support of herself and child. The agreement awarded what little community property the parties had to the defendant. The plaintiff, a laborer, has no separate property other than an interest in certain land, which is subject to the life estate of his mother, and which was found by the court to be worth $10,000.

From the evidence it appears, and the court so found, that prior to the execution of the agreement the plaintiff and defendant had discussed between themselves the subject of the contract which it was proposed by them to enter into, and agreed upon practically all of its terms. On the date of its execution the plaintiff and the defendant went together to the office of the attorney whom the plaintiff had selected, and stated to him, both parties being present, the terms which they had agreed upon. In the afternoon of the same day they returned to the office of the attorney, who in the meantime had drafted the agreement. He read it aloud to the parties, explaining the various provisions and terms and stating their meaning to them. Before the document was signed the defendant was instructed and advised by the attorney that she had the right to consult her own attorney or adviser, but she declined to do so. Prior to signing the agreement, however, she telephoned to a reputable and competent attorney of Eureka, who later appeared for her and represented her in this action. During the conversation with him she stated she did not desire his aid or advice in the matter of the agreement. The evidence fails to disclose that the defendant was in any way coerced or induced by any means against her will to enter into the contract.

[8-11] There is no evidence that the agreement was entered into between the parties with the object of dissolving the marriage contract or facilitating that result. Such contracts are void. Newman v. Freitas, 129 Cal. 283, 289, 61 Pac. 907, 50 L. R. A. 548. Under our Code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which they might if unmarried. Civ. Code, § 158. They may also agree in writing to immediate separation, and may make provision for the support of either of them, and of their children during such separation. Civ. Code, § 159. The agreement in question was apparently drawn pursuant to the authority thus given, and was one which the parties had the right to enter into. Pereira v. Pereira, 156 Cal. 1, 4, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Walker v. Walker, 14 Cal. App. 487, 493, 112 Pac. 479. Although that portion of the agreement, providing for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute a divorce action against the other, is void (McCahan v. McCahan, 190 Pac. 458, No. 3320, this day decided), it relates to a different subject, and is entirely distinct, disconnected, and separable from, and does not invalidate, the valid provisions of the contract. Estate of Sloan, 179 Cal. 393–397, 177 Pac. 150; Mack v. Jastro, 126 Cal. 130, 134, 58 Pac. 372; Beard v. Beard, 65 Cal. 354, 356, 4 Pac. 229.

[12, 13] The trial court, having jurisdiction of the divorce action, had unlimited authority to make disposition of the community property of the parties. Civ. Code, §§ 146, 147. Whenever, therefore, it was made to appear that a division of the property had been made in accordance with the terms of the separation agreement, the court necessarily had jurisdiction to consider the instrument, and to affirm it, or to disregard it if it was found to be void. "Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts." Loveren v. Loveren, 106 Cal. 509, 513, 39 Pac. 801, 802. The court, in the instant case, in its decree made no division of the property of the parties, or provision for the support of the defendant, but did recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed articles of separation. This action on its part we construe to be a ratification of the agreement to that extent.

[14] Measured by the standard of the Code provisions, and construed in the light of the circumstances surrounding its execution and subsequent performance, it is manifest that, in so far as it deals with the property rights of the parties, the contract is a valid agreement with which the court could not interfere, unless from the evidence it was authorized to find that it was procured in violation of the general rules which control the actions of persons occupying confidential relations with each other. It did not so find. Being fairly made, and not being obtained by coercion, intimidation, or undue influence, the trial court was correct in refusing to vacate and set it aside. Murray v. Murray, 28 Cal. App. 533, 535, 153 Pac. 248.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 319

ERICKSON v. ERICKSON. (Civ. 3007.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1920.)

Attachment ⊂=13—Not authorized in suit upon judgment secured in another state; "contract of record."

A judgment in another state is a "contract of record" not providing that payment shall be made in this state, so that when sued upon here no attachment is authorized under Code Civ. Proc. § 537.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract of Record.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Mary Erickson against O. S. Erickson. From an order dissolving plaintiff's attachment, the plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

C. W. Benshoof, of Riverside, for respondent.

JAMES, J. Appeal from an order dissolving an attachment issued at the instance of the plaintiff. The action was brought in the superior court of the county of Los Angeles and the cause of action stated was upon liability created by a judgment which judgment was entered against defendant in the state of Washington. Plaintiff, as a prerequisite to the issuance of the attachment, made her affidavit in which she alleged that—

Her claim was "for money due, owing, and unpaid on account of judgment rendered in favor of the plaintiff and against the defendant, and that such contract was made and is payable in this state. * * *"

Section 537, Code of Civil Procedure, permits attachment to be issued in an action upon a contract, express or implied, for the direct payment of money, "where the contract is made or is payable in this state." As to whether a judgment in any clear sense constitutes a contract is open to debate. English writers on the common law decline to give it that general character because, for one thing, a judgment in contested cases lacks the essential of consent of the party to be bound. However, judgments were sometimes classified as "contracts of record" upon the assumption that a promise would be implied in law on the part of the judgment debtor to pay the amount adjudged to be due from him. A diversity of opinion is to be found in the decisions on the question. However, the Supreme Court of this state has affirmed the position that a suit upon a judgment is an action upon contract. Bean v. Loryea, 81 Cal. 151, 22 Pac. 513, and cases cited therein. Moreover, appellant here necessarily confirmed that view, and respondent concedes that the law is so established. A contract is presumed to be payable where made, in the absence of terms providing otherwise. Tuller v. Arnold, 93 Cal. 168, 28 Pac. 863. The bald question then for determination is as to whether a contract made in another state, and which contains no terms providing that payment shall be made in this state, is such a contract as authorizes an attachment to issue in an action brought here. The answer must be in the negative. It has been directly so held. Dulton v. Shelton, 3 Cal. 206; Eck v. Hoffman, 55 Cal. 502; Tuller v. Arnold, supra. The cause of action, therefore, as shown, was not based upon a contract made or payable in California, and hence no attachment was authorized to be issued therein. The Oregon case cited by appellant (Meyer v. Brooks et ux., 29 Or. 203, 44 Pac. 281, 54 Am. St. Rep. 790) was evidently decided under a statute different in terms from those of our section 537, Code of Civil Procedure.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 208

SHERMAN v. SHERMAN. (Civ. 3358.)

(District Court of Appeal, First District, Division 2, California. April 23, 1920.)

1. Appeal and error ⊂=932(1)—That motion for allowance of counsel fees was made in action for separate maintenance held presumed.

On appeal from default judgment for separate maintenance, where no findings were necessary and no bill of exceptions was presented, it will be presumed, to sustain that portion of the judgment awarding counsel fees, that plaintiff proceeded in the customary manner by moving for counsel fees before trial and the allowance evidenced by the final judgment cannot be attacked on the theory that it was unwarranted under Civ. Code, § 137, allowing counsel fees necessary for the prosecution of the action because not made until the end of the action.

2. Husband and wife ⊂=299(1)—Community cannot be divided in suit for separate maintenance, where the complaint did not seek such relief.

While under Civ. Code, § 137, as amended in 1917 (St. 1917, p. 35), the court may, in an action for maintenance alone, make the same disposition of the community as could have been made if the marriage had been dissolved, but such award can be sustained only on the theory that it is necessary and reasonable; hence, where the complaint did not seek such relief, but alleged that the defendant husband was receiving a salary of $200 per month, and

that the sum of $75 was a reasonable sum for plaintiff's maintenance, a division of the community was not on default judgment warranted.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Edith Sherman against H. G. Sherman for separate maintenance. From portions of the judgment awarding attorney's fees and assigning the community property, defendant appeals. Modified by striking out the portion awarding plaintiff the community property, and as modified affirmed.

S. V. Wright, of San Luis Obispo, for appellant.

W. C. Carpenter, of Alturas, and M. R. Van Wormer, of San Luis Obispo, for respondent.

NOURSE, J. Plaintiff recovered judgment against defendant by default upon a complaint for separate maintenance, charging him with adultery. The judgment awarded plaintiff the sum of $75 per month for her support and maintenance in accordance with the allegations of the complaint, and in addition thereto allowed her the sum of $100 as attorney's fees in said action, and assigned to her all the community property of the respective parties. The appeal is taken from the portions of the judgment awarding attorney's fees and assigning the community property.

In respect to the matters complained of, the complaint alleges that the parties owned certain community property consisting of money in bank and an automobile, all of which it is alleged the defendant threatened to withdraw and dispose of for the purpose of leaving plaintiff without means of support. It is further alleged that the plaintiff will, "unless she has some maintenance from her said husband, be dependent upon her friends for support. That the sum of $75 per month is a reasonable sum to be allowed this plaintiff for her support and maintenance." The prayer of the complaint asks for a reasonable sum as temporary and permanent alimony for the support of the plaintiff, for counsel fees and costs, and for general relief.

[1] In attacking that portion of the judgment allowing counsel fees, appellant relies upon Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056, which holds that the court is without power to make an allowance for counsel fees in the final judgment, for the reason that, the services of counsel having then been completed, no award is necessary "for the prosecution of the action," as contemplated by section 137, Civil Code. But the rule of that case does not apply here, because, this being a default judgment in which no findings were necessary and no bill of exceptions presented upon the appeal, all presumptions of regularity in the proceedings must be indulged in to support the judgment. Thus, it must be presumed for want of showing to the contrary that, before the commencement of the trial, plaintiff proceeded in the usual and customary way by moving the court for an allowance of counsel fees necessary for the prosecution of the action, and that this motion was granted by the court, as evidenced by its final judgment.

[2] In assigning to plaintiff the entire community property of the parties, the court was bound by the allegations of plaintiff's complaint, which alone were admitted to be true by defendant's default. Clearly the allegations relating to the community property were inserted for the purpose of procuring an injunction to restrain defendant from disposing of this property for the purpose of defeating the monthly award for maintenance for which plaintiff prayed. No notice was given to defendant that any disposition of the community property was sought. Plaintiff expressly alleged that defendant was drawing a salary of $200 per month; that the sum of $75 per month was a reasonable sum for her support and maintenance; and prayed that the court award such reasonable sum for that purpose. Manifestly under such allegations the court would not be justified in awarding a larger sum for the support and maintenance of the plaintiff without amendment or notice to the defendant. Under the prayer for general relief a court cannot give a plaintiff judgment by default which is not supported by the allegations of the complaint. Concededly, under the amendment of 1917 (St. 1917, p. 35) to section 137 of the Civil Code, the court may, in an action for maintenance alone, make the same disposition of the community property as could have been made if the marriage had been dissolved; but where under such section the community property is awarded to the plaintiff without dissolution of the marriage, such award can be sustained only upon the theory that it is necessary and reasonable for the maintenance and support of the wife or for the wife and children where such relief is sought, because it is for that purpose alone that the action can be maintained, section 137 providing that "the court, in granting the wife permanent support and maintenance * * * shall make the same disposition of the community property," etc. The marriage state continues; the community is not dissolved; the parties may continue to live together and acquire and enjoy community property.

Where, therefore, the complaint expressly puts in issue the reasonableness of the sum necessary for support and maintenance by allegations that a specific sum is reasonable for such purposes, and admits, by failure to allege otherwise, that the community property is not necessary for such support and maintenance, the default of the defendant

admits the issue as so presented and nothing more.

The judgment is modified by striking therefrom the portion thereof awarding to plaintiff the community property, and as so modified will stand affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 205

Ex parte JAMES. (Cr. 520.)

(District Court of Appeal, Third District, California. April 23, 1920.)

1. Criminal law ⊂=238—Sufficient cause to believe accused guilty authorizes magistrate to hold him.

A committing magistrate may reject the testimony of accused, and believe that of other witnesses, and he is not required to confine himself to the doctrine of reasonable doubt; it being sufficient if sufficient cause exists to believe accused guilty, in view of Penal Code, § 872.

2. Criminal law ⊂=238—Probable cause held to exist for holding one accused of obtaining sheep by falsely pretending to have bank deposit.

Where accused was charged with obtaining sheep worth $16,000 on a false pretense that he had $6,000 on deposit in a certain bank, giving the vendors a check for the whole amount under a promise to deposit a sufficient amount to make the check good by a named day, and it appeared that he did not have $6,000 on deposit, the commitment was authorized.

Application for writ of habeas corpus, prayed to be directed against the sheriff of San Joaquin county, to secure release of petitioner. Writ dismissed.

Application for writ of habeas corpus by F. O. James, to be directed against the sheriff of San Joaquin county. Writ dismissed and petitioner remanded.

Walter F. Lynch, of Stockton, for petitioner.

Edward Van Vranken, Dist. Atty., and E. P. Foltz, Asst. Dist. Atty., both of Stockton, for respondent.

PREWETT, Presiding Judge pro tem. Application for a writ of habeas corpus upon the ground that the petitioner is held to answer upon a criminal charge without probable cause. He is charged with obtaining sheep worth about $16,000 upon the false pretense that, at the time of so doing, he had $6,000 on deposit in a certain bank. The petitioner denies making such a pretense, but admits that at the time he did not have said amount, or, in fact, any amount in excess of 80 cents, on deposit. He engaged to purchase the sheep from the owners. The sheep were counted out and loaded on the cars ready for delivery. He thereupon informed the owners that he had $6,000 on deposit, and that by the following Saturday he would deposit such further sums as were necessary to meet the check which he then offered to them, and which they accepted. They testified, and the court necessarily found, that they would not have parted with the title if they had not believed his statement that he had $6,000 on deposit.

1. The petitioner insists that he should be discharged because he informed the sellers that he did not have sufficient funds in the bank to meet the check. It is quite true that he so informed them, but he is not charged with the representation that the check would be paid on presentation. Both he and they knew that it could not be paid before the following Saturday, and his own testimony shows that he knew it could not be paid in full even then. The false representation with which he stands charged is that he then and there had on deposit $6,000. He took the sheep of these men, gave them a worthless check in payment, and within a few hours sold the sheep to other parties. That he may have intended, in fact, to meet the check in the future may be conceded, but this does not modify the fact, as found by the magistrate, that he obtained this considerable amount of property upon the false representation that he had a large sum on deposit.

[1] 2. The petitioner further insists that the false representation, in order to be criminal, must relate to an existing fact, and that it cannot relate to an act to be performed in the future, as a mere promise to pay. This rule, as a mere statement of the law, is sound, and is upheld in People v. Green, 22 Cal. App. 45, 133 Pac. 334, but it has no application to the facts of this case as shown above. The magistrate was clothed with authority to reject the testimony of the petitioner, and to believe that of the other witnesses, nor is he required to confine himself to the doctrine of reasonable doubt. It is sufficient if there existed sufficient cause to believe that the petitioner is guilty. In re Vandiveer, 4 Cal. App. 653, 88 Pac. 993.

[2] The owners of the sheep testify that they relied, in parting with their title, upon the fact that the petitioner had $6,000 of ready money. The essence of the alleged crime arises out of the fact, not that he could not pay the check, but that he was short by $6,000 of his claimed assets.

It may well be, as insisted by the owners, that they were willing, in view of his deposit of $6,000 in cash, to look to the band of sheep and other properties for the remaining ten thousand.

3. Petitioner's claim that the evidence must show an intent to defraud beyond a reasonable doubt is answered by the case last cited, although the specific question as to intent did not arise in that case. However, section 872

of the Penal Code provides that a defendant must be held "if it appears from the examination that a public offense has been committed." This language imports a degree of conviction far short of a belief beyond a reasonable doubt. Ex parte Becker, 86 Cal. 402, 25 Pac. 9, is in point. In that case the court discusses the degree of proof required before a committing magistrate and says:

"Whether it is sufficient to convict beyond a reasonable doubt, it is the province of the jury to say, and ought not to be determined in advance on habeas corpus."

The cases cited by petitioner in support of his claim do not deal with the measure of proof, and are not in point. No authority has been brought to our attention, and we feel assured that none exists, holding that a committing magistrate must, in a case of the character under review, be satisfied as to any fact beyond a reasonable doubt.

We discover no adequate reason for disturbing the commitment. Writ dismissed, and petitioner remanded.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 231

DUNTON et al. v. TANIGOSHI et al.
(Civ. 2820.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Judgment ⊂=155—Notice of motion to set aside default sufficient where date was correctly given, though day was improperly named.

Where a notice recited that motion to set aside a default would be made on Wednesday, the 1st day of July, the specification of Wednesday may be disregarded as immaterial, and the notice deemed sufficient, though the 1st of July fell on Monday instead of Wednesday.

2. Judgment ⊂=155—Notice that motion to vacate default would be made at 10 o'clock sufficient, though the same was not heard until 11.

Notice of motion to vacate a default, which specified it would be made at 10 o'clock, is sufficient, though the court by an arrangement of its law and motion calendar segregated causes, and under such segregation the clerk placed the motion on the calendar for 11 instead of 10; for the notice was sufficient to bring the opposite party into court, and, if there was any postponement, he was bound to take notice of it.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Cora Dunton and others against Ida May Tanigoshi and another. After default judgment was entered, defendants' motion to set aside the same was granted, and plaintiffs appeal. Order affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

L. B. Stanton, of Los Angeles, for respondents.

JAMES, J. After the plaintiffs herein had caused judgment by default to be entered against the defendants, defendants presented a motion to set aside the same and to be allowed to file an answer. The motion was granted. Plaintiffs appeal from the order.

[1] The main point presented is as to the sufficiency of the notice as given by the defendants of their motion to set aside the default and the judgment entered thereon. The notice specified that the motion would be made on "Wednesday, the 1st day of July, 1918, at ten o'clock in the forenoon of said day." As a matter of fact, Monday was the 1st day of July, and not Wednesday, and the motion was heard on Monday. Plaintiffs made no appearance at the hearing of the motion, and they contend now that the notice of motion was of no effect because it was indefinite as to the time when the motion would be presented. We think that the notice was a good notice bringing on the motion for the 1st day of July, and that the word "Wednesday" should be disregarded. The mention of the particular day of the week was not necessary to the notice, and a misstatement of that day, where the notice definitely designated "the 1st day of July, 1918," was to our minds immaterial.

[2] The further point is presented that because the superior court by an arrangement of its law and motion calendar segregated causes, and that under such manner of segregation the clerk placed the motion on the calendar for 11 a. m., instead of 10 a. m., as designated in the notice, made its action on the motion of no effect. There appears to be no merit in that contention. The segregation referred to was made by the clerk after the notice of motion was given, and the rule did not require attorneys to ascertain in advance the particular hour of the day at which motions noticed to be heard would be called. A notice that a motion would be heard at 10 a. m. would be sufficient notice to bring the opposite party into court at that time, and, if there was any postponement of the hearing under rule of court, he would be bound to ascertain that fact. No question is made at all as to the sufficiency of the showing upon the application to set aside the default and judgment.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

47 Cal. App. 228

Ex parte DE MARTINI. (Cr. 517.)

(District Court of Appeal, Third District, California. April 27, 1920.)

1. Perjury ⟸6—False statements by juror on voir dire are perjury.

False statements by one being examined as a juror, after having been sworn to make true answers to questions by court or counsel, constitute perjury under Penal Code, § 118.

2. Habeas corpus ⟸92(1)—Difficulty of proving offense charged cannot be considered.

On habeas corpus proceedings by one charged with perjury for falsely stating that he would try the case solely on the law and the evidence, the contention that the crime charged was difficult or impossible of proof does not require consideration.

Original application by George De Martini, for writ of habeas corpus to secure his release from custody under indictment for perjury. Writ denied.

E. R. Vaughn and George E. Foote, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondent.

PLUMMER, Presiding Judge pro tem. On the 17th day of March, 1920, an indictment was returned in the superior court of the state of California, in and for the county of Sacramento, charging the petitioner with the crime of perjury, alleged to have been committed by said petitioner in said court on or about the 12th day of January, 1920, upon his examination on voir dire as to his competency to serve as a juror in a certain cause then and there pending. Upon such examination the petitioner was asked the following questions and gave the following answers, to wit:

"Q. And if you are chosen as a juror in this case, you will try this case solely upon the evidence produced in court, and the instructions of the court? A. Yes, sir. Q. Nothing outside of the case—that is, outside of the evidence and the instructions of the court—will enter into your deliberations when you go into the jury-room? A. No, sir."

The indictment then sets forth allegations such as are required in charging the crime of perjury—the falsity of the answers, the knowledge thereof of the petitioner, etc.

[1] The petitioner contends that the indictment charges no public offense and that perjury cannot be predicated upon false statements given by a prospective juror, or upon his voir dire examination. The argument in support of this contention is based upon the cases having to do with promissory oaths. By section 118 of the Penal Code it is provided that—

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

The petitioner in this case had administered to him an oath in substance as follows:

"That you will true answers make to such questions as may be propounded to you by court or counsel touching your competency to act as a trial juror in the cause now pending," etc.

This oath is in substance, if not in form, the same oath that is administered to a witness testifying in either civil or criminal causes pending in any of the courts of the state. The crime charged to have been committed by the petitioner was not after having been "sworn to well and truly try the cause and a true verdict render according to the law and the evidence," etc., but when he was sworn to tell the truth. The misapprehension in this case arises from the failure to draw the distinction between the two oaths. The oath of the juror to well and truly try a cause is admittedly promissory in its nature, but the oath of a prospective juror on his voir dire examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel.

The language of section 118 of the Penal Code is certainly broad enough to include the offense of perjury when committed by a prospective juror upon his voir dire examination, and to hold otherwise would certainly be to open the door wide to all forms of collusion in the selection of jurors, if false answers knowingly and corruptly made under such circumstances can be given with impunity. In Hilliard v. State, 82 Tenn. (14 Lea) 648, a prospective juror was held to have committed perjury upon giving a false answer to the following question:

"Have you formed or expressed any opinion as to the guilt or innocence of the defendant?"

In that case the oath administered upon voir dire was practically the same as administered in the case now under consideration. In State v. Howard, 63 Ind. 502, it was held that an indictment for perjury might be predicated upon alleged false swearing given by the defendant while being examined under oath as to his competency to sit as a juror on the trial of a cause. To the same effect is the case of Finch v. United States, 1 Okl. 396, 33 Pac. 638.

It does not appear that this question has heretofore been expressly decided by the Supreme or Appellate Courts of this state. In the case of Ex parte Meyer, 40 Pac. 953[1] the

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 107 Cal. 17.

petitioner was held to answer upon a charge of having falsified his oath under similar circumstances but the question of whether perjury could or could not be so committed was not decided. The petitioner was discharged for other reasons.

[2] The contention that the crime charged is difficult or impossible of proof does not seem to require any consideration upon this proceeding. Being of the opinion that the charge of perjury may be based upon false swearing by a prospective juror upon his voir dire examination and that for the purposes of this petition the indictment herein is in all other respects sufficient it follows that the writ prayed for herein should be denied; and it is so ordered and the petitioner remanded.

We concur: BURNETT, J.; HART, J.

47 Cal. App. 235

DOLAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3442.)

(District Court of Appeal, First District, Division 2, California. April 28, 1920.)

1. Judgment ⟸337—Motion to vacate for inadvertence must be filed under Code Civ. Proc. § 473.

A motion to vacate a judgment because entered through inadvertence cannot be made under Code Civ. Proc. §§ 663, 663a, allowing motion to vacate because the conclusions of law were not consistent with nor supported by the findings, but such motion must be made under section 473, permitting relief from judgments entered through inadvertence or excusable neglect.

2. Courts ⟸114—Can correct record by entry of order nunc pro tunc.

The court can always correct its minutes so that they shall speak the truth, and therefore can enter nunc pro tunc an order submitting motion for new trial which was inadvertently not entered on the day made.

3. New trial ⟸155—Order held to show granting on date of entry which was too late, and not date nunc pro tunc, which was in time.

On order, reciting that the submission of the motion for new trial was inadvertently not entered, and further ordering that the motion be granted, and that the order granting it be entered as of a prior date, shows that the order granting the motion was made on the date of the order, not on the prior date stated for its entry, so that it was too late, where more than three months had elapsed from notice of judgment, and the motion must be deemed denied under Code Civ. Proc. § 660.

4. Certiorari ⟸58—Affidavits contrary to record cannot be considered.

On certiorari to review an order granting new trial, which showed it was made too late, an affidavit of counsel that the order was in fact made on an earlier date cannot be considered, where the respondent court and judge stand upon the order, especially where another order, made at the same time, shows that the new trial was granted on that date, and not on an earlier date.

5. Judgment ⟸397—Cannot without notice set aside for inadvertence order of vacation previously entered.

A court cannot without notice to the parties, set aside on the ground of inadvertence an order previously made, which granted a motion to vacate a judgment.

6. Judgment ⟸397—Vacating because conclusions are not supported by findings without new judgment is void.

Under Code Civ. Proc. § 663, authorizing the court to vacate a judgment because the conclusions of law are not supported by the findings or are inconsistent with the findings, and requiring entry of a proper judgment, an order granting a motion to vacate a judgment on that ground, but containing no direction for a new judgment, is void.

7. Judgment ⟸340—Void order can be set aside whenever it comes before court.

A void order can be set aside whenever it comes before a court.

Application for certiorari by Margaret Catherine Dolan against the Superior Court of the State of California in and for the City and County of San Francisco and Hon. George A. Sturtevant, Judge thereof, and another, to review orders granting a new trial and vacating a judgment. Orders annulled.

Raine Ewell, of San Francisco, for petitioner.

Jos. L. Taaffe, of San Francisco, for respondents.

BRITTAIN, J. The petitioner, wife of William Lawrence Dolan, joined as one of the respondents here, was granted an interlocutory decree of divorce on the ground of extreme cruelty. By the decree certain provision as made for the maintenance of four minor children, and certain community property was set aside to the wife. The decree also determined that other real property, the title to which it is averred stood of record in the name of the wife, was her separate property. The decree was made and entered on November 14, 1919, and thereafter on November 28, 1919, notice of motion for new trial was served and filed. On the same day a single notice of motion to vacate the judgment was served. Two grounds were specified, the first being that the conclusions of law were not consistent with, nor supported by, the findings; and the second, that the findings were signed inadvertently, in that they were not first presented to the defendant or his counsel.

[1] A motion to vacate the judgment, bas-

ed on the first ground, was permissible under sections 663 and 663a of the Code of Civil Procedure. Those sections do not provide for setting aside a judgment on the ground of inadvertence. Relief from judgments entered through inadvertence, surprise, or excusable neglect must be sought by a motion made under section 473 of the Code of Civil Procedure. The record here does not show what the moving papers were, nor what showing was made when the motions were presented.

Both motions, together with a cross-motion for additional attorney's fees, were presented to the court on January 30, 1920, the case having been transferred from the department of the superior court in San Francisco, where it was first tried to another department presided over by a different judge.

The minute order made on January 30, 1920, did not mention the presentation or submission of the defendant's motion for a new trial. It stated that the defendant's motion to vacate the judgment was submitted and taken under consideration, and that the plaintiff's motion for counsel fees was similarly submitted. On February 13, 1920, a minute entry was made. It recited that, the court having considered and being fully advised concerning defendant's motion to vacate the judgment, it is ordered that the motion be granted as to the property rights of the parties. If the court had considered that motion as one made pursuant to section 473 of the Code of Civil Procedure on the ground of inadvertence in the signing of the findings, the order would necessarily have set aside the entire judgment. Since it was limited to that portion of the judgment relating to the property rights, it must have been considered by the trial court as having been made under sections 663 and 663a of the Code of Civil Procedure. It is to be noted that this order did not direct the entry of any other judgment. It was also ordered that plaintiff's motion for counsel fees be denied. There was no reference to the motion for new trial.

On February 25, 1920, two minute orders were made, the first reading:

"It appearing to the satisfaction of the court that the order heretofore made herein on the 30th day of January, 1920, to wit, submitting the defendant's motion for a new trial having been inadvertently not entered, it is by the court ordered that the entry of said order be made this day nunc pro tunc, as of the 30th day of January, 1920. And it is further ordered that said defendant's motion for a new trial be, and the same is hereby, granted as to the property rights of the said parties to the said action, otherwise said defendant's motion stands denied, and it is further ordered that said order be entered this day nunc pro tunc as of February 13, 1920."

[2] The first clause of this order was clearly within the power of the court, which may always correct its minutes so that they shall speak the truth. Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194.

[3] Assuming that there was a mere ministerial inadvertence in omitting the order of submission of the motion for a new trial, it does not appear that the judicial function of determining that motion was exercised in any way until February 25, 1920. This was more than three months after the service of notice of the entry of the judgment on November 19, 1919. The failure of the court to determine the motion for a new trial before the expiration of the statutory period had the effect of a denial of the motion. Code Civ. Proc. § 660; Estate of Waters (Sup.) 185 Pac. 951; San Francisco, etc., Rys. v. Superior Court, 172 Cal. 544, 157 Pac. 604.

[4] It is stated in the affidavit of the attorney for the respondent, Dolan, that on February 13, 1920, the court made and gave its order granting the motion for a new trial as to the property rights of the parties. This statement contradicts the order of February 25. If the trial court in fact made the order granting the new trial on February 13, and by the later order sought only to correct the inadvertence of the clerk, it would no doubt have said so, as it did in regard to the order of submission, and it would not in terms and by the most apt language have made a new order granting a new trial, nor ordered the new order to be entered nunc pro tunc. On certiorari this court is bound by the record, particularly when, as here, the respondent court and judge stand upon it. City of Los Angeles v. Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; Borchard v. Board of Supervisors, 144 Cal. 14, 77 Pac. 708. Upon the record before this court it is concluded that the order of February 25 in so far as it purported to grant a new trial on certain issues was beyond the jurisdiction of the superior court and void. The motion for a new trial was terminated by the expiration of the time limited for its consideration.

What has been said concerning the ineffectiveness of the affidavit to contradict the record certified gains force in considering the effect of another order made on February 25. It is as follows:

"It appearing to the satisfaction of the court that the order heretofore made and entered on the 13th day of February, 1920, to wit, granting the defendant's motion for an order vacating the judgment and decree heretofore entered herein, and based on the findings of fact made by said court as to the property rights having been inadvertently made, it is by the court ordered that said order be, and the same is hereby, vacated and set aside, and it is further ordered that said defendant's motion * * * be and the same is hereby denied, and it is further ordered that said order be entered this day nunc pro tunc as of February 13, 1920."

A reading of this order in connection with the order purporting to grant a new trial

can leave no doubt upon the question concerning what orders were made on February 13, nor that when the court reconsidered them on February 25 the judge concluded and quite clearly stated that he made the order vacating the judgment, and did not make the order granting a new trial on February 13, although he may have intended to do just what he attempted to do on February 25.

[5] Because of the action of the trial court in making the order purporting to vacate the order setting aside the judgment in part, it is deemed proper for the information of the trial court and of counsel to state the views of this court in regard thereto, in order that there may be no misconception of the effect of this decision. The second order purporting to set aside the order vacating the judgment was invalid if the first order be considered as having any effect. Assuming the validity of the first order, it was subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. After a court has acted judicially it may not seek to correct its own errors by changing its judgments and orders without notice to the parties affected. Such action would very shortly deprive all judgments of their character of finality. Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Holtum v. Grief, 144 Cal. 521, 78 Pac. 11; United Railroads v. Superior Court, 170 Cal. 760, 151 Pac. 129, Ann. Cas. 1916E, 199; Gill v. Peppin, 182 Pac. 815. If the order was improvidently made, upon a proper showing and on notice it may be set aside, but the court cannot without notice and upon no showing justify a review of its own judicial act by a mere recital that it made the first order inadvertently. In this case there does not appear to have been either notice given the petitioner of the contemplated action of the court or any showing of inadvertence other than that the trial court determined on second thought that it was in error when it first acted. If the first order was a valid exercise of the power of the court, under section 663 of the Code of Civil Procedure the second order was beyond the jurisdiction of the court.

[6] The validity of the order vacating the judgment depends upon whether or not it is within the powers defined in sections 663 and 663a of the Code of Civil Procedure. Without the decision it is impossible to determine whether this objection to the judgment was well taken or not, and in support of the action of the trial judge, for the present purpose it must be assumed that it was. It does not follow, however, that the order vacating the judgment was within the jurisdiction of the trial court. Section 663 of the Code of Civil Procedure provides that a judgment may be set aside and another and different judgment entered when the findings do not support the conclusions of law, and, that when the judgment is set aside, the conclusions of law shall be amended and corrected. Code Civ. Proc. § 663. The notice of motion is required to specify the particulars in which the conclusions of law are not consistent with the findings, and an order granting the motion may be reviewed on appeal. Code Civ. Proc. § 663a. These Code provisions are consistent with the rule that litigation must not be piecemeal. If the original judgment is correct, the party in whose favor it was is entitled to have it enforced, and if it is not supported by the findings, the other party is entitled to have another and correct judgment entered. In either case the loser is given the right of appeal. The Code sections do not permit two motions to be made, nor two orders, one setting aside the judgment, and another at a later day directing the entry of a different judgment. If on the motion it appears to the court that the findings require the judgment to be set aside, it must also appear what conclusions of law should be made on the facts, and the only order within the power of the court under these circumstances is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void and not merely erroneous. Any other rule might lead to interminable delays and the loss of important rights by litigants. On such a motion the court has no power to consider or determine any matter except what judgment should be entered upon the facts as found. Swift v. Occidental, etc., Co., 141 Cal. 166, 74 Pac. 700; Dahlberg v. Girsch, 157 Cal. 325, 107 Pac. 616; Hole v. Takekawa, 165 Cal. 372, 142 Pac. 445.

[7] A void order may be swept aside whenever it comes before a court, and the order vacating the judgment without directing what judgment should be entered was such an order. Upon the present state of the record the original judgment stands unaffected by the subsequent proceedings, unless it be modified or set aside on appeal or in some other way permitted by the statutes.

The order granting the new trial and the order vacating the judgment respectively are annulled.

I concur: LANGDON, P. J.

Justice NOURSE, having rendered the judgment attacked in the proceeding herein reviewed, does not participate in the decision.

47 Cal. App. 270

KINDERMAN v. SHIPLEY. (Civ. 2678.)

(District Court of Appeal, Second District, Division 2, California. April 30, 1920.)

1. Judgment ⊂⊃714(3)—Judgment for landlord in action defended on ground of breach of lease held conclusive.

Judgment for landlord in action for one month's rent in which tenant defended on ground that landlord had wrongfully closed up entrance, thereby breaching lease and entitling tenant to vacate premises, was conclusive in subsequent action for accrued rentals under such lease, in which tenant pleaded the closing up of such entrance as a defense and by way of counterclaim for damages.

2. Judgment ⊂⊃714(1)—Judgment conclusive in subsequent action between same parties involving same question.

A former judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question.

3. Appeal and error ⊂⊃766—On appeal under alternative method failure to print portions of record held not to warrant dismissal of appeal.

On appeal under the alternative method, appellant's failure to print in her brief or in a supplement thereto such portions of record as she desired to call to the court's attention did not warrant dismissal of the appeal, under Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, since court finds it preferable to examine the typewritten record rather than require a supplement to be prepared.

Appeal from Superior Court, Los Angeles County; Louis Myers, Judge.

Action by S. Kinderman against Virginia Shipley. Judgment for plaintiff, and defendant appeals. Affirmed.

E. V. Chavez, of Los Angeles, for appellant.

J. J. Wilson, L. A. Lewis, and Haas & Dunnigan, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff brought this action to recover from the defendant $940 accrued rentals under a lease by plaintiff to defendant of a rooming house in the city of Los Angeles. Defendant admitted the execution of the lease, and that the rental was unpaid, but denied liability, and sought to recover damages upon her counterclaim. The defense and cross-action is based upon the alleged fact that after the execution of the lease for a term of years the plaintiff closed up one of the main entrances to the premises from the public street, thus greatly reducing the value of the use of the premises, and destroying the profits of defendant's leasehold.

On the trial before a jury the court instructed the return of a verdict for plaintiff, and against the defendant on her counterclaim, upon the introduction of the judgment roll in a former action between the same parties, upon the same lease, and in which the same facts were pleaded by way of defense, with findings and judgment against the defendant.

The sole question presented on this appeal is as to the correctness of the holding of the trial court that the issue of fact raised by defendant's answer and cross-complaint was res judicata.

The former action was brought in a justice's court to recover one month's rent under the lease for the sum of $90. Judgment was against the defendant, who appealed to the superior court, and a trial de novo was there had. The issue raised by the answer was pleaded as follows:

"(2) Defendant, further answering and for defense herein, alleges that at the time said agreement was entered into and she took possession of said premises from North Main street, which was the main entrance to the same, the same being designated as No. 337 No. Main street, as set out in said agreement, which fact was the reason for defendant entering into said agreement, but that after defendant had so entered into said agreement and had taken possession of said premises, and against the will and protests of said defendant, said entrance was wrongfully closed up and taken out by plaintiff or his lessor, which was a breach of the conditions of said agreement, and said entrance was made into a store on the ground floor and rented to other parties.

"(3) That the defendant depended and relied in entering into said agreement entirely upon the fact that the said premises had said entrance to said Main street; the other entrance to same to New High street being obscure and in the rear of said building.

"(4) That by reason of said Main street entrance having been so abandoned and taken out, the said agreement became forfeited, inoperative, and void, and the defendant became greatly damaged, and the said premises became entirely worthless and ruined and worthless for the purpose for which the same were leased, and that by reason thereof defendant did, and was compelled to vacate and surrender the same to plaintiff."

In its decision against defendant the superior court found that prior to the negotiations of the lease in question there had been an entrance to the premises in question as alleged by defendant, but that during the negotiations leading up to the execution of the lease such entrance to the premises was being closed, and that certain employés of the plaintiff were engaged in closing up this entrance and removing the stairway leading from Main street into the said premises; that prior to the time of the execution of said lease the entrance had been closed and abandoned, and the stairway removed; that in the execution of the lease the parties to the lease, being the plaintiff and defendant, contemplated and understood that there was to

be no entrance to said premises from Main street; and that at the time the lease was executed and defendant entered into possession of the premises there was no entrance from Main street. The court further found that the allegations of paragraphs 2, 3, and 4 of the answer herein set forth were untrue, and that the defendant, with full knowledge that said entrance did not exist, and for the purpose of ratifying the lease, caused the lease to be acknowledged, and thereafter placed it of record in the records of Los Angeles county. The defendant thereafter abandoned the premises and defaulted in all further payments of rent, and this action was brought some two years later by the plaintiff to recover damages in the sum of $940 for breach of the covenant to pay rent. The defendant, by way of defense and counterclaim, set up, in substantially the same language as in the defense to the former action, the facts there alleged as to the existence and subsequent closing of the Main street entrance, and claimed damages in the sum of $17,700.

[1, 2] We think it is clearly apparent that the defendant is estopped by the former decree and judgment from setting up this defense and cause of action on counterclaim. It is true that the relief sought here by defendant is not precisely the same as in the former action, but the right of defendant to relief depends upon precisely the same issue of fact that was tried in the former case and determined adversely to defendant's contention. The question of debarring defendant's right to plead a counterclaim in the present case because of not having presented such claim in the former trial is not involved. It is merely that the issue of fact which she now relies upon for her defense and recovery of damages has heretofore been tested and adjudged untrue in a trial by a competent court between the same parties; and the law declares that as between the parties that question was settled once for all. "A former judgment between the same parties is conclusive not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question." Bingham v. Kearney, 136 Cal. 177, 68 Pac. 597; Southern Pac. Co. v. Edmunds, 168 Cal. 418, 143 Pac. 597; Curtis v. Upton, 175 Cal. 331, 165 Pac. 935; Koehler v. Holt Mfg. Co., 146 Cal. 337, 80 Pac. 73. The last case cited is particularly in point on the issue here.

[3] Respondent calls attention to the fact that this appeal is brought under the alternative method, and that the appellant has failed to print in her brief or in a supplement thereto such portions of the record as she desired to call to the attention of the court. Such omission, under the amendment of 1919 to section 953c of the Code of Civil Procedure, does not permit of a dismissal of the appeal; and we find it preferable to examine the typewritten record rather than require a supplement to be prepared.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 224

PEOPLE v. COTA. (Cr. 702.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1920.)

1. Criminal law ⟹535(2)—Evidence aside from confession held to show entry in nighttime.

Evidence that the entry was effected between 8 in the evening and 8 the following morning, and that accused at 11 in the evening had property in his possession similar to that taken, *held* sufficient to establish the corpus delicti of burglary in the first degree, so that defendant's admission that he committed the crime between 10 and 11 in the evening was competent.

2. Criminal law ⟹1172(6)—Instruction allowing conviction of burglary on proof of intent not charged in indictment held not prejudicial.

In the prosecution for burglary in the first degree, an instruction defining burglary in the language of Pen. Code, § 459, as entry with intent to commit larceny or any felony was not prejudicial, though the information charged entry to commit larceny only, where there was no evidence to show intent to commit any other felony than larceny.

3. Burglary ⟹46(1)—Instruction as to first degree burglary held correct.

An instruction that the information charged burglary in the first degree, that before jury could convict they must be satisfied beyond reasonable doubt that he was guilty as charged in the information, and that they could not convict of burglary in the second degree was a carefully drawn instruction for the protection of defendant's rights, of which he cannot complain.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Joe E. Cota was convicted of burglary in the first degree, and he appeals. Affirmed.

W. P. Butcher, Jr., of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. Defendant appeals from a judgment of conviction had upon an information wherein he was charged specifically with the commission of the crime of burglary in the first degree.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The subject of the theft was a quantity of liquor, consisting of wine and whisky contained in bottles and demijohns, taken from the wine cellar, the door of which was locked, which cellar was situated in the basement of a residence owned by Mr. Gould, entry to which was had by the breaking of a window and the lock on the door of the wine cellar.

One of the essential elements of the crime charged is that it was committed in the nighttime, which in this case was the time between the hour of sunset at 4:54 p. m. on December 2d and the hour of sunrise at 6:46 a. m. on December 3d.

[1] Evidence of statements made by the defendant wherein he admitted his participation in the crime, which, he stated, was committed between 10 and 11 o'clock p. m. on the night of December 2d, was received over defendant's objection, and this ruling is assigned as error. His contention is that the reception thereof was not preceded by proof of the corpus delicti, namely, that the crime was committed in the nighttime, and without which the evidence was not admissible. People v. Vertrees, 169 Cal. 404, 146 Pac. 890; People v. Tapia, 131 Cal. 651, 63 Pac. 1001; Gray v. Commonwealth, 101 Pa. 380, 47 Am. Rep. 733. Conceding that it devolved upon the people to show by independent evidence and beyond a reasonable doubt that the specific crime charged was committed (People v. Smith, 136 Cal. 207, 68 Pac. 702), as a condition of admitting the confession in evidence, we think such fact was established. It was made to appear by testimony of the caretaker of the place, who lived in a house about 100 yards from the Gould residence, that the crime was committed between the hours of 8 o'clock p. m., December 2d, and shortly before 8 o'clock a. m., December 3d, at which latter time he discovered the broken window to the basement, together with the fact of the theft, and, following tracks leading from the window, he found in a hedge of trees a number of bottles containing liquor, which bottles were similar to those contained in the cellar. On the night of December 3d the sheriff stationed himself near the cached liquor, and about 10:30 o'clock defendant appeared with a sack under his coat, when he was arrested. It also appeared from the testimony of another witness that between 10 and 11 o'clock on the night of December 2d the defendant, accompanied by another party, came to his house and left some demijohns of whisky, which demijohns were identified as being similar to those which the caretaker had assisted in taking to the basement of the residence, in addition to which the caretaker testified in direct terms that the entry was made and the goods taken between sunset and sunrise; and, conceding that his evidence upon this point was shaken by his testimony on cross-examination to the effect that he was not out of his house, some hundred yards from the residence so entered, between the hours of 8 o'clock p. m. and 8 o'clock a. m., on said days, and there was an interval of an hour and a quarter of daylight, nevertheless we think the evidence and the inferences fairly deducible therefrom were sufficient to establish beyond a reasonable doubt that the offense was committed as charged. People v. Stevens, 68 Cal. 113, 8 Pac. 712; People v. Schafer, 161 Cal. 573, 119 Pac. 920. This being true, it follows that the court did not err in admitting the evidence of defendant's confession, which, if true, shows conclusively that he was guilty of the commission of the crime.

[2] In defining burglary, the court, in its instruction, used the language of section 459, Penal Code, that—

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

Appellant argues that by this instruction, notwithstanding the charge in the information was that of entering the house with the intent to commit larceny only, the jury was authorized to convict defendant if they found he had entered the house with intent to commit any felony, and hence it was error. People v. Mulkey, 65 Cal. 501, 4 Pac. 507; People v. Young, 65 Cal. 225, 3 Pac. 813; Williams v. State, 53 Tex. Cr. R. 2, 108 S. W. 371. Conceding this to be true, nevertheless, for the reason that no evidence other than that pertaining to the offense charged was offered, defendant could not have been prejudiced by reason of the error.

[3] The court instructed the jury that—

"The information charges burglary in the first degree, and before you can convict the defendant you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that he is guilty as charged in the information, to wit, of burglary in the first degree, committed at the place charged in the information and between sunset on December 2, 1919, and sunrise on December 3, 1919. You cannot in this case render a verdict of burglary in the second degree."

It would be difficult to conceive of an instruction prepared with greater care, and having for its purpose the protection of defendant's rights, than the one quoted; and it is impossible to understand, even in the light of appellant's argument, any ground whatsoever for the attack thereon.

Other alleged errors predicated upon rulings of the court in permitting the district attorney, over defendant's objection, to ask leading questions of one witness, and its rul-

ings in admitting hearsay testimony as to ownership of the house where the crime was committed, and also error predicated upon assignments of misconduct of the district attorney in his argument of the case to the jury, are not of sufficient merit to warrant consideration.

As a whole, the character of the evidence presented by the record is such that the jury could not properly have reached a verdict other than that rendered, and no errors are shown which could possibly have resulted in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 255

UNIVERSAL FILM MFG. CO. v. KERRIGAN. (Civ. 3151.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1920.)

Appeal and error ⊂=123—New trial ⊂=163(2)—Judgment held essential as basis for appeal; grant of new trial as to damages vacates judgment.

In an action for breach of contract for personal services, where a motion for new trial was granted as to issues presenting the amount of damages and denied as to all other issues, an appeal by defendant from the whole of the judgment, except the portion vacated by the order granting a new trial, will not lie; the order for retrial as to damages necessarily setting aside the judgment, so that there was no basis for appeal.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Universal Film Manufacturing Company against J. Warren Kerrigan. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Ray L. Chesebro and Edward Winterer, both of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for breach of contract to render personal services. Defendant denied that he entered into the alleged contract; also denied the alleged breach of contract, and denied that plaintiff was damaged thereby. There were further issues, including those presented by cross-complaint and the answer thereto. After entry of judgment against defendant for a stated amount, the defendant gave notice of intention to move the court "to vacate and set aside the decision and judgment" entered, and to grant a new trial of the action. that motion having been presented in due course, it was ordered that—

"Said motion for a new trial herein is granted, and a new trial is ordered as to issue or issues presenting the question of the amount of damages suffered by the plaintiff; as to all other issues the motion for a new trial is denied."

Thereafter the defendant gave notice of appeal—

"from the whole of the said judgment, except the part and portion thereof vacated by the order of the said court in granting in part defendant's motion for a new trial, to wit," etc.

Although the appeal has been presented by briefs arguing the case on its merits, the court is forced to take notice of the fact that there is no judgment, and therefore there can be no appeal therefrom. The order for retrial of the issue as to amount of damages, necessarily set aside the judgment. This is an action at law, wherein the judgment is single and indivisible, for it consists of only the one order that the plaintiff recover from the defendant so much money. Taking out that recovery, nothing effective as a judgment remains in existence.

In arriving at this conclusion, we have not excluded from consideration those decisions by which it has been determined that an order granting a new trial does not absolutely vacate the judgment until the order has become final. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 Pac. 92, and cases cited. We also have in mind the amendments enacted in 1915 (St. 1915, pp. 209, 328) to certain sections of the Code of Civil Procedure, whereby the right of appeal from an order granting a new trial, in cases tried as was the case at bar, was taken away, and whereby it was provided that on appeal from the judgment, the court may review any order on a motion for a new trial. Sections 956, 963, Code Civ. Proc.

In this case the defendant has sought to accept the benefit of the order to the extent that it granted him a new trial of the issue as to damages. To that extent the order has become final, for any claim of right to have it reviewed—assuming that any such claim could be asserted by defendant—has been expressly excluded by the terms of the notice of appeal. But it is a necessary incident to the finality of the order, to the extent that it provided for a new trial, that the whole judgment was set aside, because the specified issue could not be tried after judgment and while the judgment remained in force.

It is true that certain findings of fact have been left undisturbed. When the issue selected for retrial has been tried, and findings thereon have been made, and a new judgment entered, the appeal, if any be taken,

will come as an appeal from that judgment, and may include a review of the entire record.

The appeal is dismissed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 312

EDGE v. BRYAN et al. (Civ. 3204.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920.)

1. Fraud ⟸11(1)—Vendor's representation as to improvements held one of fact.

Representation by the seller of land that gas pipes were already upon or under it *held* representation of an existing fact within the law of fraud.

2. Fraud ⟸11(1) — Vendor's representation land was virgin soil one of fact.

For the seller of land to state that it was virgin soil was to make a representation of fact and not opinion, where, on being asked what virgin soil meant, he stated that it had been a sheep pasture and never cultivated.

3. Fraud ⟸11(1)—Seller knowing buyer relies on representation cannot assert it was opinion.

Where the buyer relies on representations of the seller without relying on his own judgment or opinion, which the seller knows, the seller cannot shelter himself under the pretense that his representation was a mere expression of opinion.

4. Fraud ⟸20, 25—Reliance on representations and damage thereby essential.

A buyer of land under false representations cannot recover from the seller on their account unless she believed the representations to be true and relied upon them to her damage.

5. Fraud ⟸49—Evidence held properly excluded as not within issues.

In an action by the buyer of land against the seller for false representations as to the character of the soil, in absence of allegations setting up the defense, evidence offered by the seller to prove that during a certain period the land which was not under cultivation was covered with barley stubble, *held* properly excluded.

6. Appeal and error ⟸1033(3)—Exclusion of evidence favorable to the other party harmless.

Where evidence offered by defendants and excluded would have supported plaintiff, the exclusion was harmless to defendants, and they cannot complain.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Hannah Edge against E. P. Bryan, L. T. Bradford, H. H. Cotton, and others. From judgment for plaintiff, the named defendants appeal. Affirmed.

W. W. Butler, of Los Angeles, for appellants.

William M. Morse, Jr., and Sam B. Dannis, both of Los Angeles, for respondent Hannah Edge.

Wheeler & Sweet, of Los Angeles, for respondent A. C. Harper.

THOMAS, J. Appeal from a judgment of the superior court by the defendants E. P. Bryan, L. T. Bradford, and H. H. Cotton, entered against them and in favor of the plaintiff, for the sum of $2,669.84. The complaint alleged facts which, if true, would support a rescission of the contract referred to therein and a recovery of damages claimed, if proven. Demurrer to the complaint was interposed, general and special, and by the court overruled. The answer of the defendants denied generally and specifically all the material allegations of the complaint.

The complaint for the relief asked was based upon certain alleged fraudulent representations made at the time of an alleged sale of real property, and which said alleged fraudulent representations, as set forth in the complaint, are as follows:

"(1) That gas pipes were already upon or under said land; (2) that said land was virgin, rich, and arable; (3) that before the completion of the contract of purchase water would be piped by the defendants to every acre of said land; and (4) that before the completion of said contract defendants would build in the subdivision, at a point convenient of access to the land purchased by plaintiff, a warehouse for the storing and marketing of the respective products of said land; that said representations, facts, and promises were a part of the consideration which induced the plaintiff to enter into said memorandum or agreement of purchase."

Then follows the usual allegation that said representations were false, and by the defendants known to be false, specifically specifying the facts supporting this statement. The complaint further alleges:

"That said promises of defendants were false and fraudulent, and were made without any intention to perform the same or to carry out any of the terms of said promises, and for the sole purpose of inducing plaintiff herein to enter into said purchase;" that plaintiff believed said statements to be true; and that so believing she entered into said contract, etc.

It is assumed by appellants, for the purpose of their argument on this appeal, and this assumption is supported by the record, that plaintiff's proof sustains her allegations as to both the representations and the promises. They urge passionately, notwithstanding this fact, that—

"As a general rule it is established that representations, to be actionable, must be of an existing fact or present condition, and not as to

future intention," and "must have been made without intention to perform."

There is no legal requirement that all such statements must be false. They also urge that—

"It is apparent, therefore, that the time when the alleged promises of defendants were to be performed has not arrived, because the promises were of things to be done before the completion of the contract, and the contract has never been completed;" hence, no cause of action can be maintained under such circumstances.

[1] If this were the question with which we are confronted we could readily concede the correctness of the contention. Among others of the allegations of the complaint we find that it was represented "that gas pipes were already upon or under the land," and that the land was "virgin, rich, and arable." Certainly, the first of these alleged representations is of an existing fact. It is also one which, according to the evidence and the concession of appellants, was at the time it was made untrue. Plaintiff testified that she did not know what was meant by the phrase "virgin soil." We think it immaterial as to what construction the courts have placed upon, or what definition may have been given by any authority of, the phrase "virgin soil."

[2, 3] There can be no question, we think, when that phrase is construed in the light of the evidence here, but that it was an expression of fact, and not one of opinion; for the evidence shows that the defendants not only said that the land was "virgin," but that, on being asked what "virgin soil" meant, said that it "had been a sheep pasture and never cultivated." To convey the impression that the land was "virgin," under the facts alleged, proven, and found by the trial court to be true, was a representation of a fact, and not an expression of an opinion. Moreover, where, as in this case, "the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false." 12 R. C. L. 248. Indeed, we think the general modern tendency is to hold the vendor to a fairly strict accountability for his representations made in connection with such sales as that under consideration here. We have no difficulty in arriving at a conclusion on the first point urged by appellants.

[4] The second point presented is that, "assuming that the representations were not true, plaintiff must show that she believed them to be true and relied upon them"; while in the third place it is contended that "she must show that she was damaged by them." We are in full accord with appellants on both propositions, so far as this case is concerned. By a mere cursory perusal of the complaint and the evidence as disclosed by the record before us, it becomes manifest that plaintiff not only has alleged, but has brought herself squarely to the place where she is not vulnerable to, the objections raised.

[5, 6] It is next contended that the court erred in sustaining objections to certain evidence offered by defendants, which evidence tended to prove that during a certain period of time the land which was not under cultivation was covered with barley stubble, and as to whether defendants had themselves farmed this particular piece of land. As we have already seen, the answers of the defendants were general denials of the material allegations of the complaint. There was no such issue presented. The issue here was as to whether the alleged false representations had in fact been made. The objections were properly sustained. In the absence of an allegation setting up that defense, the evidence was properly excluded. In any event, to have overruled the objections, permitting the presentation of the proffered evidence, would not have changed the result of this case. On the contrary, it would have supported the plaintiff in her claim, for the reason that the evidence sought to be introduced would have been in direct conflict with defendants' statement that the land in question had never been cultivated. In such case defendants cannot complain.

We concur with the learned trial judge in his observation, when he said:

"In the mind of the court there is not a single meritorious contention on the part of the defendants. No court, in the discharge of its own duty, could permit transactions of the character involved herein to stand."

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

47 Cal. App. 242

STOTT v. SOUTHERN SIERRAS POWER CO. (Civ. 2789.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Negligence ⊂=121(2)—Presumption held overcome.

Where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown if defendant by uncontradicted evidence clearly shows that he used the degree of care required of him under the circumstances, plaintiff must fail of recovery.

2. Electricity ⊂=14(1)—Degree of care required in supplying current defined.

Persons engaged in the business of supplying electric current are required to use great care to see that injury to others is not caused thereby, for the agency involved is a dangerous one.

3. Electricity ⊂=19(6)—Negligence question for court where facts are settled.

Whether a reasonable degree of care has been used by one furnishing electricity is a question of law for the court, wherever the facts are clearly settled and the course which common prudence dictates can be readily discerned.

4. Electricity ⊂=19(5)—Evidence held not to show negligence in maintaining wires causing fire.

In an action against a power company for damages by fire caused by a short circuit when insulators sustaining high voltage electric wires carried on a pole cracked, evidence *held* to show the use of the degree of care required of defendant, and that a finding of negligence was erroneous.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by H. Stott against the Southern Sierras Power Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Isaac B. Potter and Newman Jones, both of Riverside (Henry W. Coil, of Riverside, of counsel), for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

JAMES, J. Appeal by defendant. Plaintiff was awarded judgment in the sum of $500 as damages, which he alleged he had suffered because of the burning of a lot of hay. The burning of the hay was caused by fire, which originated on a pole belonging to the defendant corporation, which pole held wires carrying high voltage of electricity. Fire was communicated from the pole to some dry grass, and spread for a distance of perhaps half a mile, finally igniting the hay of the plaintiff. The fire was caused at the pole by a short circuit. Two insulators, which sustained one of the wires, which wire was carrying 33,000 volts of current, broke down, and the current, in its course to the ground and in overcoming the resistance offered by the pole, ignited the top of the latter. The wire did not fall to the ground, but remained suspended. Sparks from the burning pole were blown to the dry grass, with the result first indicated. The record shows no dispute to have been made as to the facts. Plaintiff on his part opened his case by showing the bare facts as to the causing of the fire and the amount of damage done. He called, as one of his witnesses, the superintendent of the defendant company, who testified on direct examination as to the wire construction at the pole which was burned. On cross-examination the witness was asked many questions relative to the care used in guarding against occurrences of the kind complained of; and at the conclusion of plaintiff's evidence a motion for judgment of nonsuit was made by defendant and denied by the court. One of the complaints here is that the court erred in denying this motion, because, as urged, the plaintiff had failed to establish any negligence on the part of the defendant. As the substance of all the evidence is before us, and the case presented is one where no actual conflict of testimony appeared, the question as to whether the court erred in its ruling on the motion for nonsuit need not be separately considered. The important point on this appeal is as to whether upon the whole evidence such a case was presented as authorized the court to make the findings, and enter the judgment appealed from.

Before entering into a more detailed statement of the particular facts shown in evidence, it may be stated that the position of respondent is that, having shown the circumstances attending the burning of the pole and the igniting of the grass and hay, he established, under the res ipsa loquitur rule, a prima facie case, and that the evidence of the defendant as to the care used in constructing and maintaining the defendant's lines furnished a case which should be considered as one presenting a conflict, and hence one which the trial court had the sole province of determining on the facts. Such is not the law as we understand it. The presumption which in certain cases is available to a plaintiff as showing, prima facie, negligence on the part of a defendant is one which in its practical application results only in shifting the burden of proof. "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the acci-

dent arose from a want of care." Shearman & Redfield on Negligence (6th Ed.) § 59.

[1, 2] So in cases where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown, if a defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery. In the first place, we think that it is now well established that persons engaged in the business of supplying electric current, the agency involved being a dangerous one, are required to use great care to see that injury to others is not caused thereby. Keasbey on Electric Wires (2d Ed.) § 241. To say that the care required to be used is proportionate to the dangerous agency being handled is to merely state the requirement in different terms. The question we ultimately reach in this case, and the question determinative of this appeal, is as to whether the defendant established by its evidence that it had discharged its obligation by properly constructing, installing and inspecting its power line. The question becomes a matter of law wherever the facts are clearly settled and "the course which common prudence dictates can be readily discerned." Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555. The following cases are also in point: Davis v. California Street Cable Ry. Co., 105 Cal. 131, 38 Pac. 647; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Fernandes v. Sacramento City Ry. Co., 52 Cal. 45. Conversely stated, the rule is that if, upon uncontroverted facts, reasonable deductions are suggested, both in the affirmative and negative of the question, then the decision of the court or jury must be taken as final.

[3] We are of opinion that the evidence in this case was clear and satisfactory to the point that the defendant had used that degree of care required of it in the circumstances, and that the judgment entered was erroneous. It was shown in evidence that the "short" which caused the fire was occasioned by the cracking or puncturing of two insulators mounted in series, one of which was attached to the pole and the other to the end of the current wire. The insulators were called strain insulators, and a loop wire was used to conduct the current over the pole and to the continuing wire on the other side, which was in like manner supported. These two particular insulators had been in use for at least four years. The testimony of the defendant was that they were the best known in the market, "the best that money could buy," and were those commonly and generally used by power companies; that the individual insulator had been tested to carry several times the voltage being conducted in the wires at the time; that a patrolman was employed by the company whose business it was to constantly patrol the power lines, and that he had traversed this line about four days before the "short" occurred; that he had not mounted the poles to inspect the insulators, but observed them from the ground to find whether they had become nicked or the wires loosened; that when any such defects were discovered report was immediately made; that insulators sometimes break down in the manner that the particular insulators here used did, and the current become shorted; that if an insulator cracked, the current would short; that it was impracticable to take down insulators and test them, because the current would have to be shut off from the wires and the business of the company interrupted if such were done; that even though an insulator should be taken off and subjected to a special test, it might crack within 30 seconds after being replaced upon the pole; that the fact that the particular insulators had remained in service four years would be an indication they were originally sound and sufficient in insulating properties; that when the "short" occurred which caused the fire the superintendent had almost immediate notice of it by the cessation of power on the line, and that the defect was found and remedied as soon as possible thereafter. The expert witness of the defendant testified that temperature changes would sometimes crack insulators, and that the day on which this "short" occurred was an unusually warm one, the thermometer registering in that vicinity about 117 degrees. The trial court evidently held the view that the law imposed upon the defendant practically the obligation of an insurer, rather than to use great care. In the opinion of the trial judge, which is printed in the record, the judge said:

"And the court is of the opinion that in the construction of its pole line the defendant has used the latest improved insulators and all other appliances known to the business in which defendant is engaged. In fact, it appears from the testimony that the defendant has exercised, not only due care, but the greatest of care in the construction of its line of poles and wires in the vicinity where the fire occurred."

[4] The conclusion indicated by the trial judge is not in accord with modern authority, as will be seen by an examination of the text in Mr. Keasbey's work, above cited; we have already stated the rule in that regard. The evidence, to our minds, clearly establishes without conflict that the defendant had discharged its obligation and exercised the full degree of care required of it.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 380

JUDNICK v. JUDNICK et al. (Civ. 3293.)

(District Court of Appeal, First District, Division 2, California. May 6, 1920.)

1. Execution ⟸49—Judgment cannot be sold.

A judgment cannot be sold under execution.

2. Appeal and error ⟸115—No appeal lies from order vacating satisfaction entered by purchaser of judgment at execution sale.

Since a judgment cannot be sold under execution, no appeal will lie from an order vacating the satisfaction of a judgment executed by the purchaser at an execution sale; such fact appearing from the face of the record.

3. Appeal and error ⟸151(2)—Principals not aggrieved by judgment entered against sureties on stay bond.

Defendants in an action could not appeal from a judgment against sureties on their stay bond, where they were not parties to the judgment on the bond, not being aggrieved thereby.

4. Appeal and error ⟸154(4)—Sureties consenting to judgment against them cannot appeal.

Sureties on a stay bond who consented to a judgment against them cannot appeal therefrom.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary Judnick against Antone Judnick and others. Judgment in favor of plaintiff, and several appeals were taken. Appeals dismissed.

Walter J. Thompson and J. E. Manning, both of San Francisco, for appellants.

Daniel O'Connell, of San Francisco, for respondent.

BRITTAIN, J. Motions to dismiss two appeals. On December 6, 1918, judgment was entered in the superior court in favor of the plaintiff and against Judnick Bros., a copartnership, and Steve Judnick, for the sum of $900, interest and costs. Thereafter Antone Judnick, one of the firm of Judnick Bros., appealed from the judgment. Upon motion made on behalf of the plaintiff and respondent, the appeal from the judgment was dismissed by an order of this court on August 13, 1919, on which remittitur was filed in the superior court on October 14, 1919.

One of the defendants, Steve Judnick, on February 26, 1919, paid to the plaintiff $346 for release of one-third of the judgment. While the matter was pending in this court on appeal from the judgment, the defendants, or some of them, caused to be entered on the register of actions in the superior court under dates of July 24th and 28th a statement that a certificate of sale had been filed, satisfaction of judgment filed, judgment satisfied, and docket discharged. These entries were based upon the satisfaction of judgment executed by one Meurice Swim, described as "purchaser at sheriff's sale of judgment." The satisfaction recited that it was by "the undersigned purchaser of said judgment in the above-entitled action at an execution sale of said judgment had upon execution issued out of the superior court in the state of California in and for the city and county of San Francisco, in that certain action wherein Antone J. Judnick was plaintiff, and the said Mary Judnick and Frank Judnick were defendants, and which said judgment was rendered and entered on the 21st day of September, 1918, and which said action lastly hereinbefore referred to was and is known as and numbered 67350 in the records of said superior court." It appears that Frank Judnick was also one of the firm of Judnick Bros. The action in which the present appeals were taken was numbered 88965 of the records of the superior court. Judgment in favor of Antone Judnick and against Mary Judnick was for $16, and the sale of the judgment involved in these appeals was made for the sum of $20.

On December 23, 1919, on motion the superior court made an order vacating and setting aside the entries made by the clerk relating to the satisfaction of the judgment, and one of the two appeals is from that order. On January 6, 1920, judgment was entered against Frank O'Shea and Irvine O'Shea, sureties on a stay bond of April 17, 1918, staying execution on the original judgment.

While the record on these motions is not entirely clear, in opposition to the notice of motion an affidavit was filed by one of the attorneys for the defendants and appellants controverting immaterial matters stated in the affidavit in support of the motions, and no suggestion was made either in the affidavit or in any other way that the record on the motion was defective. On the oral argument counsel for both parties and the court proceeded on the statement that the defendants in the original action were the only appellants.

[1, 2] In regard to the appeal from the order vacating the satisfaction of judgment entered by the clerk, since the only right claimed was by a purchaser of the judgment at execution sale thereof, and this fact appears from the face of the record, the conclusion is reached that the order was not appealable for the reason that a judgment in this state cannot be sold under execution. Latham v. Blake, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925. The purchaser at the execution sale is not one of those author-

ized to satisfy the judgment of record, and this court has no jurisdiction of an appeal from the order vacating the entry of satisfaction.

[3, 4] The motion to dismiss the appeal of the defendants to the original suit from the judgment entered against the sureties on the stay bond must also be granted. They were not parties to that judgment, nor aggrieved thereby, and neither Frank O'Shea nor Irvine O'Shea, against whom alone the judgment was entered, appeal. The judgment against the sureties was in effect a consent judgment, and was therefore unappealable by the sureties. Erlanger v. S. P. Co., 109 Cal. 395, 42 Pac. 31; Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864; La Societe, etc., v. Beardslee, 63 Cal. 160. Since the persons against whom the judgment on the bond runs could not appeal, the original judgment debtors could not appeal from that judgment upon the theory that they were privies of the bondsmen.

Both appeals are dismissed.

We concur: CABANISS, Presiding Judge pro tem.; NOURSE, J.

47 Cal. App. 316

ESPINOSA v. GOULD et al. (Civ. 3338.)

(District Court of Appeal, First District, Division 1, California. May 3, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. Appeal and error ⊜616(2)—Affidavits used on motion must be authenticated by judge.

Affidavits used on motion must be identified and authenticated by the trial judge before they can be considered by the appellate court, and the certificate of the clerk cannot take the place of such authentication by the judge.

2. Appeal and error ⊜659(3)—Application could not be made on appeal for order directing preparation of supplementary transcript.

An application by appellant, through a suggestion of diminution of the record, for an order of the appellate court directing the preparation of a supplemental transcript containing matters not brought up by reason of appellant's failure to give the proper notice to the clerk below, must be denied, as such relief, if it can be given at all, must be sought in the lower court.

3. Appeal and error ⊜907(2)—Ruling of lower court assumed to be proper, in absence of evidence on which based.

Where the evidence on which an order refusing to change the place of trial was based does not appear in the record, the appellate court will assume, in the absence of any showing to the contrary, that the ruling of the court was proper.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Salvador Espinosa against George S. Gould, Jr., and others. From an order refusing to change place of trial, plaintiff appeals. Affirmed.

Z. B. Stuart and C. W. Byrer, both of Los Angeles, for appellant.

Claude F. Lacey, of Salinas, for respondents.

WASTE, P. J. This is an appeal by the plaintiff from an order refusing to change the place of trial. Plaintiff, theretofore adjudged to be an incompetent person, brought this action against his guardian and the other defendants, seeking to have the proceedings, whereby he was declared an incompetent, set aside as null and void, and praying for damages in the sum of $20,000 against defendants Manuel Espinosa and R. C. McComish.

The defendants demurred to the complaint, whereupon the plaintiff filed a motion for a change of place of trial, alleging in his affidavit accompanying the motion a belief that he could not have an impartial trial in the county wherein the action was brought, by reason of the alleged bias and prejudice of the people of the community against him, and an alleged personal dislike on the part of the trial judge. The latter filed a counter affidavit, in which he denied any prejudice or bias against the plaintiff, and alleged that he never had entertained and did not feel a personal dislike against him. The motion came on for hearing and was denied; the order of the court reciting, after the introductory portion:

"Documentary evidence is introduced, said motion is submitted to the court for consideration and decision without argument, counsel for respective parties stipulating that the testimony in case No. 6598 be considered as given herein, and the court denies said motion."

[1] The appeal is taken by the alternative method under section 953a of the Code of Civil Procedure. The only record brought here is the clerk's transcript, prepared on notice of the appellant. That notice specified, and the transcript contains, only the pleadings, notices, affidavit, and notice of motion by the plaintiff, notice of hearing, order of continuance, counter affidavit of the trial judge, and the order denying the motion for change of place of trial. It is certified to by the clerk of the court but not by the trial judge. It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by the appellate court. The certificate of the clerk cannot take the place of the authentication by the judge. There is no other way in which the appellant can present

to us the affidavits on the motion in question. Waymire v. California Trona Co., 176 Cal. 395, 398, 168 Pac. 563. There is neither a bill of exceptions nor a transcript of the testimony offered or taken, or of the proceedings as authorized by said section 953a.

[2] The appellant has made application here, through a suggestion of diminution of the record, for an order of this court directing the preparation of a supplemental transcript, containing the matters not brought here by reason of his failure to give the proper notice to the clerk below. Such relief, if it can be given at all, should have been sought in the lower court (Estate of Keating, 158 Cal. 109, 113, 110 Pac. 109), and the motion is denied.

[3] What documentary evidence was introduced and used on the motion, or what the testimony was in case No. 6598, does not appear. Consequently we have a right to and will assume, in the absence of any showing to the contrary, that the ruling of the court was proper. Patterson v. Rutherford, 179 Pac. 704.

The order is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

47 Cal. App. 232

PEOPLE v. CITY OF SAN BERNARDINO.

(Civ. 2802.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Fines ⊂⊃20—State Poison Act conclusive as to disposition of fines, notwithstanding inconsistent provision of charter; "municipal affairs."

Seventy-five per cent. of the fines imposed in the police court of city for violations of the state Poison Act is to be apportioned to the state under an express provision of such statute, notwithstanding charter provision requiring fines collected in the police court to be paid into city treasury, the poison act being conclusive, since it is a general statute defining state offenses and relating to state affairs, and not to municipal affairs, within Const. art. 11, §§ 6, 8, making city charter of conclusive effect as to municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

2. Statutes ⊂⊃114(1)—Title of state Poison Act held sufficient.

State Poison Act entitled "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," *held* sufficiently expressive of the contents of the act under the Constitution.

3. Limitation of actions ⊂⊃34(2)—State's action against city for fines collected in police court is an action upon a liability created by statute.

State's action against a city for a portion of the fines collected in the police court for violations of the state Poison Act was not required to be brought within two years after accrual of cause of action under Code Civ. Proc. § 339, since such action is not on an action upon the obligation specified in such statute, but is an action upon a liability created by statute under section 338, prescribing a three-year period for such actions.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Suit by the People of the State of California against the City of San Bernardino. Judgment for plaintiff, and defendant appeals. Affirmed.

William Guthrie, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Schweitzer & Hutton, of Los Angeles, and G. B. Blanckenburg, of San Francisco, for the People.

JAMES, J. Plaintiff sued to recover 75 per cent. of certain fines imposed upon defendants in the police court of the city of San Bernardino after conviction of violations of the state Poison Act. Judgment was entered agreeable to the prayer of the complaint, and defendant appealed therefrom. The appeal is presented on the judgment roll.

[1] The main contention of appellant is that, by reason of provisions of the freeholders' charter under which defendant city is organized, all fines collected in the police court are required to be paid into the city treasury for the benefit of the city; that the provisions of the state Poison Act in conflict therewith are null and void. This argument is based upon the assumption that in the prosecutions mentioned the collection of fines and the disposition thereof is a municipal affair, and that the charter provisions affecting the matter are therefore of conclusive effect. Sections 6 and 8, art. 11, Const. Cal. The Poison Act is a general statute enacted by the Legislature (see Act 2724, Deering's Gen. Laws), and the offenses defined therein may be designated as state offenses; in other words, offenses which, in their commission or punishment, are not limited to the confines of any municipality. The entire subject-matter of the act relates in no manner to "municipal affairs." Upon the general subject of what is included within that term, see Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923. In Robert v. Police Court, 148 Cal. 131, 82 Pac. 838, it was said, in the concurring opinion:

"The jurisdiction of offenses defined by state law must be regulated by general state law, and such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the Legislature, but cannot be conferred by special freeholders' charter, and certainly not in a manner which will impair the operation of general laws."

In Fleming v. Hance, 153 Cal. 162, 94 Pac. 620, it was held that the matter of the prosecution of state offenses in police courts was not a municipal affair, and in touching upon the question of the disposition of fines collected in such cases, the court said:

"The Legislature was not bound to turn this source of revenue over to the city; but its doing so did not authorize it to compel the city to pay expenses not properly chargeable to it."

If the general statute had been silent upon the subject of the disposition of fines collected under its provisions, then it might, with reason, be held that the charter provision giving general direction as to the disposition of all fines collected in the police court would be operative. The statute, however, designates specifically that the fines shall be apportioned 25 per cent. to the city and 75 per cent. to the state board of pharmacy; and this provision, relating, as it does, to a state affair, one in which the people generally are interested, is of superior effect and must control.

[2] The second proposition made by appellant is that the title of the poison act does not satisfy the requirement of the Constitution, in that it is not sufficiently expressive of the contents of the act. The act is entitled, "An act to regulate the sale of poisons in the state of California, and providing a penalty for the violation thereof," and we think is sufficient, under the decisions made in Ex parte Liddell, 93 Cal. 633, 29 Pac. 251, and Matter of Yun Quong, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969.

[3] Appellant's last point is that the demand for recovery of certain fines was barred by the provisions of section 339, Code of Civil Procedure—the two-year statute. Counsel's position as to this defense would be correct if the two-year statute applied. However, we are of the opinion that the three-year statute is the one to be considered (section 338, Code Civ. Proc.), and that the action is one upon a liability created by statute, rather than upon the obligation specified in section 339.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 362

PATTERSON v. PATTERSON et al.

(Civ. 3352.)

(District Court of Appeal, First District, Division 2. California. May 3, 1920. Hearing Denied by Supreme Court, July 1, 1920.)

1. Pleading ⟸290(3)—Filing of unverified answer to admission of averments of verified complaint.

Where defendant husband filed an unverified answer to his wife's complaint, seeking to establish title to real property, the averments that the wife was the owner of the property, and that she was induced to convey it to her husband through fraudulent practices, were admitted.

2. Appeal and error ⟸422—Appeal will not be dismissed for defect in notice.

Where, in an action to determine title to real property inquiries were submitted to the advisory jury, and the clerk of the court on return of the verdict made a minute entry, proper in an action at law, and later entered judgment thereon, while the court which followed the advisory verdict thereafter formally entered judgment and decree, notice of appeal, which erroneously stated the day of the judgment as that when the clerk entered his ineffectual judgment, is no ground for dismissal, in view of the error in plaintiff's notice of judgment.

3. Deeds ⟸70(6)—Overreaching wife by husband through violation of the confidential relation is fraudulent.

The least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the confidential relationship, which it is the policy of the law, as evidenced by Civ. Code, §§ 2217, 2219, to uphold, and therefore is fraudulent.

4. Appeal and error ⟸762—Ground abandoned in closing brief need not be considered.

A ground abandoned in the closing brief need not be considered.

5. Vendor and purchaser ⟸244—Husband's paramour, to whom he conveyed property, held to have knowledge of his fraud.

In an action by a wife to determine her title to property which she had conveyed to her husband on his misrepresentations, and which he conveyed to his paramour, evidence *held* to show that the paramour had knowledge of the misrepresentations.

6. Deeds ⟸75—Failure of wife to specify property in divorce action not ratification of conveyance.

Where a husband by misrepresentations to his wife that he would abandon his paramour induced her to convey to him property and execute a quitclaim deed, the fact that the wife in her subsequent action for divorce did not describe the property *held* not a ratification of the conveyance as to the paramour, who was a party to the husband's fraud.

7. Deeds ⟹75—Wife's quitclaim deed of property not ratification of former conveyance induced by husband's fraud.

Where a wife on her husband's importunities and promises that he would give up his paramour conveyed to him certain property, and later, on further representations by the husband, executed a quitclaim deed to the property so that he could mortgage it for improvements, *held* that the quitclaim deed was not a ratification of the first conveyance, which would entitle the paramour to whom the husband had conveyed the property to claim it as against the wife.

8. Equity ⟹66—Requirement that plaintiff do equity held not to require defrauded wife to adjust monetary arrangements between husband and paramour.

Where a wife conveyed property to her husband on his representations that he would abandon his paramour, and instead the husband began living openly with the paramour, so that he was arrested, and conveyed to her the property while he was incarcerated, the wife, on asserting her rights, is not bound to adjust money arrangements between the husband and his paramour, by repaying to the paramour the moneys which she had advanced the husband.

9. Appeal and error ⟹1170(1) — Judgment will not be reversed for nonprejudicial error.

Where there was sufficient evidence to support the judgment, it will not, under Const. art. 6, § 4½, be disturbed where from an examination of the entire record there appeared no reversible error.

Appeal from Superior Court, Los Angeles County; F. W. Houser, Judge.

Action by Ethel Keepers Patterson against Clarence Hyatt Patterson and Monnie Blackburn. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

A. L. Abrahams, P. B. D'Orr, Claude B. Morton, and Frank G. Tyrrell, all of Los Angeles, for appellant.

R. P. Jennings, of Los Angeles, for respondent.

BRITTAIN, J. One of the defendants only appeals from the judgment, by which it was decreed that the plaintiff owned two pieces of property in Los Angeles, with a direction that conveyance should be executed by each of the two defendants of the properties to the plaintiff. Judgment followed the trial in which an advisory jury was impaneled to try the principal issues presented by the pleadings.

[1, 2] The plaintiff sued her husband and the appellant, alleging that she was the owner of the properties designated, respectively, "the apartment house" and "the bungalow" properties, which, by the fraudulent practices of her husband, she had been induced to convey to him, and which he in turn conveyed to the appellant, who, it was alleged, was not a bona fide purchaser without notice. The complaint was verified. The husband's answer was not verified, and therefore under the law it constituted an admission on his part of the fraud practiced by him upon his wife. His codefendant, the appellant, answered, setting up ownership of the properties in herself, and denying substantially all the facts upon which the plaintiff relied for recovery. As to each of the properties specific interrogatories were submitted to the advisory jury, which returned a verdict in favor of the plaintiff and determined in the first instance as a matter of fact, that the appellant was not a bona fide purchaser for value. On return of the verdict, on March 26, 1918, the clerk made a minute entry of what purported to be a judgment, such as would have been entered had the case been one at common law. This purported judgment was formally entered March 30, 1918. On March 28, 1918, judgment and decree was signed by the judge who presided at the trial, reciting that he adopted the findings of the jury. It was formally entered April 4, 1918. On April 5, 1918, the attorney for the plaintiff served upon the attorneys for the appellant a notice that—

"On March 30, 1918, the verdict of the jury and judgment thereon and judgment and decree in favor of the plaintiff was entered by the clerk of the court."

Motion for new trial on the part of Monnie Blackburn was denied, and notice of appeal was filed. The notice of appeal, entitled in the cause stated that Monnie Blackburn appealed "from the judgment heretofore entered herein on the 30th day of March, 1918, and the whole thereof."

On behalf of the respondent it is urged that because the first entry by the clerk was premature and without authority, the notice of appeal was ineffectual. Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. The clerk's minute entry of March 26, entered on March 30, was not a judgment. The only judgment was that rendered on March 28 and entered on April 4, 1918. The addition of the date in the notice of appeal in describing the only judgment in the case must be disregarded, in view of the notice of entry of judgment served by the attorney for the respondent. A highly technical contention, based on an erroneous statement made in the first instance by counsel making the technical contention, should not be made the basis of a refusal to consider an appeal otherwise properly presented on the merits.

[3] The plaintiff and her husband, at the the time of the trial, had been married 18 years. There was one child, a daughter aged 4. They came to California from their former home in 1915. The plaintiff was a woman of considerable means, with which she

purchased property in Southern California, including the two properties in suit, and, confiding in the rectitude of her husband, she caused the deeds to be taken in his name. Some time in 1916 they became acquainted with the appellant, and shortly thereafter a meretricious relationship arose between the husband and Monnie Blackburn. In the latter part of January, 1917, because of this condition of affairs, the plaintiff sued her husband to recover her separate property. Upon the promise that he would sever his relationship with the appellant and comport himself as he should as the husband of the plaintiff and the father of their child, he induced his wife to dismiss the suit, and to evidence his good faith he deeded to her all her property. Shortly thereafter he represented to her that he had severed his connection with the appellant, and, promising her that he would have no more to do with the appellant, he importuned the plaintiff to place in his name some of her property, stating that he thought he was entitled to something, and did not want to feel like a beggar. Relying upon his representations, which the plaintiff alleged were made without any intention on his part to fulfill them, she reconveyed to him the two parcels involved in this suit. The meretricious relationship between himself and Monnie Blackburn was either continued or immediately resumed. Regardless of the admission of the husband of the allegations of fraud made by his wife, the least overreaching or misrepresentation by a husband through which he gains the property of his wife is a violation of the highly confidential relationship which it is the policy of the law to uphold, and is therefore fraudulent. Civ. Code, §§ 2217, 2219; White v. Warren, 120 Cal. 327, 49 Pac. 129, 52 Pac. 723; Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

[4-6] In April, 1917, the plaintiff again sued her husband for the recovery of the two properties, the complaint being based on a charge of his fraudulent misrepresentations. Again he represented that he had entirely given up Monnie Blackburn, and promised that if his wife would let the two properties remain in his name, he would have nothing more to do with the appellant, but would conduct himself as a husband and father should. Although she was advised by her attorney not to dismiss the action, because, as she said, she then "loved him and still loved him," she caused the suit to be dismissed, and a few days later at his request she executed a quitclaim deed, covering the same two parcels of land, to him. Prior to this time they had discussed the improvement of these two properties. It was understood between them that the property should be mortgaged for that purpose. He represented that he could not secure the mortgage without her joining, and, no doubt, for the same reason that operated upon her to convey the two properties to her husband, she executed to him a quitclaim deed. He was thereupon enabled to mortgage the two properties for the purpose they had agreed upon, and the improvements were made. There is no question presented as to the rights of the mortgagees. As between husband and wife the same confidential relationship existed, and his admission of all the facts alleged by the plaintiff carries with it the admission that every act done by him pursuant to the scheme of fraud was tainted by the original fraud. On behalf of the appellant, it is claimed that the quitclaim constituted a ratification on the part of the wife because it was made by her after her knowledge that the husband had not in fact performed his promise made at the time of the original deeds to sever his immoral and unlawful relationship with the appellant. If there is evidence to support the finding of the jury adopted by the court that the appellant was fully informed in regard to all the facts she is bound by the same rule of law which binds the husband.

About November 1, 1917, the plaintiff sued her husband for divorce. In her complaint she described the properties standing in her own name, and did not describe the properties involved in this action. It is claimed that this also amounted to a ratification of the deed fraudulently procured from her by her husband. As against a party to the fraud, this was not a ratification, and while an argument is made in the appellant's opening brief on the ground of estoppel, counsel for the appellant abandoned that ground in their closing brief, and it need not be considered. During Christmas week of 1917, the plaintiff and her husband had a conversation, in which she told him that if she thought he was going to lose the properties, she would step in and save them, presumably by buying the incumbrances, because he had promised that their child should have the property, and that he would make a will in favor of the child. He then told her he would do everything he could to make the property a success, and that their child was to get it. Almost coincidentally with this conversation the two defendants went to Venice, near Los Angeles, and took up their residence in an apartment house, where the husband adopted an assumed name and the appellant passed as his wife. On January 4, 1918, they were arrested, and the husband was confined in the city jail in Venice. On January 7, 1918, while he was still in jail, the husband executed a deed of the apartment house property to the appellant. The present suit was commenced on January 9, 1918, and lis pendens was filed. On January 10, 1918, the husband conveyed to the appellant the bungalow property. At the time of the transfer of the properties the apartment house was incumbered by a first mortgage of over $17,000, a second deed of

trust of nearly $4,000, with interest and lienable claims for materials of about $1,100, and the bungalow property was incumbered by a first mortgage for $2,400 and other indebtedness of $240. The appellant claims that she had advanced the husband certain small sums of money, that she had actually paid to him $10 at the time of the transfer of the apartment house property, and as a further consideration she undertook to procure bail to have him released from the jail. It is practically conceded that she had actual, as well as constructive, notice of the claims of the plaintiff before the execution of the deed of the bungalow property, and the evidence is conflicting as to her knowledge of the various transactions which have been recited. It is claimed by the appellant that there is no evidence of her knowledge, but there is sufficient evidence of facts to warrant the deduction drawn by the jury and adopted by the trial court that the appellant was very fully informed in regard to the dealings between the plaintiff and her husband.

[7] From the frank, if not bold, statement of facts contained in the appellant's brief, which for the most part furnishes the basis for the recitals made above, it clearly appears that the fraud of the husband was the cause of the original deeds being made to him. When he repeatedly importuned his wife to forego her legal remedies and made renewed promises, which he as repeatedly violated, it would amount to a judicial sanction of gross fraud on the part of the husband to hold that, because his wife loved and trusted him more than he deserved to be trusted, she should be held to have ratified his wrong when in his final disregard of every rule of honorable living he so publicly comported himself with the beneficiary of his fraud as to bring about the arrest of himself and his paramour and his own incarceration.

[8] It is contended on behalf of the appellant that the plaintiff did not offer to do equity in her complaint, and the court should at least have required the plaintiff to pay to the appellant the moneys which the appellant advanced to the plaintiff's husband. In other words, that a court of equity, determining on the admission of an unfaithful husband that he had defrauded his wife of her property and had transferred it to his partner in the entire wrong, should, as a condition for the return of her own property to the wife, compel her to adjust the money arrangements between those who had wronged her. This court knows of no rule of equity which requires any such adjudication.

[9] Upon an examination of the entire record, this court is of the opinion that there was no reversible error committed by the trial court, and that there was sufficient evidence to support the judgment. There was no miscarriage of justice within the meaning of section 4½ of article 6 of the Constitution.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 346

PEOPLE v. NUNES. (Cr. 496.)

(District Court of Appeal, Third District, California. May 3, 1920.)

1. Mayhem ⇐5—Proof of premeditation not necessary.

Under Pen. Code, § 203, declaring that every person who unlawfully and maliciously deprives a human being of a member of his body, or puts out an eye, etc., is guilty of mayhem, it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime of mayhem, notwithstanding the word "maliciously" might imply otherwise; hence as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required, and it is sufficient to prove only the commission of an act from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show it was done under circumstances constituting self-defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mayhem.]

2. Mayhem ⇐1—One who unlawfully strikes another, destroying a member, etc., is guilty of mayhem.

If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem.

3. Mayhem ⇐1—Mere disfigurement of eye not offense unless eye rendered useless; "puts out an eye."

Under Pen. Code, § 203, declaring that every person who unlawfully and maliciously "puts out an eye" is guilty of mayhem, the mere disfigurement of an eye will not amount to mayhem unless such disfigurement results in rendering the eye useless; but an injury of an eye to such an extent that it cannot be used for the ordinary and practical purposes of life amounts to the putting out of an eye, although the injured party can distinguish light.

4. Mayhem ⇐5—Evidence held to show that defendant put out his victim's eye.

In a prosecution for mayhem, under Pen. Code, § 203, evidence *held* to warrant a finding that defendant put out his victim's eye, notwithstanding the oculist testified that it was barely possible a future operation might be beneficial.

5. Criminal law ⇐829(1)—Refusal of request covered not error.

The refusal of a request covered by the charge given is not error.

6. Criminal law ⟸829(3)—Requested instruction on mayhem held not error being covered by charge as given.

In a prosecution for mayhem, where the court stated contents of information and read Penal Code, § 203, declaring every person who unlawfully and maliciously deprives a human being of a member of his body or puts out an eye, is guilty of mayhem, and further instructed that prosecution must prove beyond all reasonable doubt that defendant was guilty of the crime charged in the information which specifically charged defendant with unlawfully and maliciously putting out the eye of the complaining witness, the refusal of a requested charge that the jury must find that defendant put out the eye of the witness, or acquit, was not error, being covered by the charges given.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Dan Nunes was convicted of mayhem. From the judgment of conviction and an order denying a motion for new trial, he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was informed against by the district attorney of the county of Sacramento for the crime of mayhem. Upon a trial he was found guilty, and he prosecutes this appeal from the judgment of conviction and from an order denying his motion for a new trial.

Louis Dulmaine, the prosecuting witness, was engaged as a bartender in a building at the corner of Seventh and L streets in the city of Sacramento; his hours of duty being from 5 o'clock p. m. until closing time the next morning. He was so engaged on the night of June 29, 1919, closed his saloon at 2 o'clock on the morning of June 30th and, about half an hour later, he and two other men started walking up Seventh street toward K. Before reaching K street they met the defendant, accompanied by a woman, approaching them. According to the testimony of the prosecution, at about that time one of Dulmaine's companions was inviting the other members of the party to his house to partake of a chicken dinner. Defendant said, "What's that; what the hell's that about chicken?" and used some vulgar language. Dulmaine turned around and wanted to know "what was the matter with that guy," and asked, "What's it to you?" or words to that effect, upon which defendant struck Dulmaine in his right eye. He was wearing glasses at the time, and the result of the blow was that they were broken and a piece of glass entered the eyeball; the prosecution claiming that thereby the eyesight of his right eye was destroyed.

[1, 2] Section 203 of the Penal Code defines mayhem as follows:

"Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

It has been held that it is not necessary affirmatively to show a deliberate or premeditated intent to commit the crime of mayhem in order to sustain that charge, notwithstanding that the word "maliciously" as used in section 203 might imply otherwise. In People v. Wright, 93 Cal. 564, 29 Pac. 240, it is said:

"* * * It therefore follows that, as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required. But the requirements of the statute in such cases will be fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously—that is, 'with a wish to * * * injure another person, or an intent to do a wrongful act'—unless the evidence tends to show to the contrary."

In other words, it is held in that case that it is sufficient to prove only the commission of the act, from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show that it was done under circumstances constituting self-defense.

If a person unlawfully strikes another, not with the specific intent to commit the crime of mayhem, and the blow so delivered results in the loss or disfigurement of a member of the body of the assaulted party or in putting out his eye, the crime is nevertheless mayhem. See Terrell v. State, 86 Tenn. 523, 8 S. W. 212; Worley v. State, 11 Humph. (Tenn.) 172, 175.

The appellant, however, does not seem to question the law as it is above stated, but his main contention is that the evidence fails to show that the defendant did "put out the eye" of the prosecuting witness within the meaning of section 203 in that particular. It is further contended that the court erred to the prejudice of the defendant by refusing to give one of his requested instructions.

[3, 4] We agree with counsel for the defendant that under the statute the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless; but we think the jury were warranted in finding, as their verdict implies that they did find, that the defendant by the blow he delivered in and upon the face of the prosecuting witness "put out" the eye of the latter.

Dr. Briggs, a noted oculist, examined and treated the eye of the complaining witness after the injury was inflicted upon the lat-

ter's eye by the defendant. He testified on direct examination as follows:

"Mr. Russell: Q. Do you know Mr. Louis Dulmaine, the gentleman back here? A. I do. Q. You have had occasion to treat him? A. I have. Q. For what sort of trouble was that, doctor? A. He came in on the 2d day of July, last, with an injured eye, that had been injured, he said, I think, two or three days previously. There was a penetrating wound of the cornea, penetrating the iris, and a punctured lense; the lense of the eye was punctured, causing cataract; causing the lense to become opaque, which we call cataract. Q. Did you treat the eye? A. I did. Q. What is the condition of the eye in reference to sight? A. The eye is practically blind. He sees light; that is all. He doesn't see objects. Q. The sight, then, is what we call destroyed? A. He is practically blind. Q. He is practically blind in that eye? A. Yes, sir. Q. All that he can distinguish is just light? A. Yes, sir; I think he can—he sees motions that are made past the eye. Q. Is that a permanent injury, doctor? A. Yes. Q. That is an injury such as cannot be cured? A. Well, yes; I can say that his chances of ever seeing any more are almost nil. Q. Now, you say there was a sort of a wound in that eye? A. A puncturing wound, yes; about, I think, a sixth of an inch long, that went through the clear part of the eye. Q. Could you tell from the nature of the wound what that might be caused by, doctor? A. Well, it might be caused by any sharp thing projected against the eye. It might have been a knife wound, a glass wound, or anything else that struck the eye with force enough to cause that kind of injury. It was more like a cut than a bruise. It was a clean-cut wound. Q. That would indicate that force had been used on it? A. Oh, yes."

There can be no manner of doubt that the foregoing testimony, taken alone, unmistakably shows that the complaining witness' eye was put out. If all that the injured party could do with the eye was, as the doctor testified, merely to distinguish lightness from darkness or perceive a motion or movement of some sort made immediately before the eye, the eye was certainly rendered perfectly useless to its possessor. If both eyes were so afflicted, it is very clear that the complaining witness would practically be blind. What the statute obviously means by the expression or phrase, "put out the eye" is that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life.

But counsel for the defendant, in his contention that the eye of the complaining witness was not shown to have been "put out," relies mainly upon the following testimony brought out on the cross-examination of Dr. Briggs:

"Hardly a likelihood of his ever having any use of that eye for visual purposes. * * * I wouldn't say it is impossible for him to get some vision in it. Possibly in a year or two years it may improve; but I think the chances of doing so are so slight that I don't know that it would be worth attempting. Q. But, in your judgment and experience, you wouldn't say that there isn't any chance? A. Oh, no. Q. In other words, there is a chance? A. There is a chance of getting some sight, but so little chance of getting any useful sight that I wouldn't consider it in human events at all possible—I wouldn't say possible—at all probable. * * * I should say he might have a chance in a hundred of getting some useful sight, and I would say that was hardly a probability either; and in the effort to get it, it might do a lot of harm. So it would be a question in my mind whether I would ever advise him to have an operation done with a view to improving the sight; I don't know; I wouldn't say; I wouldn't know, because I would have to see the eye at some other time, in some other condition. I might feel that in a year or two years' time it might be advisable to do an operation upon it. I wouldn't say it wasn't possible, now, in the course of human events, but I think it is improbable."

There is nothing in the foregoing testimony of Dr. Briggs which would justify us in holding that the verdict is not sufficiently supported. The full purport or the effect of the doctor's testimony upon cross-examination is that, while it is not impossible that "in the course of human events" and at the end of about two years an operation could be performed upon the eye which might have the effect of restoring to it some power of sight, still it was not probable that thus such a result could be brought about. Indeed, it would seem to be very clear from the doctor's testimony as a whole that he was at the time of the trial of the opinion that the injury to the eye could not be so amended or corrected as to enable the complaining witness to use it at any time in the future for any useful or practical purpose whatever. At all events, the direct testimony of the doctor amply sustains the verdict, and if there were any statements brought out on his cross-examination which were calculated to weaken his direct testimony in its tendency to show that the eye was put out, it was for the jury to consider and determine what weight they should give his direct testimony when considered by the light of statements made on his cross-examination.

Our conclusion is, as above stated, that the verdict derives sufficient support from the evidence to uphold it.

[5, 6] The instruction referred to above as having been proposed by the defendant and disallowed by the court is this:

"You are instructed that you must find from the evidence that the defendant, Dan Nunes, put out the eye of the complaining witness or you must acquit him."

One of the grounds upon which the court refused to read the instruction to the jury was that the proposition therein stated was covered by the general charge of the court, and this we find to be substantially true. In its initial instruction the court stated to the jury in detail the contents of the information,

thus telling them, as the statute describes it, the nature of the charge upon which the defendant was being tried, and then stated that the issue had been made by a plea of not guilty by the defendant to the information. The court also read to the jury section 203 of the Penal Code, upon which the information is based, and told the jury that, to justify a verdict of guilty, it rested upon the prosecution to prove beyond all reasonable doubt that "said defendant is guilty of the crime charged against him in the information." The accusatory pleading specifically charged the defendant with unlawfully and maliciously putting out the eye of the complaining witness. It would seem that the jury would certainly be minus that degree of intelligence which it must be assumed the average person usually summoned to jury duty possesses if it could be said, as a matter of law, that they did or could not understand from the initial instruction of the court that the defendant would be entitled to an acquittal unless it were shown beyond all reasonable doubt that he had put out the eye of the complaining witness. Indeed, the only question submitted to the jury was whether the defendant did put out the eye of the prosecuting witness; that was the single specific charge in the information; and, when told in general language that the charge in the information was required to be established beyond all reasonable doubt to justify a conviction, that was tantamount to telling the jury that, if the people failed to prove by the degree of proof mentioned that defendant put out the eye of the complaining witness, the former would be entitled to an acquittal.

There are no other points submitted here for consideration.

The judgment and the order appealed from are affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

47 Cal. App. 211

HUMPHRY v. FARMERS' UNION & MILLING CO. (Civ. 2035.)

(District Court of Appeal, Third District, California. April 26, 1920.)

1. Sales ⟸22(4)—Acceptance subject to inspection was not a variation of offer.

Where an interchange of telegrams between the parties had established an agreement as to all other terms of sale, the fact that the last telegram from the buyer stated the sale was subject to inspection on delivery, which had not been mentioned before, does not defeat the contract, since it merely stated a condition which would have been otherwise implied under Civ. Code, §§ 1771, 1785.

2. Sales ⟸22(3)—Withdrawal of offer after telegram of acceptance was filed is too late.

Under Civ. Code, §§ 1582, 1583, a telegram accepting an offer of sale took effect on its deposit for transmission, and a telegram thereafter sent by the buyer, canceling the transaction, was too late.

3. Sales ⟸80—Contract held to require payment at place of delivery.

Where the seller had required the buyer to furnish bank guaranty of payment of draft attached to bill of lading, payment was to be made at place of delivery, even though, in the absence of such agreement, the sale f. o. b. place of sale required payment at place of sale.

4. Sales ⟸417—Evidence of value at place of shipment held to sustain judgment for damages.

Though the measure of damages for refusal to deliver goods sold is, under Civ. Code, § 3354, the difference between the sale price and the price in the market nearest the place of delivery, evidence of market price at the place of sale is sufficient, in the absence of proof of a different market price nearer the place of delivery to sustain a judgment for the buyer.

5. Appeal and error ⟸1033(8)—Evidence ⟸84—Error as to damages held favorable to appellant; presumptive evidence of value.

The fact that a buyer in Indiana was buying beans in California for shipment to Indiana is presumptive evidence that the value of the beans in Indiana was higher than that in California, so that error in basing damages on the market value in California was favorable to the seller, and he cannot complain.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Charles A. Humphry, doing business under the name and style of the Evansville Commerce Company, against the Farmers' Union & Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, for appellant.

A. H. Ashley, of Stockton, for respondent.

ELLISON, Presiding Judge pro tem. Plaintiff brought this action to recover damages for the alleged breach of contract in and by which it was claimed that defendant agreed to sell to it 80,000 pounds of recleaned pink beans at the price of $6.35 per hundred pounds f. o. b. Stockton, Cal. After trial the court found that the contract was executed as alleged in the complaint, and that the defendant neglected and refused to deliver the beans as therein contracted to be delivered, to the damage of the plaintiff in the sum of $550, and entered judgment against the defendant for that amount. The defendant appeals from the judgment.

The contract, if one was made, resulted from certain telegrams passing between the

plaintiff and defendant. For a reversal the defendant and appellant relies upon three propositions: First, that the telegrams did not constitute an agreement; second, that the seller was entitled to be paid at Stockton; and, third, that if the place of delivery was Evansville, Ind., damages should have been based upon the price at which respondent could have bought equivalent beans in markets nearest Evansville, Ind., and not at Stockton.

[1] I. We are of opinion that a fair construction of the telegrams leads to the conclusion that the parties met upon a definite proposition and agreement. In the telegram of November 14, 1916, the defendant said:

"Cannot sell at price you name. Can sell eighty thousand pounds pink $6.35 f. o. b. Stockton. Railroad says cannot furnish empty cars promptly. The prospect of shipment getting through unfavorable. Order subject delay and confirmation."

To this telegram the plaintiff on November 15th, replied as follows:

"Answering telegram accept pink $6.35. Must ship during November. Do the best you can."

This was not an unconditional acceptance of the proposition made in the telegram of November 14th, above quoted. The defendant had stated in his telegram of November 14th that the railroad could not furnish empty cars promptly, and that the prospect of shipments getting through promptly was unfavorable, and that the plaintiff must order subject to delay and confirmation. The answer to this telegram was that the goods must be shipped during November, which was not agreeing to accept the beans subject to delay. On November 17th, the defendant, however, telegraphed as follows:

"Eighty thousand pounds recleaned pink beans ready. Car obtainable. Have your bank wire guarantee payment draft with bill of lading."

This was a statement by the defendant in effect that it could ship as requested by the plaintiff during the month of November, because it stated therein, "car obtainable." It was a statement that there would be no delay, and that if the beans were bought they could be loaded at once; but it contained a new proposition, which had not been suggested before, namely, "Have your bank wire guarantee payment draft with bill of lading." On November 18, 1916, the plaintiff's bank, the Citizens' National Bank of Evansville, Ind., wired the defendant as follows:

"We guarantee payment your draft bill of lading attached, Evansville, commercial pink beans at $6.35, subject permission inspection on arrival."

This was a meeting of the minds of the parties upon the same terms and conditions, save and except that the last telegram referred to had in it these words, "subject permission inspection on arrival." The matter of delay in shipment had been eliminated, the request that the bank guarantee payment had been accepted, and all conditions imposed by defendant had been met, qualified by the added suggestion that the beans would be subject to inspection on arrival. It is the claim of counsel for appellant that it never assented to the plaintiff's request that the beans should be shipped subject to inspection; but, as the learned judge of the trial court observed, the law would have added these words to the contract, even if they had not been inserted in the telegram. Section 1771 of the Civil Code reads:

"One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

Section 1785 of the Civil Code reads:

"On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it, and may rescind the contract if the seller refuses to permit him to do so."

In the case of Newmark & Co. v. Smith, 26 Cal. App. 339, 149 Pac. 1064, it is said:

"The purchaser under a contract of sale of a certain quantity of beans is entitled, in the absence of a waiver of the right, to inspect the property sold as a condition precedent to the making of payment, and the seller is not entitled upon the tender of delivery to refuse such inspection and demand payment, and for failure to make payment to declare the contract annulled."

[2] We are of opinion that the telegrams passing between the parties resulted in a contract between them. The defendant's telegram of November 18th, wherein it says, "wire received too late, entire matter is canceled," was sent after the Citizens' National Bank had telegraphed its guarantee of payment of the draft, and after all the terms and conditions imposed by defendant had been accepted, and was too late to prevent the consummation of the contract. The wire accepting defendant's offer took effect on its deposit at Evansville for transmission. Civ. Code, §§ 1582, 1583. It was deposited at Evansville, Ind., before the defendant's telegram of November 18th was sent.

[3] II. Some discussion is indulged in upon the meaning of the expression "f. o. b. Stockton"; it being the claim of appellant that this expression not only meant that the goods were to be placed on the car by the seller without any expense to the buyer, but also that it meant that upon their being loaded ready for shipment the purchase price was then due and payable and at the place of shipment. We deem it unnecessary to examine critically whether the expression "f. o. b." includes, not only loading, but the right to have payment at the place of load-

ing because, even if the expression in general does mean both loading and payment, the parties can contract differently. The telegrams in this case conclusively show that, if a sale were made, it was the understanding of the parties that the goods were not to be paid for in Stockton, but were to be paid for in Evansville, Ind. The telegram of November 17, 1916, sent by the defendant, "Have your bank wire guarantee payment draft with bill of lading," was a clear expression by the defendant that payment was not expected until the goods were received in Indiana, together with the bill of lading, and the guaranty of the Citizens' National Bank in response to the demand for the guaranty, "We guarantee payment of your draft, bill of lading attached," could mean nothing else than that the bank guaranteed that when the bill of lading reached Evansville, together with the draft, the same would be paid at that place, and not at Stockton.

[4] III. Lastly, it is claimed by appellant that if the place of delivery was to be Evansville, Ind., damages should have been based upon the price at which respondent could have bought equivalent beans in the market nearest Evansville and not at Stockton, and this contention is predicated upon the provisions of section 3354 of the Civil Code, wherein, in substance, it is provided that in estimating damages the value of the property to a buyer deprived of its possession is deemed to be the price at which he might have bought the equivalent thing in the market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

[5] Respondent introduced evidence tending to show the price at which equivalent beans could have been bought at Stockton, and no evidence of the price at which they could have been bought at any other place was introduced by either party. There is nothing in the record to show that the beans could have been bought at any less price at any place nearer Evansville. The price at which the beans could have been bought at Stockton was the only evidence the court had before it as to the amount the plaintiff would have had to pay for equivalent beans. There is no evidence in the record, either on behalf of plaintiff or defendant, and none offered by the defendant, tending to show what the market price of such beans was at any place nearer Evansville than the city of Stockton. We think, under the circumstances, that the court was justified in accepting the proved price at the city of Stockton as the price at which respondent could have bought equivalent beans. If there was any place nearer Evansville at which they could have been bought, then the matter was entirely open for the defendant to make such proof. It made no attempt to do so. It sufficiently appears from the record that permitting the evidence of the market price of beans at Stockton, instead of confining the proof to some unnamed place east of the Rocky Mountains, was a benefit to the appellant, instead of an injury. The fact that plaintiff was buying beans at Stockton to be shipped to Indiana, and paying the transportation charges thereon, is presumptive evidence that the market price of beans was less in California than in Indiana; otherwise, the plaintiff was unbusinesslike in buying them. The appellant is not entitled to complain of a ruling that resulted in a benefit to it and a smaller judgment than otherwise might have been obtained.

We think the judgment is right, and should be affirmed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 321

BUSCHMAN et al. v. TURLOCK IRR. DIST. et al. (Civ. 2199.)

(District Court of Appeal, Third District, California. May 3, 1920.)

1. Waters and water courses ⊂=227—New construction under Wright Irrigation Act rests on adoption of plans by owners.

The whole purpose and scope of the Wright Irrigation Act, so far as it relates to new construction work, rests on the adoption of plans and the approval of landowners of the district, and does not rest primarily with the directors, who are not empowered to carry on any new work without authorization, so that under section 39 funds can be used by the directors in the prosecution of new work only when previously authorized by voters.

2. Mandamus ⊂=154(4)—Complaint for writ of mandate to compel construction of irrigation ditches defective.

Complaint in action for writ of mandate to compel construction of ditches and delivery of water for irrigation purposes under the Wright Irrigation Act *held* defective as containing nothing from which it could be inferred that the landowners of the district had adopted plans calling for the construction of other than main and lateral canals or any canals or ditches which plaintiffs seek to have constructed.

3. Mandamus ⊂=154(4)—Complaint must show fund will not be exhausted for various purposes for which raised before application to one particular purpose may be ordered.

The board of directors of an irrigation district being given discretion by the Wright Irrigation Act to raise by a 2 per cent. assessment such sum as the board shall deem necessary for any of the purposes of the act, the different purposes are placed on an equal footing, and it

must appear by the complaint that they will not exhaust the fund raised before its application may properly be ordered by the appellate court to any particular project.

Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action for writ of mandate by C. H. Buschman and others against the Turlock Irrigation District and S. A. Hultman and others, constituting its board of directors. From an order sustaining defendants' demurrer, and from judgment denying the writ, plaintiffs appeal. Affirmed.

W. C. LeHane, of Los Angeles (Fred C. Peterson, of San Francisco, of counsel), for appellants.

Griffin, Boone & Boone and P. H. Griffin, all of Modesto, for respondents.

PLUMMER, Presiding Judge pro tem. By this action plaintiffs sought a writ of mandate from the superior court of Stanislaus county, directing the defendants to construct certain ditches and deliver water for irrigation purposes to lands and premises described in the complaint, belonging to the plaintiffs, and situate within the Turlock irrigation district. The matter is in this court upon appeal from the order and judgment of the trial court sustaining defendants' demurrer to the plaintiffs' complaint.

It appears from the pleadings that the defendant Turlock irrigation district is a quasi public corporation, organized under the provisions of what is popularly known as the Wright Irrigation Act (St. 1887, p. 29, as amended); that for some time past water has been delivered to the lands belonging to the plaintiffs through a private ditch, called the Delmas ditch, the intake of which is at a point on what is called the Ceres main ditch, constructed by and belonging to the defendant Turlock irrigation district; that the water thus furnished through the Delmas ditch is lost, in large measure, by means of seepage, and the natural porous condition of the soil traversed by said Delmas ditch before being distributed over the lands of the appellants. To remedy this defect and avoid the loss of water, a writ of mandate was prayed for, directing the Turlock irrigation district and the other defendants herein to take such action as might be necessary to furnish plaintiffs with sufficient water for the irrigation of their lands; that said water be delivered directly to, or close by, the lands belonging to the plaintiffs.

Though not stated in precise form, the relief sought is, in fact, as follows: That the Turlock irrigation district be required to build a new branch or service ditch from its main canal; that the directors of the district be required to construct said ditch and provide the money for paying the expenses of such construction without any adoption of plans or previous approval by the votes of the landowners of the district. Appellants argue that authority for such an order from the court is found in the last clause of section 39 of the Wright Act relating to the power of the board of directors of irrigation districts, which clause reads as follows:

"Also sufficient to raise such amount not exceeding two per centum of the aggregate value of the lands within the district according to the latest * * * equalized assessment roll thereof, as the board of directors shall determine may be needed to be raised by assessment for any of the purposes of this act."

A correct interpretation of this clause requires an examination or analysis of the various provisions which set forth the power and purposes of the act, and how the machinery thereof is to operate.

Section 15 gives the board of directors power to construct canals, waterways, reservoirs, etc., and to acquire land necessary for such purposes.

Section 30 sets forth that "for the purposes of constructing or purchasing the necessary irrigation canals and works and acquiring the necessary property and rights therefor," etc., as soon as the district is organized, and also whenever thereafter a construction fund is necessary, etc., for the purpose of ascertaining the amount of money necessary to be raised, said board shall cause such surveys, examinations, drawings, and plans to be made as shall furnish the proper basis for the amount of money to be raised, which plans, it is provided in section 30a, must be submitted to the commission authorized to approve bonds of irrigation districts. And finally, after the plans, surveys, and engineer's report have been approved, the proposition of raising money by a bond issue to carry on construction work according to the plans, surveys, etc., adopted must be submitted to the voters of the district, as provided by section 30c of said act. In the event that the money raised by bond issues proves insufficient to complete the work undertaken by the district according to its adopted plans, section 34 provides that a special assessment may be levied after the question of so doing has been submitted to, and received a majority vote of, the qualified voters of the district.

Section 67 provides for the creation of certain funds, to wit, a bond fund, a construction fund, and a general fund.

Section 55 specifies that the cost and expense of purchasing and acquiring the property and constructing the works and improvements provided for shall be paid wholly out of the construction fund. (This section includes other items not pertinent to this case.)

Section 61 specifies that—

"The board of directors or other officers of the district shall have no power to incur any

debt or liability whatever, either by issuing bonds or otherwise, in excess of the * * * provisions of this act," etc.

[1] It thus appears that the whole purpose and scope of the act, so far as it relates to new construction work, rests upon the adoption of plans and the approval of the landowners of the district, that it does not rest primarily with the directors, and that the directors are not, specifically or otherwise, empowered to carry on any new work without such previous authorization. Hence, if that portion of section 39 relied upon by appellants should be construed to authorize the use by the board of directors of funds so raised in any new work, such funds could only be employed in that manner if such new work had been previously authorized by the voters of the district.

[2] There is nothing in the appellants' complaint from which it can be inferred that the landowners of Turlock irrigation district have adopted any plans calling for the construction of other than main and lateral canals, or of any canal or ditch which the plaintiffs seek to have constructed by order of this court. It does not appear that anything more than a general system has been provided for. It does appear, by way of argument in the briefs and the general history of irrigation districts, that different plans have been adopted by the voters of different districts. In some main canals and laterals only have been provided for in the plans, and in others a much more comprehensive system of ditches, calling for the construction at the expense of the district not only of main and lateral canals, but of ditches conveying water to every 40 acres of land susceptible of irrigation, has met the approval of the voters of the district.

The complaint is also lacking in other particulars. It does not appear therefrom what the proposed work would cost, nor whether, if authorized by the district, the 2 per cent. assessment provided for in section 39, if otherwise applicable, would prove adequate to defray the expenses of the undertaking.

[3] There is no means by which this court can determine whether any sum raised by the 2 per cent. assessment might properly be applied to the construction of service ditches, and so order its application, without it being specifically shown that such sum is available. The board of directors of the district are given discretion to raise by a 2 per cent. assessment such sum as the board shall determine may be necessary to be raised for any of the purposes of the act. The different purposes are placed upon an equal footing, and it must appear that the different purposes will not exhaust the fund for which it has been raised before the application of such fund may properly be ordered by this court applied to any particular project.

Considerable stress is laid upon section 18, wherein it is "expressly provided that all waters distributed for irrigation purposes shall be opportioned ratably to each landowner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district." We do not, however, agree with the contention that this section either authorizes or commands the construction of either main, branch, or lateral canals or service ditches which have not been otherwise provided for. Its plain import would seem to be that, when the landowners have their lands prepared for irrigation, have their service ditches connected with the system built by the district, then and in that case distribution of the water available for irrigation purposes is to be apportioned ratably, as therein set forth.

Being of the opinion that plaintiffs' complaint does not set forth a cause of action, it follows that the order and judgment of the trial court should be, and the same are hereby, affirmed.

We concur: BURNETT, J.; HART, J.

47 Cal. App. 247

HOGUE-KELLOGG CO. v. BAKER.
(Civ. 2847.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1920.)

1. Crops ⟸3—Contract for sale of crops to be grown in future valid, where seller has land.

A valid contract may be made for the sale of a crop to be grown in the future by the vendor, where such vendor possesses the land on which the crop is to be grown, for in such case the needful thing out of which the crop is to be produced is in existence, and hence the crop has potentiality.

2. Crops ⟸3—Contract for sale of future crops held valid.

Contract for sale of crop to be grown in the future on seller's land, providing that "this contract is understood by both parties to pass title and constitute absolute sale," *held* not void as against objection that it contemplated a completed sale of property not in existence; the contract being executory, notwithstanding quoted provision, which merely means that title should be deemed to pass whenever the produce became a growing crop.

3. Crops ⟸3—Invalidity of provision as to title on sale of future crops has no effect on main contractual obligation.

Under Civ. Code, § 1141, declaring when title passes by an executory agreement for sale of personal property, the invalidity of provi-

sion, in agreement for sale of future crops, that execution of the contract passed title, would not affect the main contractual obligation to grow and deliver the crops.

4. Contracts ⊂=10(4)—Contract of sale of future crops held not void for lack of mutuality.

Agreement to sell future crops, for which buyer agreed to pay specified price if delivered on or before certain date, *held* not void for lack of mutuality, notwithstanding provision giving buyer option, on delivery after such date, to either cancel contract or continue it in force; such provision being a mere statement of legal right of buyer in case of seller's default.

5. Sales ⊂=411—Buyer, suing seller for refusal to deliver, not required to plead particulars as to general damages.

Buyer, suing seller for breach of contract to grow and deliver crop of beans, was not required, as respects general damakes, to specially plead the particulars as to how and why he had been damaged.

6. Sales ⊂=411—Allegation as to price for which goods could have been bought not equivalent to allegation as to value thereof to buyer.

In buyer's action for nondelivery, allegation as to price for which goods could have been purchased at date of delivery *held* insufficient as an allegation of value of property to buyer, under Civ. Code, § 3308, providing that the measure of damages in such case is the excess, if any, of value of goods to buyer over amount due seller under the contract, if it had been fulfilled.

7. Sales ⊂=411—Complaint held to state cause of action for failure to deliver.

In buyer's action for seller's breach of contract to grow and deliver crop of beans, complaint, *held* sufficient, as against a general demurrer, to support a judgment for nominal damages, even if it should be held that matters relating to damages omitted therefrom should have been specially pleaded.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Hogue-Kellogg Company against J. S. Baker. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Ardis and W. S. Knott, both of Los Angeles, for appellant.

Fred N. Arnoldy, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff upon an alleged cause of action for damages arising because of defendant's failure to perform the obligations imposed by written contract. The case went to judgment after answer and trial. The only contention made by appellant, however, is that the court erred in overruling his demurrer, which was interposed to the complaint of plaintiff. It is insisted that the complaint failed to state facts sufficient to constitute a cause of action. The contract for the breach of which plaintiff sought damages is set out in the complaint and is as follows:

"J. S. Baker, of Norwalk, Cal., does hereby agree to grow for the Hogue-Kellogg Company, of Ventura, Cal., 20 acres of Henderson bush beans, to be grown during the farming season of 1917 on land situated near Norwalk, Cal., known as Baker ranch, and to deliver the entire crop product thereof. The beans are to be delivered as soon as possible after threshing, properly recleaned, free from damage of any kind, in first-class shipping condition, sacked in new bean bags, to be even weighted and so stenciled, f. o. b. cars at Buena Park, Cal.

"The Hogue-Kellogg Company agrees to pay for said beans on net weight at $4.25 per hundred pounds, delivered f. o. b. cars at Buena Park, Cal., on or before December 1, 1917; and in case delivery is not made within the final time limit, it is optional with the Hogue-Kellogg Company to consider this contract in force or to cancel same.

"In case it rains, damaging the beans, said beans shall be handpicked and put in the condition as above stated.

"It is mutually agreed that the Hogue-Kellogg Company will sell seed beans for planting the above acreage at the rate of $4.25 per hundred pounds, f. o. b. Ventura, Cal., payment to be made when the crop is delivered.

"This contract is understood by both parties to pass title and constitute absolute sale, but until delivery has been completed grower agrees to and does assume all risk of loss or damage. Time is the essence of this contract, and any controversy arising under this contract is to be settled by arbitration; each party hereto to select one arbitrator and the two jointly to select a third, the decision of a majority of said arbitrators to be final and binding on both parties."

[1, 2] Appellant insists that the contract was invalid because it contemplated a completed sale of property not in existence, and that it is void for want of mutuality. The third point made has to do with the sufficiency of the allegations in the complaint affecting plaintiff's alleged damages. It is well-settled law that a valid contract may be made for the sale of a crop to be grown in the future by the vendor, where such vendor possesses the land upon which the crop is to be grown, for in such case it appears that the needful thing out of which the crop is to be produced is in existence, and hence the crop has legal potentiality. Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Benjamin on Sales (7th Ed.) § 311. It was alleged in the complaint that at the time of the making of the contract and subsequent thereto defendant was the owner and in possession of the 20 acres of land referred to in the written contract. We construe the contract to be executory. The mere fact that

the writing provided that the contract should pass title and constitute an absolute sale, with a risk on the grower for loss or damage until delivery, should be held to mean only that title should be deemed to pass whenever the produce became a growing crop. It was competent for the parties to so contract. Farmer v. Leaf, 189 Pac. 735.

[3, 4] But, were we to assume that that particular term of the contract was void, it would not vitiate the main contractual obligation imposed upon the defendant, which was to grow and deliver the crop. In that case section 1141 of the Civil Code would apply, which declares that title is transferred by an executory agreement for the sale of personal property, when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer title thereto. There was no lack of mutuality in the obligations imposed by the contract. Plainly its terms were sufficient to have enabled the defendant, had he produced a crop and offered it to the plaintiff, and had the latter refused to accept it, to enforce that term which provides for the payment of the price agreed upon. That term is definitely stated, to wit:

"The Hogue-Kellogg Company agrees to pay for said beans on net weight at $4.25 per hundred pounds, delivered f. o. b. cars at Buena Park, Cal., on or before December 1, 1917."

The condition immediately following, that in the event there was a failure to deliver it would be optional with the vendee to cancel the contract or continue it in force was a mere statement of the legal right of the vendee upon default being made by the vendor.

[5, 6] As to the allegation of damage, plaintiff particularly alleged the making of the contract, the terms thereof, and the breach committed by the defendant; it alleged that by reason of the failure and refusal of the defendant to grow and deliver the beans plaintiff had been damaged in the sum of $775, and that the damages had not been paid. It is the position of appellant that the particulars as to why and how the plaintiff had been damaged should have been specially alleged, and in this regard it is claimed that an additional allegation contained in the complaint, which was that at the time when performance was due the price at which the plaintiff "might have bought" the equivalent of the beans agreed to be grown and delivered, and which the land was capable of producing, was the sum of $12 per hundred pounds, is insufficient. This allegation, of course, if that matter was required to be specially pleaded, as contended for by appellant, was insufficient, for section 3308 of the Civil Code declares that the detriment caused by the breach of a seller's agreement to deliver personal property is "the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." The statement in the complaint of the price at which the plaintiff "might have bought" beans in the market at the time delivery from defendant was due is not an allegation of the value of the beans to the plaintiff or the market price thereof. But we think the plaintiff was not required to particularly plead the facts as to how the damage arose.

"At the common law, general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule." Riverside Coal Co. v. Holmes, 36 Neb. 858, 55 N. W. 255.

"Under a general allegation of damages a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called 'general,' as contradistinguished from 'special' damages, which are required to be specially stated in the declaration." Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Barber v. Cazalis et al., 30 Cal. 92.

[7] A still further answer to the contention of appellant is that, as against the general demurrer, the complaint was sufficient to support a judgment for nominal damages, even though matters required to be specially pleaded were omitted therefrom. McCarty v. Beach, 10 Cal. 461; Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380.

For the reasons stated, the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 355

OLDS v. THORINGTON et al. (Civ. 3183.)

(District Court of Appeal, First District, Division 1, California. May 3, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. Appeal and error ⊂⊃80(3)—Judgment in action to quiet title not interlocutory to necessitate dismissal of appeal.

Judgment in an action to quiet title, leaving necessary no further judicial action by the court for final determination of the rights of the parties *held* not interlocutory to necessitate dismissal of defendants' appeal.

2. Homestead ⊂⊃43—Declaration not stating declarant resided on premises claimed held ineffective.

Omission of declaration of homestead to state that the declarant was residing on premises claimed, in that it could not be determined whether he was residing on a strip to the east of a quarter section, a strip to the west of that section, or on the quarter section itself subsequently attempted to be selected as a homestead, *held* fatal under Civ. Code, § 1263.

3. Homestead ⊂⊃43—Right of claimant must appear on face of declaration.

The right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Charles L. Olds, in his own right and as executor of the last will and testament of Martha D. Olds, deceased, against Ettie B. H. Thorington and others, and Ettie B. H. Thorington as administratrix of the estate of William R. Thorington, deceased. From judgment for plaintiff, defendants appeal. Reversed.

W. A. Lamar, of Independence, and A. H. Swallow, of Bishop, for appellants.

L. C. Hall, of Bishop, and S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for respondent.

KNIGHT, Judge pro tem. The judgment in this action decreed that plaintiff's title to certain lands situate in Inyo county be quieted upon the payment by plaintiff to defendants of the amount of a mortgage previously given by plaintiff's predecessors covering the lands in question. Defendants appeal. Plaintiff, in his own right and as executor of the last will of Martha D. Olds, deceased, avers in his complaint that he is the owner and entitled to the possession of the disputed premises, and prays that his title thereto be quieted. Defendants in their answer deny the validity of plaintiff's title, and by way of cross-complaint seek to reform a certain deed which forms a part of their chain of title by correcting the description of the property intended to be conveyed, and thereupon to quiet their title, which they aver was acquired by prescription. Defendants also pleaded the statute of limitations. Section 318, Code Civ. Proc.

Plaintiff is the son of David and Martha D. Olds, both of whom are now deceased. Defendants are, respectively, the widow and the children of William R. Thorington, since deceased, the latter being a son of Martha D. Olds by a former marriage. The premises in question were acquired in the year 1874 by David and Martha D. Olds subsequent to their marriage, and are conceded to be community property, upon which David Olds, on August 11, 1881, filed a homestead. On June 27, 1891, said William R. Thorington loaned David Olds and wife $2,500, for which they gave him a note, secured by a mortgage purporting to cover the premises in question. For the purpose of satisfying that mortgage David Olds, on February 24, 1894, executed and delivered to Thorington a deed to said premises. Martha D. Olds did not join in that deed. The mortgage was immediately afterwards satisfied of record. After said deed to Thorington had been executed and delivered Olus and his wife continued to reside upon said premises, until the death of Olds, which occurred on January 16, 1909, at which time Thorington, who had been living with his wife on what is called the "Horton" ranch, moved onto the Olds place, his wife remaining on the Horton place. Thorington then lived with his mother, Mrs. Olds, on the Olds place, keeping house for her, until January, 1910, when he moved back to the Horton ranch to reside with his wife. Thereafter Mrs. Olds resided alone upon the Olds place until the 1st of August, 1913, at which time Thorington, with his wife and family, moved onto the Olds place, and jointly occupied the dwelling thereon with Mrs. Olds. Thorington died on November 2d of the same year, after which Mrs. Olds and the Thorington family continued to occupy the Olds dwelling until the death of Mrs. Olds, which occurred January 17, 1914, and since then Thorington's widow and children have occupied said premises and dwelling.

Three main issues were presented by the pleadings, viz. the validity of plaintiff's title, the right of defendants to reform the deed executed by David Olds to Thorington in 1894, and defendants' asserted title by prescription.

The foundation of plaintiff's title is the homestead declared by David Olds in 1881. If, as contended by appellants, the homestead is void, title to said property was vested in Thorington by the deed executed by Olds in 1894, for the reason that, in the absence of a valid homestead, Olds possessed the power, under the provisions of section

172 of the Civil Code, as that section existed at the time of this transaction, to dispose of the community property, other than by testamentary disposition, the same as he would if it were his separate estate. If, however, said homestead is valid, said deed is inoperative, and the question of whether or not plaintiff's title, acquired under said homestead has been defeated by the asserted prescriptive title of defendants becomes necessary for determination. The matter of the reformation of said deed becomes material only in the event that defendants' title is found to depend upon said deed.

The trial court found specifically on all of the issues of fact presented by the pleadings, from which it evidently concluded that said homestead was valid, and that defendants' title by prescription had not been established, although in its conclusions of law and in its judgment neither of those matters were specifically determined. It found that the description in the Thorington deed was intended to cover the premises in question, but it declined to grant relief toward the reformation of said deed, upon the ground that, even if reformed, said deed "would still be inoperative to pass or convey his title to the lands and premises" in question, and as to defendants' prescriptive title it found that the possession of said premises by Thorington was a joint possession with that of Olds and his wife, and was not an exclusive, hostile and adverse one, and that the only exclusive possession by the Thoringtons had been since the death of Mrs. Olds, which occurred January 17, 1914. The court's conclusions of law and its judgment were, in effect, that by reason of said mortgage and deed Thorington and his successors became mortgagees in possession, and that plaintiff's title should not be quieted until said mortgage is paid. The judgment which follows strictly the conclusions of law decrees that the defendants and cross-complainants are entitled to retain possession of said premises until plaintiff pays to defendants and cross-complainants the sum of $3,297.50, the amount found by the court to be due on said mortgage from Olds and his wife to Thorington, and that upon the payment of said sum said debt will have been fully paid, and plaintiff will thereafter be the owner in fee simple of said premises, subject only to the administration of the estate of Martha D. Olds, deceased, and that upon the payment of said sum plaintiff will be entitled to a decree quieting his title to said premises.

[1] Preliminary to the main questions presented by the appeal, respondent contends that the appeal should be dismissed upon the ground that said judgment is interlocutory in its character and not final. We are of the opinion that the point is not well taken. The form of judgment is one falling within the rule stated in Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696, in which it is held that if after a decree has been entered no further proceedings can come before the court, except such as are necessary to carry the decree into effect, the decree is final. Under the provisions of the judgment in this action no further judicial action on the part of the court is necessary to a final determination of the rights of the parties. The amount to be paid by plaintiff before he is entitled to relief has been definitely fixed and determined by the court, and upon said payment plaintiff ipso facto becomes entitled to a decree quieting his title. Nothing remains to be done by the court except to carry the decree into effect, which, as we have seen, does not render the decree interlocutory in its character. We do not consider the case of Krotzer v. Clark, 178 Cal. 736, 174 Pac. 657, relied upon by respondent, in point, for the reason that the decree in that case was apparently rendered and intended by the court as an interlocutory decree. Furthermore, the entry of the final decree in that case depended upon the tender of a deed and a certificate of title showing the names and widths of all streets and roads touching the property, which, if tendered, may have given rise to further questions for judicial determination as to the sufficiency of said deed and certificate. The other authorities cited by respondent (Bateman v. Gits, 17 N. M. 619, 133 Pac. 969, Ann. Cas. 1915B, 1192; Elliott on Appellate Procedure, § 83; Freeman on Judgments [4th Ed.] §§ 29, 34) are not in conflict with the views expressed in Zappettini v. Buckles, supra.

The first question presented on the merits of the appeal is the one relating to the validity of the homestead. If the homestead is void plaintiff has no title upon which to base his action. Several objections are urged against its validity, the most important of which is that the declaration contains no statement that the person who makes it is residing on the premises claimed as a homestead. A copy of the declaration of homestead is as follows:

"Know all men by these presents, that I, David Olds, of Round Valley, county of Inyo, state of California, a married man and the head of a family, residing with my family on the northwest one quarter section twenty-eight, township six south, range thirty-one east, do hereby declare my intention to claim as a homestead the N. W. ¼ Sec. 28, T. 6 S., R. 31 E., less 32 feet in width off the east side of said section conveyed to William Horton and less 31 rods wide off the west side of said section conveyed to W. R. Thorington, and the actual cash value I estimate at three thousand dollars.

"In witness whereof, I have hereunto set my hand and seal this, the 10th day of August, A. D. 1881. David Olds. [Seal.]"

[2] It will be observed that the declarant declares that he resides on the northwest

quarter of section 28, which, according to the description immediately following in the homestead, consists of three distinct parcels of land, two of which the declarant does not own. He fails to specify, however, on which of those three parcels he was then residing. In other words, it cannot be determined from the declaration whether the declarant was then residing on the 32-foot strip on the east side of said quarter section, or on the 31-rod strip on the west side of said quarter section, or on the mid parcel which he afterwards attempts to select as a homestead. We are of the opinion that such omission is fatal.

Section 1263 of the Civil Code, as it read at the time of the filing of this declaration, required that a declaration of homestead must contain a statement "that the person making it is residing on the premises, and claims them as a homestead." If the statement of residence, or any of the other statements required to be made by said section, is omitted, the homestead is void. It was said in Jones v. Gunn, 149 Cal. 687, 87 Pac. 577:

"While it is true that homestead and exemption laws are remedial and generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction. Indeed, the Supreme Court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements as (formerly) to wife's acknowledgment (Beck v. Soward, 76 Cal. 530, 18 Pac. 650) as to head of family (Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 77 Am. St. Rep. 206, 58 Pac. 1063); as to residence on premises (Boreham v. Byrne, 83 Cal. 27, 23 Pac. 213); as to statement of husband's failure to make declaration (Cunha v. Hughes, 122 Cal. 113, 68 Am. St. Rep. 27, 54 Pac. 535); and as to estimate of the actual cash value of the premises, etc. (Tappendorff v. Moranda, 134 Cal. 421, 66 Pac. 491)."

And in Tappendorff v. Moranda, 134 Cal. 419, 66 Pac. 491.

"The right to a homestead, and to enjoy the privileges and immunities incident thereto, is purely of statutory creation, and exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory, and cannot be dispensed with."

In Boreham v. Byrne, 83 Cal. 23, 23 Pac. 212, it was held that where the declarant stated that he was "in possession" of certain described premises which he claimed as a homestead it was not the equivalent of the required statement of residence. It was there said:

"Nothing could make the premises a valid protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration are alike ineffectual to constitute a homestead."

The case of Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58, was one in which it was shown that a parcel of land on which the declarant resided was not the one described in the declaration, and the court held the error to be fatal, saying:

"A declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described."

Respondent endeavors to sustain the homestead by invoking the doctrine of liberal construction, as stated in Southwick v. Davis, 78 Cal. 504, 21 Pac. 121, and in Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436. But the facts of those cases are quite dissimilar to the facts of the case at bar. In both of those cases the question of the statement of value was involved. In the former case it was stated in the declaration that the value "does not exceed $5,000," and in the latter case the statement was, "We do place the value of said land at a sum not to exceed sixteen hundred dollars." In both cases it was held that the words used were sufficiently definite to convey an expression of an opinion of value.

[3] Respondent further contends for the application of the rule that ambiguity or obscurity in a written instrument may be removed by extrinsic evidence, from which he argues that, since the evidence shows that the dwelling was located on the mid parcel, the defect in the declaration is cured. The established rule is, however, that the right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence. Reid v. Englehart-Davidson Co., supra, 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206; Boreham v. Byrne, supra.

In the light of the authorities above cited, the homestead in question must be held to be void, upon the ground that said declaration contained no statement that the declarant resided on the premises which he claimed as a homestead. That being so, the deed from David Olds to Thorington became an operative conveyance, and vested title in Thorington, and the determination of the question of the defendants' prescriptive title becomes unnecessary.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 258

OAKLAND STREET IMPROVEMENT BOND CO. v. FITZMAURICE, City Treasurer. (Civ. 3440.)

(District Court of Appeal, First District, Division 2, California. April 29, 1920.)

Constitutional law ⊂⊃121(2) — Street assessment is a contract and statutes in force at time thereof as to its enforcement are part thereof.

A "street assessment" is a contract, and the statutes in force at the time prescribing the manner of its enforcement are a part thereof, and the holder of a bond securing an assessment issued prior to the amendment of Improvement Act 1911, § 68, in 1919 (St. 1919, p. 554) could require the city treasurer to advertise for sale and sell the property subject to the lien without depositing the cost of having a search of the records made for the purpose of ascertaining the name of all lien holders of record.

Application by the Oakland Street Improvement Bond Company for a writ of mandate prayed to be directed to W. M. Fitzmaurice, as City Treasurer of the city of Oakland, to require sale of property under lien of assessment for street work. Writ granted.

E. S. Page, of Oakland, for petitioner.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, for respondent.

BRITTAIN, J. The respondent demurs generally to the petition on which an alternative writ of mandate was issued. The facts are not subject to controversy. A single question of law is involved.

Under the Improvement Act of 1911 (St. 1911, p. 730), the assignors of the petitioner under public contract performed certain street work in the city of Oakland. In due course assessment was made on the property subject thereto, and upon one of the lots the amount of the assessment was secured to be paid by a lien for a statutory bond issued by the city treasurer on October 29, 1914. After default in payment of certain installments which became due under the bond, demand was made on the respondent by the holder of the bond for the advertisement for sale and the sale of the property subject to the lien. He refused to advertise unless the bondholder should first deposit with him the cost of having a search of the records made for the purpose of ascertaining the names of all lienholders of record, or unless the bondholder should have such a search made, justifying his refusal upon the provisions contained in section 68 of the Improvement Act, as that section was amended in 1919 (St. 1919, p. 554).

At the time of the issuance of the bond the section in question required the treasurer, after default and demand, to publish a notice of the proposed sale in a newspaper, and that a similar notice should be "served upon any such owner if known, either personally or by depositing the same in the post office at such city, addressed to such owner at his address, if known, with the postage prepaid thereon." By the amendment of 1919 the quoted clause was made to read that a notice similar to that published should "be deposited by the city treasurer in the post office at such city, addressed to the person to whom said property is assessed upon the last assessment roll of such city, * * * if known, and to all record lienholders, with the postage thereon prepaid. When the addresses of such persons are unknown the notice shall be mailed to them at the city in which said property is located." The act makes no provision for the original cost of ascertaining the names of the lienholders of record, nor for the collection thereof from the proceeds of the sale of the property or as a part of the amount secured by the bond in the event of tender of the amount due prior to the date of sale.

The case is not to be distinguished in principle from the recent decision of the Supreme Court on rehearing in bank affirming a decision of Department 2 of the Supreme Court, which affirmed the judgment of the superior court in Los Angeles county. Chapman v. Jocelyn, February 19, 1920, 187 Pac. 962. It was there held that the case must be determined upon the act as it existed when the bond was issued. A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of the contract. In effect, the bond creates a power of sale, whereby its holder may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond was issued. The Constitution forbids the passage of a law impairing the obligations of a contract. "Not only is the bond and the statute a contract, but it is a contract forced upon the parties by the compulsion of law." Chapman v. Jocelyn, supra.

It was well said upon oral argument that to put upon the bondholder the burden of having expert searchers of records determine the names of record lienholders, when no provision is made for the repayment of the expense of such search, would in many instances deprive such bonds of all value, because the cost would amount to more than the amount secured by the bonds.

Let the peremptory writ issue, directing the respondent to make advertisement in accordance with the provisions of the act as it stood at the date of the issuance of the bond.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 216

STONER et al. v. SECURITY TRUST CO. et al. (Civ. 3175.)

(District Court of Appeal, First District, Division 1, California. April 26, 1920.)

1. Appeal and error ⟸882(21) — Failure to request reporter's transcript cannot be complained of where respondents failed to give notice of termination of proceedings for new trial.

Where notice of intent to move for a new trial has been given, but the motion has not been brought on for hearing nor any action taken within three months after service of entry of judgment, the proceedings on the motion were terminated without further order in view of Code Civ. Proc. § 660, and where respondents have failed to give notice of the denial of the motion "or of other termination thereof" as required by section 953a, they cannot, in the absence of anything showing a waiver of such notification, object on appeal to a consideration of the evidence on the ground that appellants did not file their notice with the clerk below requesting the reporter's transcript of the record within 10 days as required by the last-mentioned section; the trial court having discretion to approve the transcript when presented.

2. Quieting title ⟸19—Suit to cancel assignments of mortgage and for recovery of money collected will lie as one to determine adverse claim.

A suit to cancel purported assignment of note and mortgage and for the recovery of money collected by the assignees thereunder may be regarded as a suit under Code Civ. Proc. § 1050, to determine an adverse claim for money or property upon an alleged obligation, and is not objectionable as being an attempt to quiet title to personal property.

3. Descent and distribution ⟸91(1) — Heirs held entitled to sue to cancel assignment of mortgage by decedent and for amounts collected.

Where a decree of final distribution had been duly entered, the distributees were vested with the absolute right and title to a note and mortgage claimed to belong to decedent, and could bring an action to cancel an assignment thereof and to recover money collected by the assignees thereunder.

4. Pledges ⟸16(3)—Evidence held to sustain finding that assignment of mortgage was for security.

In a suit by heirs to cancel a purported assignment of a note and mortgage and to recover money collected by the assignees, evidence *held* to support a finding that the note and mortgage were assigned merely as security for money advanced.

5. Cancellation of instruments ⟸47—Evidence in suit to cancel assignment held to support finding that note and mortgage assigned were worth their face value.

In a suit by heirs to cancel an assignment of a note and mortgage and to recover amounts collected thereunder, a finding that the note and mortgage for $3,500 were worth their face value *held* supported by evidence that the land covered was worth $8,000 incumbered only by a first mortgage for $1,500, and by testimony that the makers of the note were considered financially good for the amount.

6. Bills and notes ⟸167—Note and mortgage with default and option clause held not negotiable.

A note and mortgage on land containing a default and option clause and executed as part of the same transaction *held* not negotiable.

7. Pledges ⟸40 — Pledgee cannot transfer greater interest in pledge than that he himself has.

A holder of a note and mortgage as security for a loan cannot by pledge or sale transfer to another a greater interest in the property than that he has himself.

8. Estoppel ⟸75—One clothing another with apparent ownership cannot assert title against transferee.

Where an owner of a nonnegotiable note and mortgage by assignment for security merely clothes his assignee with apparent title to the paper, and an innocent third party is thereby induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title.

9. Estoppel ⟸116—Purchaser relying on negligence of true owner has burden of proof.

If the purchaser from one who has not title to a note and mortgage pledged with him as security merely relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.

10. Estoppel ⟸110—Facts constituting estoppel must be pleaded.

In an action to cancel an assignment of a note and mortgage, transferred for security merely, a purchaser from the assignee cannot maintain that the true owner was estopped because he clothed his pledgee with apparent ownership, unless he pleads the facts constituting such estoppel.

11. Trial ⟸393(1)—Findings need not be in any particular form.

Findings are not required to be in any particular form so long as they properly dispose of the material matters at issue.

Appeal from Superior Court, Kern County; K. S. Mahon, Judge.

Action by Vining B. Stoner and others against the Security Trust Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Emmons & Johnstone, of Bakersfield, for appellants.

Chas. H. Mattingly, of Los Angeles, for respondents.

WASTE, P. J. The plaintiffs, children and only heirs at law of Vandoren Stoner, claim-

ing to be the owners of a certain note and mortgage executed to the decedent during his lifetime, brought this action to recover the same from the defendants, and for certain sums of money alleged to have been collected thereon. Defendants answered, alleging ownership of the note and mortgage in defendant Katze, by an absolute and bona fide assignment, and that the defendant Security Trust Company held the same as collateral security for certain loans made to defendants Katze and Coyne. The lower court gave judgment for plaintiffs, from which the defendants appeal, seeking a review of the proceedings upon their motion for a new trial.

During the life of Vandoren Stoner, L. P. Keester and M. P. Smith executed and delivered to him their promissory note for $3,500, payable in seven annual installments of $500 each, and secured by a second mortgage upon real property. The note provided that, should default be made in payment of any installment of interest or principal when due, the whole sum of principal and interest should immediately become due at the option of the holder. By an instrument in writing Stoner assigned and transferred the note and mortgage to defendant Katze; the assignment being absolute in form, and purporting to be "in consideration of the sum of ten dollars." This transfer, the trial court found, was made without any consideration, except the sum of $710 loaned by Katze to Stoner, and that the assignment was made as collateral security for the repayment of that amount, and for no other purpose. Stoner gave no authority or direction in reference to the hypothecation or other disposition of the note or mortgage.

Shortly after taking the assignment, Katze borrowed and received of the defendant Security Trust Company the sum of $750, giving his note for the amount. As collateral security for the payment of that note he transferred the Keester and Smith note and mortgage for $3,500 to the trust company; the assignment, by apt reference, being made to secure the particular note. At that time the bank had no knowledge, so the trial court found, that Katze held the assignment from Stoner merely as collateral security. Some time later Katze and Coyne, two of the defendants, borrowed from the bank an additional $500, giving their joint note therefor. Three days later, on May 20, 1913, Vandoren Stoner died. On July 28th following Katze, by an instrument in writing, executed a general assignment of the $3,500 note and mortgage to the bank. The reason for this transaction, as explained by the bank's clerk while on the stand, was that, having only a specific assignment to secure the $750 note executed by Katze, and having advanced an additional amount to Katze and Coyne on their joint note, the bank, on July 28, demanded the new assignment be "given for the money that had been previously advanced."

On the 8th day of December following Katze and Coyne executed a new note to the bank for $2,600. The previously executed notes for $750 and $500, respectively, were thereupon treated as "paid by renewal," and the difference between their total and $2,600, the amount of the renewal note, or $1,350, was credited upon the books of the trust company to the account of defendant Coyne. No new or further assignment was taken by the bank, but on that day it caused the general assignment of July 28th to be recorded, and continued to hold it "as security that they (Katze and Coyne) would pay that $2,600." The limited assignment of March 12th was not recorded.

There is some evidence that the bank had knowledge of the limited interest Katze had in the $3,500 note and mortgage before he hypothecated them for his $750 loan. Katze so stated in his letter to the attorney for the Stoner estate. However, the court found to the contrary. Aside from this bit of evidence, it does not clearly appear that the bank knew of the claim of the estate before the renewal transaction in December. The testimony on the question is conflicting, and the court made no finding in that regard. There is nothing in the record, however, to indicate that the bank made inquiry at any time, during the entire transaction, to inform itself on the point. It took the special and general assignments without any investigation as to the real interest of defendant Katze, in each case for money about to be or already advanced, and apparently by tacit consent, continued to hold the note and mortgage as collateral security for the repayment by Katze and Coyne of the $2,600, to which sum their indebtedness was enlarged by the renewal transaction.

Due administration of the estate of Vandoren Stoner was had, of which the bank had notice. As has been made to appear by diminution of the record, by the final decree of distribution, the note and mortgage for $3,500 executed by Smith and Keester were distributed to these plaintiffs.

The defendant Security Trust Company in its answer admits having collected and appropriated to its own use the first two installments of $500 each upon the $3,500 note and mortgage, together with the interest.

The lower court decided that plaintiffs are the owners of the note and mortgage and entitled to recover the installments of principal and interest collected by the Security Trust Company, less the sum of $710 and interest, representing the amount loaned by defendant Katze to Vandoren Stoner as consideration for the original assignment by Stoner to him. By the judgment this sum was directed to be deducted from the amount collected by the bank, and to be applied by it as a credit on the amount of its claim against defendant Katze. The assignment by defendant Katze to the Security Trust Company was set

aside, and it was ordered to assign and deliver the note and mortgage to plaintiffs.

[1] Respondents make a preliminary objection to a consideration of the evidence in the case, upon the ground that the appellants did not file their notice with the clerk below, requesting a reporter's transcript of the record, within time. That notice must be filed within ten days after notice of entry of the judgment, order, or decree, or if a proceeding on motion for a new trial be pending, within ten days after notice of decision denying said motion, *or of other termination thereof.* Code Civ. Proc. § 953a. The italics are ours. The defendants gave notice of their intention to move for a new trial. The motion was not brought on for hearing, nor was any action taken by the trial court in the matter, within three months after the service of the entry of the judgment, the effect of all of which was a denial of the motion without further order, and amounted to a termination of the proceedings on the motion for a new trial. Code Civ. Proc. § 660. No notice of this "other termination thereof" was given, and there is nothing in the record which indicates that appellants either waived such notification or acted in the proceedings of the cause as if they had received formal and binding notice. They caused no undue delay, and the trial court acted well within its discretion in approving the transcript when it was presented.

[2, 3] Appellants contend that the complaint fails to state a cause of action in that it is based upon an attempt to quiet title to personal property, not provided for by sections 738 or 1050 of the Code of Civil Procedure, and for the further reason that the heirs of the decedent may not maintain the action. The specific object of the suit was to cancel the two purported assignments of the note and mortgage, and for the recovery of the money collected by the assignees under them. It may be regarded as a suit under section 1050 of the Code of Civil Procedure to determine "an adverse claim * * * for money or property upon an alleged obligation." Hoffman v. Kirby, 136 Cal. 26, 29, 68 Pac. 321. As to the other objection, a decree of final distribution in the estate of Vandoren Stoner was duly entered before the action was brought, the effect of which was to vest the absolute right and title to the note and mortgage in the distributees, who, as plaintiffs, brought this action. Garraud's Estate, 36 Cal. 277, 279–280.

[4, 5] The appellants urge as other grounds for reversal the alleged insufficiency of the evidence to support certain findings, and that the findings themselves do not warrant the judgment. That the note and mortgage were assigned by Stoner to Katze, as security for money advanced, is amply supported by the testimony of a number of witnesses as to the admissions made to them by Katze that such was the fact, by his acknowledgment that such was the case contained in his letter to the attorney for the estate of Stoner, and by his own testimony concerning the transaction. His acts and relations with Stoner after the purported assignment, as related by himself, particularly under cross-examination by plaintiffs' counsel, and by the court, were inconsistent with his theory of an absolute assignment. His own denials only raised a conflict in the evidence, which the trial court has determined against him. The claim of the defendant Coyne was also shown by the evidence to be based upon money alleged to be owed to him by the decedent, Stoner. His attitude in the matter has much the appearance of being suggested by an effort to collect the amount out of the proceeds of the $3,500 note and mortgage, without the necessity of presenting a claim against Stoner's estate. The finding that the note and second mortgage for $3,500 were worth their face value is supported by the evidence that the land covered by the mortgage was worth $8,000, incumbered only by a first mortgage for $1,500, and by testimony that the makers of the note were considered financially good for the amount.

[6-9] The assignment by Stoner to Katze was for collateral security only. The note for $3,500, secured as it was by a mortgage on land, both being executed as parts of the same transaction, and containing the default and option clause, was not negotiable. Meyer v. Weber, 133 Cal. 681, 685, 65 Pac. 1110; National Hardware Co. v. Sherwood, 165 Cal. 1, 5, 6, 130 Pac. 881. What, then, is the position of the defendant Security Trust Company under these circumstances? If the bank has any right which it can assert, other than the right to offset its claim against defendant Katze to the extent of $710, owed by the decedent Stoner to Katze, and which the court allowed and provided for in its judgment, it must be because it obtained the note and mortgage under such circumstances as would estop Stoner, and those claiming under or through him, from asserting their claim to its prejudice; for it is the general rule that one in possession of personal property can transfer to another, by pledge or sale, no greater interest in the property than he has himself. There is an exception to this rule, where the owner of the property clothes another with the apparent title to, or power of disposition over, it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto; the true owner being in such case held estopped from afterward asserting his title. Chase v. Whitmore, 68 Cal. 545, 547, 9 Pac. 942; Shafer v. Lacy, 121 Cal. 574, 578, 54 Pac. 72; Shirey v. All Night and Day Bank, 166 Cal. 50, 55, 134 Pac. 1001; Fowles v. National Bank of California, 167 Cal. 653, 659, 140 Pac. 271. Under this principle, a bona fide purchaser of a nonnegotiable

chose in action, from one to whom the owner assigned apparent absolute ownership, may obtain a valid title as against such owner, although the assignee may not be the true owner. This conclusion is reached by the application of the doctrine of estoppel, and the modification of the general rule relating to the transfer of personal property is placed upon that ground. Moore v. Metropolitan National Bank, 55 N. Y. 41, 14 Am. Rep. 173; 2 R. C. L. p. 632; Fairbanks v. Sargent, 104 N. Y. 108, 117, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490. But if the purchaser from one who has not the title, and has no real authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit. Barstow v. Savage Mining Co., 64 Cal. 388, 393, 1 Pac. 349, 49 Am. Rep. 705. The burden is upon the one seeking to invoke the exception to the general rule. Woodsum v. Cole, 69 Cal. 142, 145, 10 Pac. 331; Kenniff v. Caulfield, 140 Cal. 34, 45, 73 Pac. 803.

[10] In the instant case the defendant bank appears to have relied solely upon a legal defense to the action. It contented itself with making common cause with the other defendants in asserting that the assignment by the decedent Stoner to Katze was absolute and for adequate consideration. If it intended to interpose the equitable grounds of estoppel it was incumbent upon it to specially plead the facts constituting such defense. Clarke v. Huber, 25 Cal. 593; Chapman v. Hughes, 134 Cal. 641, 646, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. Not having so pleaded, it could not be now considered (Burk v. City of Santa Cruz, 163 Cal. 807, 811, 127 Pac. 154), even though the appellant was now attempting to avail itself of it, which it is not. By neither averment or proof has it brought itself within the exception to the general rule. Such action on its part seems to be entirely consonant with its chosen line of defense. We feel that it was satisfied to abide by the fate of its codefendants. We are therefore constrained to hold that its interest in the hypothecated note and mortgage was measured by the extent of the advances made to Stoner by Katze, which the trial court has found, on evidence which we must admit is somewhat confusing, to be the sum of $710.

[11] In view of our conclusion in the matter, the point made that certain findings may appear to be immaterial need not be further considered. A large part of this objection arises, no doubt because the lower court's conclusions do not harmonize, with the theory of the appellants. Findings are not required to be in any particular form so long as they properly dispose of the material matters at issue. Millard v. Supreme Council, 81 Cal. 340, 342, 22 Pac. 864; Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194.

We find nothing in the record which would have justified the trial court in granting a new trial.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 47

PALVUTZIAN v. TERKANIAN et al.
(Civ. 3257, S. F. 9093.)

(District Court of Appeal, First District, Division 2. California. April 9, 1920. Opinion of Supreme Court in Bank Denying Hearing June 7, 1920.)

1. **Courts ⟸107—Decisions limited to matters before court.**

It is elementary that every decision is limited in its application to the matters before the court.

2. **Appeal and error ⟸1078(1)—Matters not argued deemed waived.**

On appeal matters not argued by the appellant are deemed to have been waived.

3. **Waters and water courses ⟸156(4)—Obvious easement impliedly retained by grantor of portion of land.**

Where owner of land sold a part after the establishment of an irrigation ditch across the part conveyed, an implied understanding arose that the lands sold were to continue subject to the right to have the water flow through such ditch, the easement being obviously apparent and the parties having knowledge thereof at the time of the grant.

4. **Estoppel ⟸107—Not necessary to plead estoppel in technical words if facts appear on face of complaint.**

If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel be pleaded in technical words.

5. **Estoppel ⟸78(3) — Contract regarding rights in irrigation ditch estopped landowner from denying existence of easement.**

In an action for damages and to enjoin interference with irrigation ditches over defendant's land, defendant *held* estopped to deny the existence of an easement by reason of having entered into a contract with plaintiff and another adjoining landowner recognizing the existence of the easement.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by T. G. Palvutzian against John Terkanian and others. Judgment for defendants, and plaintiff appealed. Reversed.

Astor Elmassian, G. L. Aynesworth, and H. M. Johnston, all of Fresno, for appellant.

C. K. Bonestell and J. A. Steele, both of Fresno, for respondents.

BRITTAIN, J. From a judgment in favor of the defendants the plaintiff appeals. The

suit was for damages and for injunction to prevent interference with certain irrigating ditches and the flow of water over the defendants' land for which the plaintiff claimed an easement.

The court found that prior to 1885 the predecessors of both the plaintiff and defendants owned in one body the lands now owned by them severally. While the lands were held in single ownership two irrigation ditches or canals were constructed across the tract. These ditches were connected with the main ditch or canal of the Fresno Canal & Land Corporation's system of irrigating ditches. Since their construction they have been the only source from which water can be obtained for the irrigation of plaintiff's land, except by the installation of a pumping plant or the acquisition of a right of way for ditches over other property. The ditches were at all times since 1885 the visible and obvious means of transporting water to the lands now owned by the plaintiff. For two or three years between 1885 and 1908 they were not used, but they were used continuously for five years commencing in 1909. In 1908 the owner of the entire tract conveyed to the defendant Terkanian one portion of the tract. Thereafter the grantor and his successors used the ditches on the portion theretofore conveyed. The plaintiff acquired his portion of the original tract in 1915. In October, 1916, "at the special instance and request of the defendant, John K. Terkanian and one Kienitz," who was the owner of an adjoining tract over which the ditches in controversy ran, Kienitz, the plaintiff, and Terkanian entered into an agreement which is summarized in the findings, but to which it is proper to make some further reference. Kienitz was named as the party of the first part, and the plaintiff, Palvutzian, and the defendant Terkanian were joined under the designation of the "second party." It recited the ownership of Kienitz of his land, "and that a certain ditch or canal is now located upon the premises of the first party, and that said ditch or canal is now used for the purpose of furnishing water for irrigation purposes to second party." It was agreed that "in consideration that first party furnish to second party through and by means of a pipe line [which was to be and was constructed in lieu of the old ditch on the Kienitz land] an amount of water equal to the quantity which has been furnished by said ditch or canal to second party, second party hereby agrees to waive any and all rights that they may or might have in said ditch, and further agree that said first party shall be allowed to obliterate said ditch and substitute therefor the said proposed pipe line, it being understood that first party shall in no manner lessen the quantity of water heretofore furnished to second party by and through said ditch or canal." Taking this contract by its four corners, it appears to have been made as much for the benefit of the plaintiff as for the defendant Terkanian, that the latter by joining in it recognized Palvutzian's right to the water as equal to his own, and that all three of the adjoining landowners recognized the right of the lower owners on the ditch to the flow of water over the lands of the upper owners, merely agreeing that on one of the upper tracts the pipe line might be substituted for the existing ditch, thus changing the easement from the right to have the ditch maintained to one to have the same flow of water through the pipes.

Pursuant to this contract the court further found that Kienitz constructed the pipe line and plowed up the ditches on his land; that Terkanian made a ditch connecting the Kienitz pipe line with the westerly of the two ditches over the defendants' land leading to that of the plaintiff, but refused in April, 1918, to allow the plaintiff to connect the pipe line with that ditch. In May, 1918, Terkanian plowed up and filled the easterly ditch and the westerly ditch so that the plaintiff could not thereafter obtain water for irrigation thereby. Sixty acres of the plaintiff's land was then planted in Thompson seedless grape vines, and 60 acres were in pasture. Neither the grape vines nor the pasture will grow or produce without irrigation during the irrigating seasons. It was then found that by reason of the acts of the defendants in plowing and filling up the ditches the plaintiff has been prevented from irrigating any portion of his premises from the old source of supply; that his grape vines and pasture have been dying out and will die out entirely unless they are irrigated; that there was water in the main canals of the irrigation system which would have flowed to and upon plaintiff's premises for irrigation if the ditches had not been plowed and filled up; that the plaintiff's land has depreciated in value in the sum of $300; that the defendants threaten and intend to and will keep the ditches plowed and filled up so that the plaintiff cannot obtain water through them for the purpose of irrigating his land; the plaintiff's damages unless water be obtained for irrigation will be irreparable, the premises materially reduced in value, and the pasture and seedless grape vines on the plaintiff's land will be rendered valueless; and that the plaintiff has no plain, speedy or adequate remedy at law. The court further found that neither the plaintiff nor Terkanian had acquired as against the other any adverse interest in the ditches since the date of the deed to Terkanian.

Upon these findings the court concluded that by the conveyance to Terkanian the plaintiff's predecessor conveyed to him all his right, title, and interest in and to the ditches, and there was no express or implied right of way reserved over the land for ditches to irrigate the land he afterwards convey-

ed to the plaintiff, that in the use of the irrigation ditches after the deed to Terkanian plaintiff's grantor or successors in interest was without right, and that Terkanian had the right to plow and fill up the ditches and is not liable for damages which the plaintiff suffered thereby. The plaintiff and appellant maintains that upon the findings of fact these conclusions of law cannot be sustained, and that in the determination of this appeal on the findings judgment should be entered for the plaintiff for the damages found to have been sustained by him and for injunction in accordance with the prayer of his complaint.

[1, 2] The respondent contends that under the facts the case is not to be differentiated from Taylor v. Avila, 175 Cal. 203, 165 Pac. 533 (Sac. No. 2276). The appellant relies upon a number of cases which unquestionably sustain his position, unless the decision in Taylor v. Avila, supra, is determinative. Cave v. Crafts, 53 Cal. 135; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Jones v. Sanders, 138 Cal. 405–412, 71 Pac. 506; Jersey Farm Co. v. Atlanta R. Co., 164 Cal. 412, 129 Pac. 593; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025. Except Cave v. Crafts, cited upon another proposition than the one chiefly involved in this case, none of these cases was referred to in the opinion of Taylor v. Avila. An examination of the record and briefs in Taylor v. Avila shows that the rule of law announced in the cases relied on by the appellant was not presented to nor considered by the court. It had before it solely the question of the construction and effect of a particular deed. Upon this question the only matters argued in the briefs or decided by the court were that the language used in the deed purported to transfer to the grantee all water rights, ditch rights, etc., and that it did not purport to reserve any then existing water rights for the benefit of the tract of land from which that conveyed by the deed was severed. It is elementary that every decision is limited in its application to the matters then before the court. Grant v. Murphy, 116 Cal. 432, 48 Pac. 481, 58 Am. St. Rep. 188; Chapman v. State, 104 Cal. 690–697, 38 Pac. 457, 43 Am. St. Rep. 158. The decision under consideration was a department decision, and it does not appear that rehearing by the court in bank was sought. It is significant that in the opinion it was suggested there was a probability that the parties intended to include in the deed a reservation in favor of the grantor of the existing easement she then possessed and that by mutual mistake it was omitted therefrom. It was stated the complaint contained no allegation of such mistake, and the plaintiff did not seek reformation of the deed. The opinion closes with the statement that, "as the record stands, we have no choice but to reverse the judgment and order, and it is so ordered." It is also elementary that on appeal matters not argued by the appellant are deemed to have been waived. Churchill v. Lauer, 84 Cal. 233, 234, 24 Pac. 107; Rogers v. Schlotterback, 167 Cal. 35, 52, 53, 138 Pac. 728.

[3] If the appellant in Taylor v. Avila had presented to the court argument under the rule announced in Cheda v. Bodkin, supra, and Jersey Farm Co. v. Atlanta R. Co., supra, and the decision in Taylor v. Avila had been rendered in its present form, this court might have been warranted in concluding the effect of Taylor v. Avila was to overrule the earlier cases. That they are not overruled appears from the fact that in a later case the rule declared in Cheda v. Bodkin, supra, was reannounced by the Supreme Court, and that case cited as authority, the statement being:

"The mere fact that appellant's predecessor was the grantee of one of the respondents under a warranty deed does not prevent an assertion by plaintiff of a right to use the track. Where the owner of one tract of land sells part of it, and that part is burdened by an obvious easement in favor of other persons, or other parts of the larger tract, an implied understanding arises that the burdens and correlative advantages shall continue as they existed before the separation of the title." Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 402, 170 Pac. 832.

This latter decision was one of the other department of the Supreme Court. It is not only the later opinion of the court, but it appears that there was an application for hearing which was denied. This court is bound by the later decision, supported as it is by a long line of decisions not considered in Taylor v. Avila.

The rule of law which was reannounced in Southern Pac. Co. v. Los Angeles Mill Co., supra, received lengthy and careful consideration by this court in Kallenberg v. Long, 179 Pac. 730, and in Nay v. Bernard, 180 Pac. 827, and in both cases it was applied in the manner in which the appellant maintains it should be applied in this case. The matter has received further careful consideration, and no reason appears why this court should overturn a rule of property which has been recognized in this state since the decision in Cave v. Crafts, 53 Cal. 135, decided by the Supreme Court in 1878. Upon the facts found by the trial court, it appears that when the Terkanian deed was made the land conveyed was burdened with an obvious easement for the maintenance of the ditches and flow of water to the property retained by Terkanian's grantor and subsequently conveyed to the plaintiff, and that under the rule to which reference has been made the defendants had no right to destroy the ditches and thus to irreparably injure the plaintiff and his lands.

[4, 5] This case may be further differentiated from Taylor v. Avila, in that it appears

in that case there was no allegation to support a reformation of the deed to express the true intent of the parties. In this case the plaintiff sets up the agreement by which Kienitz and Terkanian both recognized the right of the lower owners to the maintenance of the ditches and the flow of water, and the court found that the plaintiff entered into that agreement at the special instance and request, not alone of Kienitz, but of Terkanian. The contract on its face showed that it was made for the benefit both of the plaintiff and Terkanian. If the facts from which an estoppel arises appear on the face of the complaint, it is not necessary that estoppel shall be pleaded in technical words. Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Beardsley v. Clem, 137 cal. 328, 332, 70 Pac. 175. The effect of pleading this contract, connected with the finding in regard to it, creates an estoppel as against the defendants to assert that an easement, the existence of which was so recognized, does not exist.

The judgment is reversed, with instructions to the trial court to take such further proceedings as are consistent with the views herein expressed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

SHAW, J. Upon the denial of the petition for a rehearing in this case I deem it advisable to state one feature of the decision in Taylor v. Avila, 175 Cal. 203, 165 Pac. 533, which is not noticed in the opinion of the District Court of Appeal, and which clearly distinguishes it from the present case. The facts in that case were that originally Taylor owned 80 acres, being a west half of a northwest quarter, and Avila or his predecessors owned 40 acres adjoining the north end of the 80 acres. Through these tracts a ditch was made leading from the canal to the north, and it was in use for the purpose of irrigating both tracts. Afterwards Taylor conveyed the north 25 acres of her 80-acre tract to one Gularte. Thereafter she continued to use the ditch as before, although no reservation of the right to do so had been made in her deed to Gularte for her 25 acres. Afterwards Gularte sold the 25 acres to Avila and she joined with Gularte in the deed conveying said 25 acres to Avila.

The significant fact in the case is that she had no right or interest whatever in the 25 acres at the time she joined in the deed of Gularte to Avila, except her implied easement, consisting of her right to maintain the ditch through said 25 acres for the benefit of her remaining 55 acres of the 80-acre tract, and that her deed to Avila expressly purported to convey all ditch rights or interests in ditches for irrigating. The only effect the deed could have, so far as she was concerned, was to convey her right to the ditch. There was, therefore, no room for the operation of any implication that she reserved the ditch right, since, from the circumstances, it was obvious that the only possible intention on her part in joining in the deed was to convey to the defendant her right in the said ditch over the 25-acre tract. The case of Taylor v. Avila is in all respects parallel to that of Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091, in which the same conclusion was reached, and it is not contrary to the decisions in Cave v. Crafts, 53 Cal. 139, Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69, Jones v. Sanders, 138 Cal. 405, 71 Pac. 506, Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593, and Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025.

183 Cal. 121

In re STARR'S ESTATE.

STARR et al. v. GRIMES.

(L. A. 6371.)

(Supreme Court of California. June 9, 1920. Rehearing Denied July 3, 1920.)

Exemptions ⊂=50(1)—Insurance money of deceased leaving no spouse or minor children not exempt.

Proceeds of life policies, the annual premium of which does not exceed $500, although exempt to the insured during his life, under Code Civ. Proc. § 690, subd. 18, are to be treated as nonexempt property subject to decedent's debts, where there is no surviving spouse or minor children of the decedent; section 1465, relating to distribution of property, having no application in the absence of such persons.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

In the matter of the estate of Joseph L. Starr, deceased, of which Helen L. Starr is administratrix. From a decree directing her to pay judgment, Mrs. M. E. Grimes, the administratrix, and her coheirs appeal. Affirmed.

W. A. Martin and Leland S. Bower, both of Los Angeles, for appellants.

Jesse F. Waterman, of Los Angeles, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN, of the District Court of Appeal, First Appellate District, while acting as Justice pro tempore of this court in the place of Mr. Justice MELVIN. It is adopted as the opinion of the court.

Joseph L. Starr died intestate in the county of Los Angeles, leaving an estate which consisted wholly of a life insurance policy of approximately $1,200, payable to his executors, administrators, and assigns, the annual premium upon which did not exceed $500. He left him surviving as his only heirs at law seven children all over the age of 21 years. Helen L. Starr, one of such children, was appointed administratrix of the estate. During administration the respondent obtained a judgment against the administratrix for some $1,600, to be paid in due course of administration. In due time the final account of the administratrix was settled and allowed, but the court denied her petition that the balance in her hands be distributed to the heirs of the deceased, and directed that she pay it to the respondent in liquidation and discharge pro tanto of her said judgment. The administratrix of the estate and her coheirs have appealed from the part of the decree directing such payment. In support of their appeal it is their claim that the whole of the estate is exempt from the payment of debts, and should be distributed to them after the payment of the costs of administration.

The provisions of our Code applicable to the situation described are found in section 690 of the Code of Civil Procedure, subdivision 18 of which, in enumerating the kinds of property exempt from execution, specifies "all moneys * * * accruing or in any manner growing out of any life insurance" policy, etc., if the annual premiums paid do not exceed $500; and section 1465 of the same Code, which declares that all exempt property may be set aside for the use of the surviving spouse, or, in case of his or her death, to the minor children of the decedent. There is no doubt that under these sections the policy was exempt from execution during the lifetime of the deceased, and the proceeds after his death. The difficulty that arises in this case results from the fact that there is no express provision for the distribution of exempt property after the death of the debtor except in the case provided for in section 1465, Code of Civil Procedure. Here there was no one entitled to take the property under this provision. There was, therefore, no reason why this property should not be administered in the same manner as any other property belonging to the estate. The law requires that such property shall be applied first to the payment of the debts of the deceased, and after such payment shall be distributed to the heirs. The exemption was intended to apply to the decedent, and upon his death to the surviving spouse, and if there were no surviving spouse then to the minor children of the deceased.

The special provision contained in said section 1465 relating to the distribution of property which during the lifetime of the decedent had been exempt from execution, having as its only beneficiaries the surviving spouse and minor children of the decedent, has no application in the absence of persons comprised within these classes, with the necessary result that such property is to be treated as nonexempt property, and is therefore, like it, subject to the payment of the decedent's debts.

The judgment is affirmed.

WILBUR, LENNON, and SLOANE, JJ., concur.

183 Cal. 126

PEOPLE v. NIINO. (Cr. 2297.)

(Supreme Court of California. June 10, 1920.)

1. Criminal law ⟸1159(2)—Judgment not reversed if supported by evidence.

The Supreme Court will not reverse a judgment given upon a verdict, unless there is no evidence to support it, or when the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, or when it so clearly and unquestionably preponderates against the verdict as to convince the court that it was the result of passion or prejudice on the part of the jury.

2. Homicide ⟸270—Sanity of defendant for jury.

In a prosecution for homicide, sanity of the defendant *held*, under the evidence, for the jury.

3. Criminal law ⟸452(2) — Witnesses acquainted with defendant competent to testify as to sanity.

In a prosecution for murder, where witnesses testified that they had known defendant for many years and were well acquainted with him and saw him frequently, *held*, that the court did not abuse its discretion in allowing such witnesses, as intimate acquaintances of the defendant, to give their opinion upon his mental sanity, under Code Civ. Proc. § 1870, subd. 10.

4. Criminal law ⟸1153(2)—Competency of intimate acquaintance to testify as to sanity matter within discretion of trial court.

The determination of the question as to whether or not one is an intimate acquaintance with another, and therefore competent, under Code Civ. Proc. § 1870, subd. 10, to give an opinion as to mental sanity, is to a great extent within the discretion of the trial court, whose ruling thereon will not be disturbed except where the evidence is such as to leave no just room for question that the discretion has been improperly exercised.

5. Criminal law ⟸1035(3)—Remark of court not objected to not error.

A remark by the court, when a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, "They can all speak English, but they won't," cannot be complained of on appeal, where the remark, when made, was not assigned as misconduct.

6. Criminal law ⟸656(2)—Remark of court not prejudicial.

A remark by the court, in a homicide case, when a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, "They can all speak English, but they won't," *held* not prejudicial.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

T. Niino was convicted of first degree murder, and he appeals. From the judgment and an order denying his motion for a new trial. Judgment and order affirmed.

F. E. Kilpatrick and H. Scott Jacobs, both of Hanford, for appellant.

U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN, of the District Court of Appeal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

The defendant was convicted of murder in the first degree. He moved for a new trial, which motion was denied, and he was thereupon sentenced to suffer the death penalty. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

At the trial it was shown by the undisputed evidence that on October 27, 1919, the defendant shot and killed a young Japanese woman named Misco Hayashi, whom he desired to marry, but whose father had repeatedly refused consent thereto. Upon the last of such refusals the defendant almost immediately procured a double-barreled shotgun, went to the place where the young woman was at work in a vineyard picking grapes, and there deliberately fired two shots into her face and throat, causing almost instant death.

In support of his appeal the defendant contends that the evidence is insufficient to sustain the verdict, that the court erred in admitting certain testimony, and that the court and prosecuting attorney were guilty of misconduct prejudicial to the rights of the defendant.

[1, 2] Defendant contends that the evidence is insufficient to support the verdict. In view of the gravity of the case we have carefully examined the record in order to learn if this contention can be maintained, and after such examination we are satisfied that it cannot. This court will not reverse a judgment given upon a verdict unless there is no evidence to support it, or when the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, or when it so clearly and unquestionably preponderates against the verdict as to convince the court that it was the result of passion or prejudice on the part of the jury. People v. Willard, 150 Cal. 553, 89 Pac. 124. The record before us discloses no such case. The evidence upon the only issue of fact in the case—the soundness or unsoundness of mind of the defendant—was conflicting. Witnesses were introduced by the defendant who testified that in a town in Japan of about 1,600 inhabitants, where the defendant was reared, his maternal grandfather and his mother were reputed to be in-

sane; also that his brother and sister, as well as he himself, acted queerly, and were all regarded as mentally defective. There was also evidence tending to show that the defendant a few years before the trial had contracted syphilis; that he was subject to fits and was the victim of some nervous disturbance. A witness was also called who testified that the defendant was more excited and showed more concern over being served with summons and complaint in a justice's court suit than upon his arrest under the present charge. Two medical men, testifying as experts, after an examination of the defendant, and in answer to a hypothetical question, gave it as their opinion that the defendant was not sane on the day he shot the deceased. On the other hand, there were a number of witnesses introduced by the prosecution, intimate acquaintances of the defendant, whose opinion on this question was contrary to that of the doctors. Under such evidence, it was clearly a question of fact for the jury to determine whether, at the time of the homicide, the defendant was sane; and their conclusion that he was, as evidenced by their verdict, will not be disturbed by this court. People v. Willard, supra.

The defendant's claim as to the improper admission of testimony is directed to that of six of the nine witnesses called by the prosecution and who, as intimate acquaintances of the defendant, testified that on or about the day of the homicide he was of sound mind, and is founded upon the contention that none of these witnesses was such intimate acquaintance within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure, which provides that an intimate acquaintance may, upon a trial, give his opinion as to the mental sanity of a person.

One of these witnesses had known the defendant for seventeen years, and the latter had, during four or five years of that time, worked for him. He worked satisfactorily and their relations were friendly and up to a week of the shooting he visited and associated with the defendant.

Another witness testified that he, too, had known the defendant for about seventeen years; that within that time the defendant had worked for him during four or five plowing seasons, the last occasion being about two years before the trial; that he frequently saw the defendant after that, and in fact, had seen him the day before the shooting; that he and the defendant were on friendly terms and had often played cards together.

A third witness testified that he had known the defendant for sixteen or seventeen years; that during the first part of their acquaintance the defendant was engaged in business and during that time they seldom met, but later the defendant sold his business and went to the country, and thereafter the witness saw much of the defendant and they became well acquainted.

Still another witness testified that he had known the defendant about nine years, during which time they had worked together at different places, including that at which the homicide was committed. Another witness was a friend and associate of the defendant for four years.

The testimony of the other witnesses introduced as to this phase of the case was similar to the evidence just briefly detailed.

[3, 4] These witnesses were Japanese, and each of them testified that, in his opinion, the defendant was sane on the day of the homicide. No error was committed in allowing these persons, as intimate acquaintances of the defendant, to give their opinion upon his mental sanity. The determination of the question as to whether or not one is an intimate acquaintance of another, and therefore competent, under subdivision 10 of section 1870 of the Code of Civil Procedure, to give such opinion, is of necessity, to a great extent, within the discretion of the trial court, and the ruling of that court will not be disturbed except where the evidence is such as to leave no just room for question that the discretion has been improperly exercised. People v. Clark, 151 Cal. 207, 90 Pac. 549. It is plain that the court, in the instant case, did not abuse its discretion in admitting the testimony of the witnesses referred to.

[5, 6] During the trial a question arose as to whether or not one of defendant's witnesses should be permitted to give his testimony through an interpreter, upon which the court remarked, "They can all speak English, but they won't." It is claimed on behalf of the appellant that this observation by the court constituted misconduct which seriously affected his right to a fair trial. No such claim was made at the time of the occurrence, and the remark was not then assigned as misconduct. Moreover, we do not regard it as such, and we cannot perceive how it could have had an influence on the jury prejudicial to the defendant's substantial rights. Nor do we find any merit in the point that the prosecuting officer indulged in an unfair imputation against defendant's counsel which was prejudicial to the defendant. If the imputation charged was made, it was unfair, but it cannot be regarded as having had any effect on the right of the defendant to a fair and impartial trial.

It follows from the foregoing that the judgment and order should be affirmed, and it is so ordered.

ANGELLOTTI, C. J., and SHAW, LAWLOR, WILBUR, LENNON, OLNEY, and SLOANE, JJ., concur.

183 Cal. 131

SOUTH SAN FRANCISCO PACKING & PROVISION CO. v. JACOBSEN et al. (S. F. 8829.)

(Supreme Court of California. June 10, 1920.)

1. Sales ⊂=52(7)—Finding that purchaser did not obtain possession by means of worthless check held warranted.

In an interpleader action involving disposition of proceeds of three carloads of hogs, finding that purchaser who at times between the date he gave a check and its presentation had on hands funds more than sufficient to cover the check was not guilty of fraud in obtaining delivery by means of a worthless check *held* warranted despite other contradictory evidence.

2. Sales ⊂=199—Whether title passes at delivery depends on intention as shown by circumstances.

Whether title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case.

3. Sales ⊂=202(2, 3)—Title to hogs held not to pass where check for price was dishonored.

Where hogs were sold under an arrangement that check should be given at time of delivery, the sale should be treated as one for cash, and where the check was dishonored title did not pass; for, while delivery is a most significant fact as indicating the intention to transfer title, it is not conclusive, and where a check is accepted as a particular form of cash payment and is dishonored, the seller can resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken, and it is apparent where check was demanded at time of delivery that the sale was one for cash.

4. Sales ⊂=222—An attaching creditor has no greater rights in personal property than his debtor.

Where title to personal property did not pass to a buyer on delivery because the check for the purchase price was dishonored, the attaching creditor of the buyer has no right superior to his debtor, and the original seller is entitled to the property or proceeds as against the attaching creditor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action in interpleader against J. Jacobsen and another, D. A. Taylor and Arthur Rosecrans, individually and as copartners under the firm name and style of Taylor & Rosecrans, and the Western Meat Company. From a judgment for last-named defendant, Taylor and Rosecrans appeal. Reversed.

Tum Suden & Tum Suden, of San Francisco, for appellants.

Lilienthal, McKinstry & Raymond, Sullivan & Sullivan, and Theo. J. Roche, all of San Francisco, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal of the First Appellate District while acting as Justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

This is an appeal from a judgment in favor of the defendant Western Meat Company, and against the defendants Taylor & Rosecrans, in an action in interpleader.

Briefly the facts of the case are these: Taylor & Rosecrans, at the time the transaction here involved took place, were copartners engaged in the live stock business in the state of Idaho, as also was the defendant Jacobsen, their respective places of business, however, not being in the same locality. Shortly before the 10th day of June, 1915, Jacobsen, by telephone, purchased from Taylor & Rosecrans three carloads of hogs at an agreed price, the hogs to be delivered at a certain place in Idaho, where Jacobsen or his agent was to receive them and make payment therefor by check. Accordingly the hogs were delivered and a check for $3,490.98 was given in payment by Jacobsen's agent, the delivery of the check taking place at midnight on said June 10th. Before noon of the following day it was deposited for collection with the firm's bank at Burley, Idaho. It reached the bank in Idaho Falls on which it was drawn three days later, i. e., Monday, June 14th, when payment was refused for lack of funds. As is apparent, Saturday afternoon and Sunday falling within these three days, the actual business time comprehended within said period of three days was but a day and a half. There being no evidence in the record to the contrary, we will presume that the check was presented for payment in the ordinary course of business. On the 10th day of June, when the check was delivered, Jacobsen's bank balance was $1,733.37; on the next day, June 11th, Friday, said balance was increased to about $5,000; on Saturday, June 12th, it had been reduced to about $4,000, and on Monday, when the check was presented for payment, said balance was $1,341.57. Jacobsen had no arrangement with the bank for credit or overdraft.

Shortly after the purchase of the hogs by Jacobsen he disappeared. Commencing with June 14th many checks drawn by him were, when presented at the bank, dishonored. In the meantime Jacobsen had shipped the hogs to the plaintiff, which in turn disposed of them in San Francisco, and the fund involved in this litigation is part of the sum realized by the plaintiff from their sale. While there is some dispute on the subject, nevertheless it fairly appears from the record, not only that defendants

Taylor & Rosecrans, upon learning of the dishonor of the check, demanded the fund from the plaintiff under a claim of ownership, but also that the respondent, Western Meat Company, a creditor of Jacobsen, at about the same time commenced an action against him and levied an attachment on this fund. The plaintiff being thus confronted with two conflicting claims, commenced this action in interpleader against the partnership, Jacobsen, and the Western Meat Company. Jacobsen defaulted, and judgment went for the Western Meat Company as against Taylor & Rosecrans, who have appealed.

[1] The appellants contend that Jacobsen, having obtained delivery of the hogs by means of a worthless check, was guilty of fraud, and that therefore the sale was void, both as to Jacobsen and his attaching creditor. It is true, as contended by the appellants, that the issuance by Jacobsen of this check, payment of which was refused for lack of funds, coupled with his unexplained disappearance, is some evidence of fraud. It appears, however, that after the issuance of the check, and before its presentation for payment three business days later, Jacobsen, on two of those days, had more than sufficient money on deposit to meet the check. This circumstance, with the presumption of innocence and fair dealing, furnish some foundation for the finding of the trial court against fraud, so that, in view of what may thus be regarded as a conflict of evidence, we are not at liberty to disturb this finding.

There are several technical points made by the appellants in support of their appeal; but, as we have concluded that the judgment must be reversed upon the main ground urged, it will be unnecessary to discuss these. We are thus brought to the consideration of the principal question involved, viz. whether or not title to the hogs passed at the time of the delivery by Jacobsen's agent of the check. We are of the opinion that this question must be answered in the negative, and, consequently, that the appellants are entitled to the fund as against Jacobsen's attaching creditor, the Western Meat Company.

[2-4] Whether or not title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case, so that the question is ordinarily one of fact for the jury, or for the court when sitting without a jury. Where, however, the facts bearing upon the question of intent are undisputed, only a question of law is presented. Here the evidence shows without conflict that Jacobsen was to pay for the hogs upon delivery by check; and it is argued by the respondent that accordingly, a check having been given and received in payment for the hogs, title to the animals passed to the buyer notwithstanding that upon due presentation the check was dishonored. This argument is supported by reference to cases holding that parties may agree to accept a check or bill or note as absolute payment for goods sold, in which case title to the goods will pass upon such acceptance irrespective of whether the paper is honored upon due presentation or not. We think, however, that the facts of this case do not bring it within the principle referred to, for it is quite apparent that the requirement of the vendor that a check should be given by the buyer upon the delivery of the hogs was intended as the equivalent of an insistence upon payment on delivery; in other words, that it was not a sale on credit, nor for the check as such, but that delivery of the animals and payment for them, though such payment might be made by check, were to be simultaneous, and the transaction was understood by the vendee in this sense. The legal situation thus arising can logically be no different from one where the terms of the sale are cash on delivery and a check is accepted by the vendor. In such case it is held that the acceptance of the check is no waiver of immediate payment; and, although delivery is made of the goods upon receipt of the check, title thereto does not pass as between the parties unless, upon due presentation, the check is paid.

"A check is accepted as a particular form of cash payment, and if dishonored the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken." Benjamin on Sales (7th Ed.) pp. 755–772.

"If the sale is for cash, and the check of the buyer is taken, this will operate as no more than a conditional payment, as well as a conditional delivery; and if upon due presentation of the check it is dishonored the vendor may retake possession of the goods." 23 R. C. L. p. 1448.

"While a delivery is perhaps the most significant fact as indicating an intention to transfer the title, it is not conclusive, and, notwithstanding there has been a delivery, the property will not pass if it appears that such was the intention of the parties, as when payment is made a condition precedent to the passing of the property." 35 Cyc. 308.

"The title will not pass until payment if by the terms of the contract such payment is a condition precedent, or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived." Id. 322.

"The condition as to payment or security is one which may be waived by the seller, in which case title to the goods sold will vest in the buyer although the condition has not been performed. * * * Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by all the facts and circumstances of the case, and so it is ordinarily a question of fact for the jury.

If the sale is for cash, the mere acceptance of a check does not constitute absolute payment or waiver of the condition as to payment. Where the seller delivers the goods conditionally and without any intention of waiving payment or security, the property does not pass; and in order to render the delivery conditional within the application of this rule it is not necessary that there should be any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties, or that the delivery was made in the expectation of immediate payment, the question being primarily one of intention, as shown by all the facts and circumstances of the case. * * * So if the seller delivers on an understanding, express or implied, that he is to receive immediate payment or security he may reclaim the goods, or if he delivers on payment by check instead of cash, and the check is dishonored, he may reclaim the property." Id. pp. 327, 328.

In effect, this sale was for cash as distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, and as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation was dishonored, title to the hogs remained in the seller. In Johnson, etc., Co. v. Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615, it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor, unless it is otherwise expressly agreed. In Nat. Bank v. Chicago, etc., Ry., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact, payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional, or a means of obtaining the money. So, in Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527, it is held that payment by check is a mere mode of making a cash payment; that it is conditional only; and if the check, upon due presentation, is dishonored, the vendor may retake the goods from the purchaser.

There is nothing in this record indicating that the original sellers intended to accept Jacobsen's check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience, and to obviate the necessity of handling and transporting large sums of money with its attendant risks. In the case of Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28, it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored was accepted in payment of the debt sued upon should not be construed as signifying anything more than the provisional or conditional payment presumed by law, and is no evidence of absolute payment.

The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchaser from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the attaching creditor is concerned it has no better right to the fund than Jacobsen himself. Ward v. Waterman, 85 Cal. 491, 508, 24 Pac. 930.

It follows that the judgment should be reversed; and it is so ordered.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LENNON, SLOANE, and LAWLOR, JJ., concur.

183 Cal. 137

PEOPLE ex rel. MASTICK et ux. v. LAKE COUNTY WATER DIST. et al. (S. F. 8850.)

(Supreme Court of California. June 11, 1920.)

1. Waters and water courses ⟸216—Act providing for water districts and for inclusion of lands without notice not unconstitutional.

If act providing for creation of water districts authorized inclusion in district by supervisors of lands not included within boundaries defined by any noticed petition, without consent of owners and without notice or opportunity to them to be heard, the act would not thereby violate any constitutional guarantee.

2. Waters and water courses ⟸226—Act for organization of water districts precludes inclusion of land not within boundaries shown in petition.

St. 1913, p. 1049, providing for the incorporation of county water districts, precludes the inclusion by the supervisors of land not included within the district as shown by petition initiating the proceeding, published notice of proposed presentation of which is required, except when such inclusion is had on application of the owner of the land.

3. Waters and water courses ⟸226—Act for incorporation of water districts permits supervisors to exclude lands within proposed district to extent stated.

St. 1913, p. 1049, providing for the incorporation of county water districts (section 3), *held* to mean that solely with regard to territory described in the petition the supervisors shall make such changes in the proposed bound-

ary as may be deemed advisable, provided that they may not exclude from the district as proposed by the petition any territory to be benefited, in their judgment, or allow to remain therein any lands which will not be so benefited, except that on application or with consent of owner of land outside the proposed district they may in their discretion add such land.

4. Waters and water courses ⇐226 — Water district to which lands other than shown in petition were added not properly organized.

Lake county water district, to whose territory, as shown by original petition, the board of supervisors added 50,000 acres separated from the district by high mountains, increasing its area by approximately one-third, this not on application of any owner of such added land, *held* not organized in compliance with St. 1913, p. 1049.

In Bank.

Appeal from Superior Court, Lake County; Emmet Seawell, Judge.

Proceeding in quo warranto by the People of the State of California, on the relation of George H. Mastick, and Lizzie Mastick, his wife, against the Lake County Water District and others. From judgment for defendants, plaintiffs appeal. Reversed.

U. S. Webb, Atty. Gen., and Alan C. Van Fleet, of San Francisco, for appellants.

H. E. Witherspoon, of Lakeport, for respondents.

ANGELLOTTI, C. J. This is a proceeding in quo warranto against the Lake county water district and its directors to have it adjudged that all proceedings had relative to the formation of such district are void, and that the district be dissolved and restrained from acting as a corporation and exercising the franchise of a corporation, and for such other relief as may be meet and proper. Judgment was given decreeing the district to be a legally created, acting, and existing county water district of the state of California, duly organized and incorporated under the act relative to such districts, approved June 10, 1913, and, in effect, denying the relators all relief. We have here an appeal by plaintiffs from such judgment.

Two principal claims are made by appellants; one being that there was such a material and substantial departure by the board of supervisors from the provisions of the act in the matter of inclusion in the proposed district of lands not within the boundaries of the district, as set forth in the original petition as to render the whole proceeding void; and the other being that if the act purported to authorize the course followed in this matter it is in violation of rights guaranteed relators by both federal and state Constitutions.

The act (Stats. 1913, p. 1049) is one providing for the incorporation, organization, and powers of county water districts. It provides explicitly how such a district may be brought into existence. By its terms:

"The people of any county, * * * or portion of a county, * * * having a population of not less than one thousand inhabitants, may organize a county water district under the provisions of this act by proceeding as herein provided." Section 2.

The proceeding for the creation of such a district must be inaugurated by the presentation to the board of supervisors of the county at a regular meeting of a petition signed by "registered voters within the boundaries of the proposed water district, equal in number to at least ten per centum of the number of votes cast in said proposed county water district for the office of Governor" at the last general election. The petition must "set forth and describe the proposed boundaries of such water district, and shall pray that the same be incorporated" under the provisions of the act. The text of the petition must be published in a newspaper or newspapers printed and published in the county, together with a notice stating the time of the meeting of the board of supervisors at which the same will be presented and considered, for at least two weeks before the time at which the same is to be presented; the publication showing the names of at least five of the signers and the number of signatures attached. The published notice must also state that at the time stated "all persons interested therein may then appear and be heard." At such time the board of supervisors shall hear the petition and those appearing thereon and may adjourn such hearing from time to time, not exceeding four weeks in all. Then follow the provisions here directly involved, which are as follows:

"On the final hearing said board shall make such changes in the proposed boundaries as may be deemed advisable and shall define and establish such boundaries. But said board shall not modify said boundaries so as to exclude from such proposed district any territory which would be benefited by the formation of such district; nor shall any lands which will not, in the judgment of said board, be benefited by such district, by means of any of said systems of works, be included within such proposed district. Any person whose lands are benefited by such district may upon his application, in the discretion of said board, have such lands included within said proposed district."

Upon the final determination of the boundaries of the district the board must give notice of an election to be held in the proposed water district for the purpose of determining whether the same shall be incorporated. If a majority of the votes in each municipal corporation or part thereof includ-

ed in the district, and also in the unincorporated territory included therein, be in favor of such incorporation, the board shall make an order declaring the territory duly organized as a county water district. On this a certificate of incorporation is issued by the secretary of state, and thenceforth the district is deemed incorporated. The board's finding in favor of the genuineness and sufficiency of the petition and notice is final and conclusive against all persons except the state upon suit commenced by the Attorney General within one year after the order of the board declaring the district organized. (This suit was so commenced.) The district is governed by its own board of directors selected in the mode provided in the act. It is clothed with all the powers appropriate to the acquirement and operation, as a business, of a water system which is primarily for the benefit of the inhabitants and property in the district, and water of which, when there is a surplus, may be sold outside the district. In aid of its purposes it may issue bonds, the principal and interest thereof to be paid by the district. The express intention of the act is to require all operating expenses, as well as expense of repairs and depreciation of works and interest on bonded debt and, "so far as possible," principal of bonded debt as it falls due, to be paid from the revenues of the district, the directors being commanded to fix such rates for water as will enable this to be done; but it is expressly provided that if, from any cause, the revenues are inadequate to pay such interest or principal, the directors shall furnish to the board of supervisors and county auditor an estimate of the minimum amount of money required, and the board must levy a tax on all property in the territory comprising the district to raise the amount. This tax constitutes a lien on all the property in such territory, having the same force and effect as other liens for taxes.

The original petition presented in this manner, referred to as the Maher petition, was for the organization and incorporation as a county water district of certain territory described therein, constituting the central part of Lake county, surrounding Clear Lake, the waters of which, its tributaries, and other sources of water within the contemplated district it was proposed to use. It was signed by the requisite proportion of voters of the proposed district, and notice of the proposed presentation of the petitions and the time thereof was duly published, as required by the act. The matter came on for hearing as noticed. While the matter was pending before the board of supervisors two other petitions, with an aggregate of 73 "registered voters in a part of Lake county that was not included in the proposed water district," were presented, one known as the Akin petition and the other as the Herrick petition. These petitions asked that there be included in the proposed water district all that part of the county south of the district as originally proposed, the additional territory comprising, it is said, 50,000 acres, and increasing the area of the proposed district approximately one-third. All of this additional territory is separated from the lands described in the Maher petition "by high mountains." Of this additional territory the relators own 4,412.81 acres. No notice was ever published of the proposal to present or the presentation of either the Akin or Herrick petitions. Neither of the relators signed any of the petitions, or received notice "of any kind or character whatsoever of the proceedings or any part thereof," or "had an opportunity to be heard before the board of supervisors of said county as to whether or not the" additional territory "should be included within" the district, or "to be heard at all on the matter of the formation of the" district. The board included the additional territory in the district, and at the special election held thereafter within the district as finally fixed by the board a majority of the votes cast were in favor of the incorporation of the district. It may be noted that the report of the vote by precincts contained in the record indicates that the vote in the additional territory was heavily against the proposition. The board then made its order declaring the district, as enlarged by the additional territory, duly organized and on January 15, 1916, the certificate of the secretary of state was issued. This action was commenced within three months thereafter.

[1] It may be conceded solely for the purposes of this decision that, assuming that the act authorized the inclusion in the proposed district by the board of supervisors of lands not included within the boundaries defined by any noticed petition, without the consent of the owners of such land, and without any notice to them or opportunity to them to be heard before the board upon the question of the propriety of including their land in the proposed district, there would be nothing therein opposed to any constitutional guaranty, and this upon the theory that the steps provided for the organization of such a district are simply for the creation of a public corporation to be invested with certain public duties which it is to exercise in behalf of the state and which do not directly affect private property. See Henshaw v. Foster, 176 Cal. 507, 513, 515, 169 Pac. 82. So conceding, it would, however, seem most reasonable, in view of the provisions of the act, that every property owner whose property is proposed to be included should have some sort of notice and opportunity to be heard on that question. What we have said as to the act shows that all the property in such a district is practically pledged to the proper operation of the district and the discharge of all its obligations, financial and otherwise. The hear-

ing before the board of supervisors prior to the final fixing of the boundaries provided by the act is the only opportunity afforded a property owner to show that his property, as to which it is proposed to create this obligation, would be in no way benefited by such district. That he should have such an opportunity was doubtless one of the main objects for the notice of hearing provided by the act.

[2] Although the precise question appears never to have been decided by this court in any other way than as dictum, we are of the opinion that the act, reasonably construed, precludes the inclusion by the supervisors in such a district of land not included within the boundaries of the district as set forth in the petition initiating the proceeding, and of the proposed presentation of which published notice is required, except when such inclusion is had upon the application of the owner thereof. The petition is one by voters of the territory described therein, asking that such territory be incorporated as such a district. The proceeding is one directed exclusively to that particular territory, to determine whether it shall be constituted such a water district. No suggestion of the possible inclusion of land not part of this territory is provided for, either in petition or the notice. It apparently concerns, in so far as the enforced inclusion of their land is concerned, only those within the proposed district as the same is described in the petition and notice. It is in the light of this fact, together with the provisions as to notice, as well as in the light of what immediately follows, that we must read the provision that—

"On the final hearing said board shall make such changes in the proposed boundaries as may be deemed advisable and shall define and establish such boundaries."

This is immediately followed by the provision that in any such change the boundaries shall not be modified so as to exclude from the proposed district any territory which would be benefited by the formation of the district. Then follows the provision that no land which will not, in the judgment of the board, be benefited by such district by means of any of said system of works, be included in such district. Then follows the independent separate provision that—

"Any person whose lands are benefited by such district may upon his application, in the discretion of said board, have such lands included within said proposed district."

There is no express provision for the addition to the proposed district of land not included within the boundaries given by the petition other than the one just quoted, which makes the application of the owner a prerequisite to such action by the board. It is to be noted, too, that this provision is entirely superfluous if the board, by virtue of the previous provisions, already has the power to add such land to the district without the application or consent of the owner.

[3] We are of the opinion that, taken altogether, these provisions of section 3 of the act mean simply that solely with regard to the territory described in the petition the board of supervisors "shall make such changes in the proposed boundaries as may be deemed advisable," provided that they may not exclude from the district as proposed by the petition any territory which, in their judgment, will be benefited by the formation of the district, or allow to remain therein any lands which, in their judgment, will not be so benefited, except that on the application or with the consent of the owner of land outside the proposed district, which will be benefited by the district, they may, in their discretion, add such land to the proposed district. The meaning might perhaps have been more clearly expressed, but this, we think, was the evident intent. Although in no way necessary to the discussion, this court in Central Irrigation District v. De Lappe, 79 Cal. 351, 360, 21 Pac. 825, 828, in considering a provision of the so-called Wright Irrigation District Law (Stats. 1887, p. 29), in all material respects the same as the one here involved, said:

"It is to be observed that no power is given to the board to include lands which are not included by the petition, except upon request of the owner."

It was held in that case that there was nothing in the law requiring such request to be in writing. A similar provision contained in the irrigation district act of March 31, 1897 (Stats. 1897, p. 254), as amended March 26, 1911 (Stats. 1911, p. 510), was referred to in Imperial Water Co. v. Supervisors (certiorari), 162 Cal. 14, 25, 26, 120 Pac. 780, where it was claimed the order of the board of supervisors was void because it included certain tracts of land not within the boundaries described in the petition. The order was silent upon the question whether the owners of such land applied to have them made part of the district. It was said that the plaintiff was in no way interested in such land, and that "they comprise a very small proportion of the district as finally established." It was said that "whatever the rights of the owners thereof [the land therein] may be, the consideration thereof is immaterial to the present case," in that the plaintiff in that proceeding had "no right to invoke aid from them and no right to represent them here," and that "the lands comprise so insignificant a portion of the district that the exclusion thereof from the legal boundaries would not be sufficient to nullify the order providing for the organization of the district."

[4] This action is one contemplated by the act, an action seasonably commenced by the people of the state on the relation of own-

ers whose land has been improperly included in the district. The territory added by the board, as we have seen, comprised some 50,000 acres, separated from the proposed district "by high mountains," and increasing the area of the district approximately one-third. It is not made to appear that a single owner of any of this 50,000 acres of land asked that his land be included in the district, the only request in the matter being that of certain "registered voters" of portions of Lake county not included in the proposed water district. Certainly it cannot fairly be said that the departure from the law in the matter of the organization of this district, as we read it, was not a very substantial one. It seems to us to be such that it may not fairly be held that the district was organized in accord with the provisions of the act, substantial compliance with which is essential.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.

183 Cal. 124

CALIFORNIA NAT. SUPPLY CO. v. FLACK et al. (L. A. 6060.)

(Supreme Court of California. June 9, 1920.)

1. Corporations ⊂=426(7)—Payment on note a ratification of its unauthorized execution.

A payment on a note by a corporation was a ratification of the note's unauthorized execution by a corporate officer.

2. Corporations ⊂=592—Proclamation unnecessary to dissolution for nonpayment of license and franchise tax.

A corporation which fails to pay license and franchise tax becomes defunct, under St. 1915, pp. 425, 426, §§ 7, 10, 12, and St. 1913, p. 7, § 24, because of the nonpayment, and not by proclamation of the Governor.

3. Corporations ⊂=630(6)—Judgment against defunct corporation void.

A judgment rendered against a defunct corporation, in an action brought after the forfeiture of its charter by reason of failure to pay license and franchise taxes, is void.

Department 2.

Appeal from Superior Court, Los Angeles County, Fred H. Taft, Judge.

Action by the California National Supply Company against C. L. Flack and J. H. Lindsey, as trustees for the Gate City Oil Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Dockweiler & Mott and Albert M. Cross, all of Los Angeles, for appellants.

Flint & Jutten and H. S. MacKay, Jr., all of Los Angeles, for respondent.

WILBUR, J. This is an action brought upon a promissory note executed on behalf of the corporation by the president and secretary of the Gate City Oil Company to recover from the directors of that corporation, acting as trustees, after the forfeiture of the corporate charter for nonpayment of the license and franchise tax. The plaintiff recovered judgment and two of the defendants appeal.

The note sued on was given in renewal of notes executed for the purchase price of supplies furnished by the plaintiff to the defunct corporation. Only two points are presented on the appeal: First, that the court erred in refusing to permit evidence of the lack of authority of the president and secretary to execute the note in question; second, that an action had been previously brought upon the same note against the Gate City Oil Company, and that the judgment therein obtained against that company for the amount thereof was a bar to this action.

[1-3] As to the first point, it is sufficient to say that it is admitted that several months after the execution of the note the corporation paid $250 on account thereof. Such payment constituted a ratification thereof, and therefore the question of the previous authority on the part of the president and secretary to execute the same becomes immaterial. 10 Cyc. 1081. The second point depends upon the legal effect of the failure to pay the corporate taxes. The statutes of 1915 provide that the failure to pay the corporate license tax ipso facto terminates the corporate existence and that the forfeiture occurs on the Saturday preceding the first Monday in March (i. e., March 4, 1916) at 6 o'clock p. m. Stats. 1915, §§ 7, 10, 12, pp. 422, 425. See Rossi v. Caire, 174 Cal. 74, 81, 161 Pac. 1161; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 648, 103 Pac. 341; Lewis v. Curry, 156 Cal. 93, 96, 103 Pac. 493; Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 Pac. 1040. The provision requiring the Governor to issue a proclamation of such default and forfeiture is not contained in the license tax law, but in the law taxing corporate franchises (Stats. 1913, p. 7, § 24) and only applies to forfeitures for the nonpayment of the taxes on franchises. In either event the dissolution of the corporation is effected by operation of law, because of such nonpayment, and not by proclamation.

The case of Kehrlein-Swinerton Const. Co. v. Rapken, 30 Cal. App. 11, 156 Pac. 972, relied upon by appellant to establish the necessity of the Governor's proclamation to establish or create the forfeiture of the charter, has no application to the facts here, for that decision construed the act of 1905, which provided that the forfeiture occurred 60 days after the proclamation (Stats. 1905, p. 493, § 6), and hence properly held that proof of the

proclamation was an essential element in establishing such forfeiture. Therefore, the prior action upon the note, begun March 10, 1916, was not saved by the proviso of the statute permitting the prosecution to judgment of actions pending at the time of forfeiture (Stats. 1915, p. 427, § 13), notwithstanding the fact that the Governor's proclamation was not made until March 28, 1916.

A judgment rendered against a defunct corporation in an action brought after the forfeiture of its charter is void. Crossman v. Vivienda Water Co., 150 Cal. 575, 585, 89 Pac. 335; Lowe v. Superior Court, 165 Cal. 708, 712, 134 Pac. 190; Newhall v. Western Zinc Min. Co., supra. The prior judgment, therefore, was not a bar to the present action.

The judgment is affirmed.

We concur: SLOANE, J.; LENNON, J.

183 Cal. 149

JOHNSON v. MONSON et al. (S. F. 8798.)

(Supreme Court of California. June 11, 1920.)

1. Master and servant ⊂=305—Assault, though made in violation of orders, actionable.

A saloonkeeper is liable for an assault on a patron by a bartender, authorized to maintain order, though the assault was made in violation of express orders not to use physical force.

2. Master and servant ⊂=302(3) — Assault, though malicious and willful, actionable.

A saloonkeeper is liable for an assault on a customer by his bartender, committed in the course of keeping the saloon in order, even though the assault was malicious and willful.

3. Master and servant ⊂=302(3)—Assault held within statutory phrase "including wrongful acts."

The words "including wrongful acts," in Civ. Code, § 2338, relating to liability of master for acts of agent, do not refer back to the word "negligence," and such statute renders a master liable to a third person for an assault by an employé in the course of his employment, even though not ratified by him, under section 2339.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Edward Johnson against Oscar Monson and Charles Longren. Judgment for plaintiff, and defendant Monson appeals. Affirmed.

Leon Samuels, Joseph L. Taaffe, and Chas. J. McDonnell, all of San Francisco, for appellant.

E. B. Mering and M. J. Gillespie, both of San Francisco, for respondent.

OLNEY, J. This is an appeal by the defendant Monson from a judgment against him and the other defendant Longren jointly for $1,500, as damages suffered by the plaintiff because of a personal assault upon him by the defendant Longren. The facts, as they appear from the findings, are that Monson was the owner of a saloon in San Francisco, and employed Longren as bartender. The latter's duties were to manage the saloon, dispense liquors, and maintain order. The evening of March 17, 1917, the plaintiff was in the saloon, somewhat intoxicated, noisy, and engaging in verbal controversies with other patrons, but not quarrelsome or threatening physical violence. The bartender, Longren, told him to stop his noise, and, upon his failing to do so, assaulted him, inflicting personal injuries, to the plaintiff's actual damage in the amount of $1,500. No punitive damages were allowed. The trial court also found that the defendant Monson, the owner of the saloon, did not know of the assault until some days later, and did not authorize it, but did ratify it by retaining the bartender in his employ.

[1] The findings are not attacked, with the exception of the finding as to ratification. This is attacked, and practically the entire discussion on appeal is concerned with the matter of Monson's ratification of the act of his bartender. But the discussion is beside the mark. It is immaterial whether there was any ratification by Monson or not. The other facts found, whose support by the evidence is not questioned, are sufficient to sustain the judgment. This is true, although it is found that Monson did not authorize the assault or know anything about it at the time. It would, in fact, make no difference if the assault had been in violation of express orders to the bartender not to use physical violence on customers. The question is not one of authority as between the principal and the agent. As between them, it may well be that the agent's tort against a third person is without authority or is directly contrary to express orders. But the principal is nevertheless liable for the tort of the agent, provided it be committed by him within the scope of his employment. That the assault in this case was committed within the scope of the bartender's employment is plain. To be sure there is nothing to show that he was authorized or employed to commit assaults, but it is found that he was authorized to maintain order in the saloon, and the assault was committed in the course of his keeping order.

The illustrations of this principle are exceedingly numerous and familiar. For example, if some firm employing delivery trucks should expressly instruct its truck drivers not to exceed the legal speed limits under any circumstances, but one of them, in the

course of his employment, did exceed the speed limit, and as a result of so doing injured some third person, the employer is responsible. The principle is stated thus in Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 124 Pac. 704, 707 (41 L. R. A. [N. S.] 529).

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. Story on Agency, § 452; Shearman & Redfield on Negligence, § 65; Civ. Code, § 2338."

[2] The situation is not changed by the fact that the court finds the assault to have been malicious and willful. Under some circumstances the malicious or willful character of the agent's act is material in determining whether or not the act was committed in the course of his employment. If, for example, in the present case, the question had been presented as to whether the assault on the plaintiff had been committed in the course of keeping order in the saloon, or as part of an altercation purely personal to the bartender and the plaintiff, for which the principal would be in no wise responsible, the willful and malicious character of the assault would have some weight as showing that it was purely personal to the participants. But if it appear that the tort was in fact committed by the agent in the course of his employment, the employer is not relieved of his necessary responsibility by its malicious or willful character. In the present case it appears plainly that the assault was committed by the bartender as a means to compel the plaintiff to cease the noise he was making in the saloon; that is, as a means of performing the bartender's duty of keeping order.

[3] The only difficulty in the case arises from the somewhat ambiguous wording of section 2338 of the Civil Code, which reads:

"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

This is followed by section 2339, which reads:

"A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

A casual reading of section 2338 might give the impression that the words "including wrongful acts" refer back to the word "negligence," so that the only wrongful acts of an agent for which the principal is declared to be responsible are wrongful acts of negligence. The present assault was, of course, not such an act. But this construction would take away all meaning from the words "wrongful acts," since all wrongful acts of negligence are fully covered by the previous expression "negligence." Furthermore, such a construction would mean that by the Code section it was intended, for no apparent reason, to change a universal and elementary rule of the law of principal and agent, and one essentially just. Every presumption must be against such a construction. It does no violence to the language of the section to hold that the word "including" is used in a conjunctive sense, as the equivalent of such expressions as "and also" or "as well as." So construed, effect is given to all the language of the section, and it is made to conform to what should be the law, and is, so far as we are aware, universally the law elsewhere. As so construed, the present case comes directly within it.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

47 Cal. App. 374

PEOPLE v. MAJORS. (Cr. 705.)

(District Court of Appeal, Second District, Division 1. California. May 5, 1920. Rehearing Denied June 1, 1920; Hearing Denied by Supreme Court July 1, 1920.)

1. Burglary ⊂=42(3)—Evidence held to sustain conviction.

In prosecution for burglary, evidence that defendant had possession of the stolen property, and that he had sold the property under a false name and for a grossly inadequate price *held* sufficient, in absence of an explanation, to sustain conviction.

2. Witnesses ⊂=255(3)—Use of memorandum by witness to refresh memory as to dates and other details not error.

In prosecution for burglary, where a jeweler testified principally from memory as to buying the stolen property from defendant, his use of a memorandum made by him at the time of the transaction to refresh his memory concerning dates and other details *held* not error.

3. Criminal law ⊂=418(1)—Testimony as to conversation in defendant's presence held admissible.

In a prosecution for burglary, testimony by jeweler who had purchased stolen property from defendant, as to a conversation with third person who accompanied defendant at the time, in the presence of defendant, *held* admissible.

4. Criminal law ⊂⊃1170½(5) — Exclusion of cross-examination held harmless, in view of sufficiency of evidence.

In prosecution for burglary, where the unexplained evidence as to defendant's possession and sale of stolen property was sufficient to sustain conviction, court's refusal to permit defendant to examine jeweler, who had testified to buying property from defendant, concerning a visit made by defendant to jeweler's place of business after defendant had been charged with the crime, if error, *held* harmless.

5. Criminal law ⊂⊃1169(1)—Admission of testimony held harmless, in view of sufficiency of evidence.

In prosecution for burglary, where unexplained testimony as to defendant's possession and sale of stolen property was sufficient to sustain conviction, the admission of testimony as to investigations made concerning place where defendant lived, if error, *held* harmless.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

A. R. Majors was convicted of burglary. From judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

Paul W. Schenck and Frank Dominguez, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

CONREY, P. J. [1] The defendant, having been convicted of the crime of burglary, appeals from the judgment, and from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the verdict, in this, that there is no evidence that the defendant committed the crime. That burglary was committed at the time and place alleged in the house of one George B. Varnum, is not now disputed. One of the articles stolen on that occasion was a pair of binocular glasses. The burglary occurred on the 11th day of February, 1919. One Levy, a jeweler testified that on the 27th day of February, 1919, he bought those glasses from the defendant, who then and there signed the name B. F. Strong on a memorandum of the sale, in the book kept by Levy. The witness Murphy, one of the officers who arrested defendant, testified that when arrested the defendant said that his name was James Wilson. A handwriting expert, whose testimony remains uncontradicted testified that the signature B. F. Strong, on Levy's book, was written by the same person who signed another document, whereon it was shown that the defendant had signed the name James Wilson. The sale made by defendant to Levy, of the binocular glasses and other jewelry, brought defendant only $10 for the lot. The glasses alone were worth $60. Conceding that mere possession by defendant of the stolen property after the time of the burglary would not be sufficient to warrant his conviction, it seems clear that such possession, taken together with his sale of the property, under a false name and for a grossly inadequate price, in the absence of any explanation—and none appears—are circumstances quite sufficient to sustain the verdict. People v. Lang, 142 Cal. 482, 76 Pac. 232.

[2, 3] It is contended that the trial court erred in permitting the witness Levy to testify from a private record kept by that witness, without first compelling the prosecution to lay the proper foundation; and in permitting the prosecution to prove by the same witness certain conversations had with and purchases made from one Soulard on February 26th, in the presence of the defendant. The memorandum from which Levy testified was shown to have been made by him at about the same time when the transactions occurred. He testified principally from memory, but used the memorandum to refresh his memory concerning dates and perhaps as to some other details. We think that the court did not err either in this matter or in allowing the testimony as to conversations and transactions between Levy and Soulard in the presence of the defendant. The sales made by the defendant to Levy on the 27th day of February occurred in the presence of Soulard. On the preceding day these two men had made the first of their two joint visits to Levy, and on this first occasion certain articles of jewelry were sold to Levy by Soulard in the presence of the defendant. Some of the articles sold by Soulard were a part of the loot which had been taken from the Varnum house on February 11th.

[4, 5] The remaining matters complained of by appellant are that the court erred in refusing to allow the defendant to examine the witness Levy concerning a visit made by the defendant to Levy's place of business after the defendant had been charged with this crime; and in permitting the witness Wood to testify concerning the result of certain investigations made by him as to where the defendant lived. In view of the conclusion at which we have arrived concerning the matters previously discussed, it is unnecessary to enter further into the record concerning these two last assignments of error. They are not of sufficient weight and importance to affect the result of the case, or to enable us to say that there has been any miscarriage of justice.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

47 Cal. App. 267

MUTCH v. LONG BEACH IMP. CO. et al. (Civ. 2677.)

(District Court of Appeal, Second District, Division 2, California. April 30, 1920.)

1. Replevin ⊂=82—Damages allowed to person deprived of use of automobile held excessive.

While the amount to be allowed one deprived of the use of an automobile is to be determined according to the market value of the use of the property, it is the net usable value, less the expense of keeping up the property, which may be recovered, and in determining the value of the use care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself, and hence a judgment for $1,500 in a claim and delivery case, involving an automobile worth $400, was clearly excessive, and cannot be sustained, in view of Civ. Code, § 3359.

2. Attachment ⊂=296—Sheriff not liable for detention of automobile until after notice of third party claim.

Where no third party claim was made to the sheriff as provided by Code Civ. Proc. § 689, for more than 8 months after the levy of an attachment upon an automobile, the sheriff was at least not liable for the detention of the property for the period prior to the notice of claim.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Mary E. Mutch against the Long Beach Improvement Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Bowen & Bailie, of Los Angeles, for appellants.

Denio & Hart, of Long Beach, for respondent.

SLOANE, J. In an action in which the defendant, Long Beach Improvement Company, was plaintiff and John B. Mutch, the husband of plaintiff in this action, was defendant, the sheriff of the county of Los Angeles levied an attachment upon an automobile as the property of said John B. Mutch. The property was taken on attachment on February 19, 1916. Subsequently the plaintiff here claimed to be the owner of the automobile, and made demand upon the defendant, Long Beach Improvement Company, for its possession. She made no third party affidavit of ownership nor demand upon the sheriff, under section 689 of the Code of Civil Procedure, until October 16, 1916, more than eight months after the levy. On November 26, 1916, this action of claim and delivery was brought to recover possession of the automobile and damages for its detention. During the pendency of the suit the automobile was delivered to the plaintiff, and thereafter judgment was given, determining the question of ownership in plaintiff's favor and awarding her damages for the taking and detention in the sum of $1,500.65 against both defendants. The defendants appeal from the judgment on the judgment roll and a bill of exceptions. The main contention of appellants is that the evidence does not support the findings and judgment in the admeasurement and award of damages.

The items of damages going to make up the amount of the judgment consist of the sums of $1,297.50, for the rental value of the car from February 19, 1916, the date of the attachment, until October 17, 1917, the date of its redelivery to plaintiff—a period of 86½ weeks, at $15 per week—and $203.15 for loss of tools and appliances belonging to the car, cost of cleaning the car after its recovery, and depreciation of its value during its detention. The undisputed testimony fixes the value of the car at the time it was taken on attachment at $400. Plaintiff gets her car back, with $203.15 for its depreciation during its detention, and with over three times its market value for damages from being deprived of its use for about 20 months.

[1] Appellants interpose various objections to the measure of damages adopted by the trial court. Without discussing them in detail, we think it is sufficient to say that one thus deprived of the use of an automobile cannot recover the gross rental value of a fully equipped and maintained car, free from all expense of maintenance, repairs, and natural wear and tear, such as a rented car would naturally be subject to. It must be apparent at once that there is something wrong with a scale of damages that allows three times as much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance. In this case the automobile was in use by the plaintiff as a pleasure car, and after its taking was not in use during its detention. But neither the fact that the plaintiff was not using the car for business nor the defendants' using it at all, would absolve the defendants from compensating the plaintiff for any detriment she actually sustained by its wrongful taking and detention; but it would be against conscience to permit a recovery so out of proportion to the value of the thing involved as appears here. Section 3359 of the Civil Code provides that "damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." While the amount to be allowed is to be determined according to the market value of

the use of the property, it is the net usable value, less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself; otherwise the result is not for compensation for use, but punishment for a wrong in a case where exemplary damages as such would not be allowed. So, where damages allowed for the detention of property for less than a year were more than twice the value of the property, it was held that such damages were grossly excessive. 23 R. C. L. 913; Armstrong v. Philadelphia, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082; Ann. Cas. 1914A, 381; Romberg v. Hughes, 18 Neb. 579, 26 N. W. 351.

[2] Attention has been called to the fact that no third party claim was made to the sheriff, as provided by section 689 of the Code of Civil Procedure, for more than 8 months after the levy of the attachment. This fact would in any event absolve the sheriff from liability for the detention of plaintiff's property for the period prior to the notice of claim. It is expressly declared by section 689 that the sheriff is not liable for damages for the taking or keeping of such property to any such third person unless such claim is made. Code Civ. Proc. § 689; Killey v. Scannell, 12 Cal. 73; Fuller Desk Co. v. McDade, 113 Cal. 360, 363, 45 Pac. 694.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 156

WILMOT v. MOODY et al.
(Civ. 3234; L. A. 5829.)

(District Court of Appeal, First District, Division 1, California. April 19, 1920. Opinion of Supreme Court in Bank Denying Rehearing June 18, 1920.)

1. Attorney and client ⊜109—Attorney of executrix not liable for permitting statute to run against note of estate taken by her in informal division.

Where executrix and others interested in estate without order of court divided the property by deeds and assignments, and executrix got a note as part of her share, and the property was taken from the hands and control of the attorneys for the executrix, the executrix could not recover amount of note from the attorneys by reason of collection of the note becoming barred by limitations six months after the division.

2. Appeal and error ⊜1011(1)—Findings on conflicting evidence not disturbed.

Findings of the trial court based on squarely conflicting evidence cannot be interfered with on appeal.

3. Limitation of actions ⊜100(8)—Cause of action on fraudulent statement barred.

False representation by attorney of executrix on borrowing money from her that the note given therefor was secured by mortgage, and that the mortgage was "in the bank," did not postpone the running of the three-year statute of limitations, the executrix having the same means of discovering the falsity of the statement at the time it was made as she ultimately employed to that end; there being no proof of any affirmative action on the part of the attorney to prevent her employing such means at any time.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Iva N. Ricker Wilmot, as executrix of the estate of Samuel M. Ricker, deceased, against Elmer I. Moody and C. M. Simpson, individually and as partners. Judgment for defendants, and plaintiff appealed. Judgment affirmed in District Court of Appeal, and hearing denied in Supreme Court.

J. H. Merriam, and Merriam, Rinehart & Merriam, all of Pasadena, for appellant.

Ticknor & Carter, Hahn & Hahn and Simpson & Simpson, all of Pasadena, and Elmer I. Moody, of Los Angeles, for respondents.

RICHARDS, J. The plaintiff, as the executrix of the estate of Samuel M. Ricker, deceased, brought this action against the defendants as the members of a copartnership engaged in the practice of law, and who had been employed by her as such to advise and assist her in the probate of the will of the deceased and the administration of his estate, to recover the sum of $2,000.

The complaint contained two counts, the first of which was based upon allegations of negligence, in that the defendants allowed the statute of limitations to run against a promissory note for $1,000, executed by one Sylvester M. Rice, and being part of the assets of the estate, so that the amount of the note was lost. The burden of the second count was that the defendants had persuaded and induced the plaintiff, as such executrix, to loan to Elmer I. Moody, one of their number, the sum of $1,000 upon his promissory note, representing that the note would be secured by a mortgage on real property of greater value than the amount of the loan; that after the making of said loan and the acceptance by the plaintiff of said note of $1,000 executed by Moody, the defendants represented to her that a mortgage securing the same had in fact been executed and was "in the bank," together with a certificate of title relating thereto, whereas in truth no such mortgage had been or ever was executed, and that as the result of this transaction the estate was damaged in the amount of said loan. Follow-

ing these averments of the second count and based thereon is an allegation that by reason of the fraudulent representations, facts, and circumstances therein set forth, the defendants fraudulently disposed of the money, goods, chattels, and effects of the estate. Judgment was prayed against the defendants for the sum of $2,000.

The answer of the defendants denied the material allegations of the complaint, and also pleaded certain special defenses to be hereafter referred to, and in support thereof introduced evidence at the trial that as to the cause of action contained in said first count the plaintiff and her brother and sister, being legatees of the entire estate and entitled to have distributed to them the whole thereof, had by agreement among themselves, and more than one year after the death of the decedent, their legacies being then due and payable, divided among them the personal property of the estate, and had executed and delivered to one another quitclaim deeds to the real property thereof without waiting for formal distribution by order of the probate court, and that the plaintiff under such division had received the Rice note as part of her share of said estate. That at said time the defendants, who had theretofore had possession of the securities belonging to the estate, delivered all of them to the plaintiff and her colegatees, and which delivery occurred about six months before the Rice note became barred by the statute of limitations. That the defendants, through Elmer I. Moody (who, of the members of the partnership, attended exclusively to the affairs of the estate), shortly before the date when said note became outlawed, advised and warned the plaintiff to take steps before said date should arrive to have the same collected or renewed, but which advice and warning were not heeded.

As a further defense to this cause of action it was alleged that the plaintiff, suing as executrix of the estate, was not the real party in interest, and that the cause of action, if any, was barred by sections 337 to 340, inclusive, of the Code of Civil Procedure limiting the time for the commencement of actions.

As to the second count, the answer of the defendants denied that they persuaded or induced the plaintiff to make said loan to Moody, or that they made any representations that the loan, if made, would be secured by mortgage, or after it was made, that a mortgage securing it had been executed and deposited in a bank, and alleged that the loan was made to Moody individually upon the understanding that it was not to be secured by a mortgage or otherwise.

As to this note also the defendants introduced evidence at the trial that it formed part of the assets of the estate divided among the legatees in the same manner already detailed, and was the property of the legatee to whom in such division it had been assigned.

As to this count of the complaint also the answer of the defendants set forth that the plaintiff, as executrix of said estate, was not the real party in interest, and that the cause of action, if any, was barred by the same sections of the Code of Civil Procedure as pleaded to the first cause of action.

The court made findings in favor of the defendants on both counts of the complaint, setting forth in great detail the facts that it determined had been established by the evidence, and also found in favor of the defendants upon their pleas of the statute of limitations, and that the plaintiff was not the real party in interest. Judgment in favor of the defendants followed accordingly.

The main attack upon the judgment is that the findings are not supported by the evidence, and it is also urged that certain findings are inconsistent with each other, and that the decision is against law. It may be stated at once that while the evidence in the case upon the facts which determined the question of the right of the plaintiff to relief against the defendants was squarely conflicting, there is ample evidence which, if accepted as true by the court, supports its judgment both on the merits and on the bar of the statute. It shows generally that the defendants were employed by the plaintiff to render services as attorneys at law in the probate of the will and administration of the estate of her testator, the defendant Moody, however, attending to this work exclusive of his codefendants. The papers concerning the estate were delivered to him, including the notes and mortgages, and during the time he held them and until the division of the estate among the legatees he attended to renewals of notes or their collection and such matters, and prepared the necessary documents in connection therewith. At the time of such division, however, the securities of the estate, including the Rice note and mortgage, were delivered to the plaintiff or to her colegatees, and they thereafter exercised control over their respective portions thereof.

[1] In such a situation it cannot, of course, be contended that the defendants, as attorneys for the executrix, had any further concern with them, and if by oversight or neglect the plaintiff—to whose share in the division the Rice note and mortgage fell—allowed the statute of limitations to bar an action upon them, such fact, unfortunate though it be, cannot give rise to a claim for damages against the defendants, or either of them. And if this be true, the question of the bar of the statute becomes immaterial, but the court found this also in the defendants' favor.

[2] The same conflict in the evidence prevents a review by this court of the finding in favor of the defendants on the second count.

It was testified to squarely by Moody that the loan was made to him upon his personal note upon the understanding that no security was to be given. This testimony found some support in the physical circumstances of the transaction, and such conflict as there was in the evidence having been resolved in favor of the defendants, this court will not disturb the finding of the trial court.

[3] Moreover, this count of the complaint was founded upon alleged negligence and fraud on the part of the defendants. The negligence, if any, occurred in 1911, and the action was commenced in 1917. The fraud is charged to consist in the representation that the defendant Moody would execute a mortgage to secure his note. Assuming, contrary to the court's finding, that such representation was made, it was made some six years before the commencement of the action. It is sought to avoid the three-year limitation against the action, however, by charging a further false representation on the part of the defendants, namely, that such mortgage had in fact been executed as promised, and was "in the bank," by which plaintiff was lulled into a sense of security. In view of the finding of the court that none of these representations were made, it seems useless to discuss the sufficiency of an averment and proof of such a representation as last made to postpone the setting in motion of the statute of limitations against the fraud by which the loan is charged to have been obtained. Assuming such representation to have been made, the plaintiff had the same means of discovering its falsity at the time it was made as she ultimately employed to that end, and there is no proof of any affirmative action on the part of the defendants to prevent her employing such means at any time. It would seem that the making of such a representation, though false, would not postpone the operation of the statute. Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080.

We find no ground for the reversal of the judgment in other points urged by the appellant.

Judgment affirmed.

We concur: WASTE, P. J.; GOSBEY, Judge pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we desire to say that we regard the last two sentences of the opinion of the District Court of Appeal as not in any way essential to a disposition of the appeal, and that our denial of the application is not to be taken as an expression or intimation of opinion as to the correctness thereof.

The application for a hearing in this court is denied.

All concur, except WILBUR, J.

47 Cal. App. 383

MORTGAGE SECURITIES CO. OF CALIFORNIA v. PFAFFMAN. (Civ. 2833.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. Appeal and error ⟹1208(8)—Delivery of possession of personalty held not to deprive defendant of right to judgment for restitution upon retrial after reversal.

In an action for possession of automobile, the mere delivery of automobile to plaintiff, for whom judgment had been rendered pending appeal did not deprive defendant, where no stay bond had been executed, of right to judgment for restitution of the property on retrial following reversal, even though no order of execution was issued.

2. Appeal and error ⟹460(1)—Defendant appealing held required to deliver possession of personalty on demand, where no stay bond executed.

On defendant's appeal from judgment for plaintiff in an action for possession of automobile, where no stay bond has been executed, defendant is required to deliver automobile to plaintiff on plaintiff's demand.

3. Appeal and error ⟹1011(1)—Conflict in evidence for trial court.

A conflict in the evidence was for the trial court to settle.

4. Appeal and error ⟹1071(6) — Failure to make finding held immaterial.

In an action for possession of automobile by mortgagee against repairman claiming lien under Civ. Code, § 3051, court's failure to make finding as to nonpayment of mortgage debt was immaterial, since the repairman's lien was superior to that of the mortgage lien, so as to entitle repairman to judgment, even though mortgage debt had not been paid.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Mortgage Securities Company of California against F. W. Pfaffman. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118.

Tobias R. Archer, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the defendant. The action was brought by the plaintiff to obtain possession of a certain automobile. In the original com-

plaint filed it was alleged that the plaintiff acquired a lien upon the automobile by reason of a certain chattel mortgage executed by the Chatts. The terms of that mortgage provided that in the event the mortgagors failed to pay the amount of the mortgage debt, plaintiff might take possession of the automobile and proceed to sell the same in the manner provided by law; further, that at the time suit was brought the said debt had matured and remained unpaid. Defendant answered, and asserted, in brief, that the automobile had been delivered into his possession by the Chatts, and that, at the request of the latter, repairs had been made upon the machine aggregating in value the sum of $349.40, of which sum nothing had been paid but $10, and that the defendant claimed right to the possession and the lien given him by section 3051 of the Civil Code. The cause was tried, and the court determined that the lien of the chattel mortgage was superior to the lien of the repairman, and gave judgment to the plaintiff for recovery of the automobile. An appeal was taken to this court, where the judgment was affirmed. A rehearing was granted by the Supreme Court and a reversal of the judgment entered by the trial court was ordered; it being last determined that the lien of a repairman is superior to that of a mortgagee. Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118. Before the second trial was had, which resulted in the judgment here appealed from, plaintiff filed a supplemental complaint, alleging, in effect, that subsequent to the first trial the controversy had been settled by the voluntary delivery of the automobile by the defendant to the plaintiff; further, that after obtaining such possession the plaintiff had proceeded to sell the machine after the giving of the usual notices. An answer was filed to this supplemental complaint, which raised an issue as to the settlement having been made of the controversy. The second trial was proceeded with, evidence heard, findings made, and judgment entered. As to the matter concerning the delivery of the automobile by the defendant to the plaintiff, the court determined the facts as follows:

"That at the institution of this suit the defendant refused to deliver to the plaintiff the said automobile, claiming his right to retain the same under section 3051 of the Civil Code of the state of California, and that the above cause first came on for trial in the month of February, 1917, resulting in a judgment for plaintiff, from which an appeal was taken by the defendant to the Supreme Court of the state of California, which afterwards reversed said decision, and that pending said appeal, to wit, on or about June 29, 1917, the defendant delivered to the plaintiff the said automobile after demand had been made therefor by the plaintiff under its judgment rendered in said cause tried in February, 1917, and in pursuance of said demand, the defendant delivered said automobile to the plaintiff, and that no bond was made pending the appeal of said action, but that no consideration or nothing of value whatever was paid or agreed to be paid to the defendant for the delivery of said automobile to the plaintiff, and the said delivery was made in pursuance of the demand by the plaintiff by its duly authorized officer, and that the value of said automobile is the sum of $595. That defendant, from the institution of said action up until said June 29, 1917, continued in possession of said automobile, and it is not true that the defendant at any time, as alleged in the complaint, wrongfully or unlawfully detained said automobile, and it is not true that the plaintiff was entitled to the possession thereof."

The conclusions of law embrace the statement that—

"Defendant did not waive his rights herein by the delivery of said automobile to the plaintiff or its agent."

[1-3] The chief contention made by appellant is that the findings of the court against the allegations of the supplemental complaint are not sustained by the evidence; that is, that the evidence showed a voluntary delivery of the automobile by the defendant to the plaintiff, with intent to satisfy the judgment first rendered by the court and to make a settlement of the controversy. That the mere delivery of the automobile to the plaintiff pending the appeal did not deprive the defendant of the right to have a judgment for restitution of the property upon retrial seems very clear. No stay bond was given, and the plaintiff without doubt had the right, pending an appeal under such circumstances, to require the property to be delivered to it in compliance with the terms of the judgment. The fact that no order or execution was issued upon the judgment does not change the situation, for the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand. In the case of Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. Rep. 400, that question is considered and the court quotes with approval from Freeman on Judgments, § 480a, as follows:

"One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is, that though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

The assertion of appellant that the evidence showed that the automobile was delivered by the defendant to it with the full intent to satisfy the judgment and settle the controversy, is borne out only by the evidence offered on

behalf of the plaintiff. There was other evidence to the contrary submitted by the defendant and a conflict resulted, which, of course, was for the trial court to settle. The testimony of defendant's witnesses on this point, if credited by the trial judge, as we must assume it was, is amply sufficient to sustain the findings adverted to.

[4] A second point made by the appellant is that the court failed to find upon a material issue tendered by the pleadings, to wit, as to the nonpayment of the mortgage debt. It is true that the findings did not cover that matter, but in view of the fact that the trial court properly determined, under the decision of the Supreme Court in the case, the lien of a materialman to be superior to that of a mortgagee, such finding, if made, would not have indicated any different judgment than that entered. The omission, therefore, must be considered here as an immaterial one. There is evidence shown in the record establishing the value of the automobile and the amount of the lien charges held by the defendant against it.

We find no error justifying the claim for reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 326

PEOPLE v. WON LEE WING. (Cr. 501.)

(District Court of Appeal, Third District, California. May 3, 1920.)

Criminal law ⊂=1182—Conviction affirmed on conclusive evidence and fair trial.

Where the evidence is overwhelming and conclusive as to the guilt of an appellant, and it appears that his rights were all safeguarded by the lower court and that he had a fair trial, a judgment of conviction will be affirmed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Won Lee Wing was convicted of assault with a deadly weapon, and he appeals. Affirmed.

George E. Foote, of Sacramento, and J. W. Mento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was charged with the crime of assault with a deadly weapon with intent to commit murder, and he was convicted of assault with a deadly weapon. No argument has been made in this court in his behalf, his counsel concluding, no doubt, in view of the record, that any discussion would be useless. The evidence is overwhelming and conclusive as to his guilt. Indeed, he was greatly favored by the jury in rendering a verdict for the lesser offense. His rights were all safeguarded by the lower court and he had a fair trial.

No reason exists why the verdict should be disturbed, and the judgment is therefore affirmed.

47 Cal. App. 264

HUGHES et al. v. SCOTT et al. (Civ. 3319.)

(District Court of Appeal, First District, Division 1, California. April 30, 1920.)

1. Deeds ⊂=133(1)—Present interest in property conveyed.

Under a deed making a gift of a life estate in property to L., and providing "In the event of the death of said grantee herein said real property to revert to A., my daughter, and to her heirs and assigns, and in the event of the death of said A. before the death of said grantee herein then said property to revert to the heirs of said grantee," and "to have and to hold," etc., "unto the said party of the second part during his lifetime and as hereinbefore set forth," there was a present disposition of the reversion in such property to A.

2. Deeds ⊂=90—All parts must be considered together.

All parts of a deed must be considered together and be so construed as to give effect and meaning to every part thereof if possible, under Civ. Code, § 1641.

3. Deeds ⊂=93—Intention of parties to be ascertained.

The primary object of all interpretation of conveyances is to ascertain and carry out the intention of the parties thereto, under Civ. Code, § 1636.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Anita I. Hughes and others against Alice Scott and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robert R. Syer and Owen D. Richardson, both of San Jose, for appellants.

C. L. Witten, of San Jose, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action to quiet title. The facts of the case are undisputed, and are briefly these: Michael Hughes was in his lifetime the owner of the premises in question. He had a son, William I. Hughes, who was the father of the plaintiffs herein, and a daughter, Alice Scott, who is one of the defendants, and he left surviving him his widow, Annie Hughes, another of said defendants. On February 6, 1917, Michael Hughes made a gift deed of the premises in question to his grandson by another child, Leo C. Matthews, granting to the

latter a life estate in said property. Following the words of said grant the deed contained this clause:

"In the event of the death of said grantee herein said real property to revert to Alice Scott, my daughter, and to her heirs and assigns, and in the event of the death of said Alice Scott before the death of said grantee herein then said property to revert to the heirs of said grantee."

The habendum clause read as follows:

"To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident unto the said party of the second part during his lifetime and as hereinbefore set forth."

After the death of Michael Hughes this action was commenced by the plaintiffs as his children and heirs to establish and quiet their title to their alleged interest in said property. To the amended complaint filed herein the defendants interposed a demurrer which the trial court sustained, and upon failure or refusal of the plaintiffs to amend judgment was entered in the defendants' favor, from which judgment this appeal is taken.

[1-3] The sole contention of the appellants is that by the clause above quoted from said deed no present interest in said property was conveyed either to Alice Scott or to the heirs of Leo C. Matthews, the grantee named in said deed. The only authority cited by the appellants in support of this contention is the case of McGarrigle v. Roman Catholic Orphan Asylum, etc., 145 Cal. 694, 79 Pac. 447, 1 L. R. A. (N. S.) 315, 104 Am. St. Rep. 84. We think, however, that a clear distinction can be drawn between said case and the case at bar. In that case, after the grant of a life estate in the premises therein involved, the conveyance proceeded with these words:

"It is the purpose of the party of the first part by this deed that, after the death of the party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco."

The Supreme Court held that this clause contained no operative words of grant and amounted to nothing more than an expression of the grantor's purpose in relation to the future disposition of the property, and hence was inoperative to pass a reversionary interest therein. The cases which are cited in the opinion in that case as sustaining this view are found upon examination to be all cases wherein it was clearly the intent of the grantor that the conveyance of such interest should not take effect until after the grantor's death, and hence was void as testamentary in character. In the case at bar, however, the clause of the deed in question does contain words and phrases which are in the nature of operative words of grant, such as these: That in the event of the death of the grantee in said deed the said real property should "revert to Alice Scott, my daughter, and to her heirs and assigns," and also the clause providing that in the event of the death of said Alice Scott before the death of said grantee said real property should "revert to the heirs of said grantee." In the habendum clause of said deed there is also an expression indicating the intent of the grantor to make a present disposition of the reversion in said property. It is a well-established rule of construction that all parts of a deed must be considered together and so construed as to give effect and meaning to every part thereof if possible. Civ. Code, § 1641. It is also well settled that the primary object of all interpretation of conveyances is to ascertain and carry out the intention of the parties thereto. Civ. Code, § 1636; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896.

The case last cited strongly resembles the case at bar in respect to the language of the conveyance involved, since after the grant of a life estate in the property the deed there in question proceeded to state "and upon and at the time of her death the title to all of said property shall pass to and be vested in" certain specified persons. This court construed said deed as conveying a life estate to the immediate grantee named therein with remainder over to the other persons to whom by the terms of said deed the said property was to pass upon the termination of the life estate. In so deciding, this court cited with approval the cases of Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, Burnett v. Piercy, supra, Henderson v. Mack, 82 Ky. 379, Carson v. McCaslin, 60 Ind. 335, and Caldwell v. Hammons, 40 Ga. 342, in each of which the terms of the grant and reversion were similar to those in the conveyance in question here. These cases indicate what we think is the better rule to be applied to the construction of the clauses in the deed here under review, and in accordance therewith we are of the opinion that the trial court was not in error in sustaining the defendants' demurrer to the plaintiffs' amended complaint.

This being so, the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 309

WILLITS v. HELMER et al. (Civ. 3306.)

(District Court of Appeal, First District, Division 1, California. May 1, 1920.)

1. Evidence ⊜589—Court properly disregarded defendants' testimony where surrounded with elements of uncertainty and suspicion.

In an action to declare a trust in land, court *held* justified in disregarding testimony of defendants that they had property of their own, where such testimony was surrounded with elements of uncertainty, improbability, and suspicion.

2. Appeal and error ⊜1078(4)—Appellate court will not search record for grounds of alleged errors.

Claims of error in refusing to grant motions to dismiss as to a certain defendant and to grant such defendant's motion for a nonsuit will not be considered, where neither argument nor authority nor any reference to the evidence whatever is urged in support, as the court cannot be expected to search the record for grounds of such alleged errors.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by M. L. Willits, by guardian ad litem, against Emma L. Helmer, also known as E. L. Helmer, Bertha Helmer, and others. M. L. Willits dying after the institution of the action, suit was continued in the name of the administrator of his estate, H. G. Willits. From an adverse judgment, the last-named defendant appeals. Affirmed.

Griffith Jones and John J. Craig, both of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

RICHARDS, J. This action was instituted during the lifetime of one M. L. Willits, now deceased, through his guardian ad litem to have it determined that the defendants held certain real property which, it was alleged, had been purchased with funds belonging to the plaintiff, to have a trust thereon declared in his favor, and to also obtain an accounting for certain other moneys and property alleged to have been received by certain of the defendants from said plaintiff under the circumstances set forth at length in the complaint. Shortly after the institution of the action M. L. Willits died, and the suit was continued in the name of the administrator of his estate. Upon the trial of the cause the court made its findings and conclusions of law in the plaintiff's favor, and judgment was accordingly rendered, establishing such trust and directing such accounting. The defendant Bertha Helmer appeals.

[1] The facts of the case, briefly stated, are these: The defendant Emma L. Helmer, daughter of the appellant herein, became acquainted with said M. L. Willits during the year 1911 at Clinton, Iowa, and in the month of November of that year the said M. L. Willits came with the Helmer family to San Diego, Cal., and thereafter was an inmate of the family up to a short while before his death. Willits at the time of his arrival in California was well along in years and had considerable means in the form of money and also in the form of a valuable piece of property in Illinois, a portion of which latter property he sold in the year 1912 for the sum of $14,000, and the remainder of which he conveyed to the defendant Emma L. Helmer by a deed executed in April, 1914, but which was not recorded until after his death. It is alleged in the complaint, and found by the court, that between the date of the arrival of said M. L. Willits in California and the latter part of the year 1914, the said Emma L. Helmer obtained from him sums of money at various times aggregating in all about $20,000, and that she also obtained from him the deed to the farm in Illinois, through undue influence and while he was of unsound mind. It is also alleged in the complaint, and found by the trial court, that a large part of the money thus obtained from him was invested by said Emma L. Helmer in those certain pieces of real estate which are sought to be impressed with a trust. The findings of the trial court are quite full and detailed with respect to the history of the relation between M. L. Willits and the Helmer family from the year 1911 to 1914. The appellant does not in the main attack these findings in such a way as to require us to go into a detailed consideration of the question as to whether they are sustained by the evidence in the case. The chief contention of the appellant seems to be that the evidence is insufficient to justify that portion of finding 4, wherein the trial court, dealing with the question as to whether the real properties purchased by the defendant Emma L. Helmer were bought with money received from said Willits, or were purchased, as the defendants claimed, with money belonging to Emma L. Helmer and Bertha Helmer before they came to California, stated in said finding "that the said Emma L. Helmer and the said Bertha Helmer had no property of any substantial value." It is true that both of these defendants testified that Emma L. Helmer had approximately the sum of $1,200 in her possession when she came to California, and that her mother, Bertha Helmer, had at the same time the sum of about $9,000 in money, and that these moneys had been invested in some real estate; but an examination of the record shows that this testimony on the part of said defendants was so surrounded with the elements of uncertainty, improbability, and suspicion as to have entirely justified the trial court in disregarding it.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Upon the question of the undue influence exercised by the Helmers over said Willits it is not necessary to set forth in detail the history of that branch of the case, since the Supreme Court of this state in the Matter of the Estate of M. L. Willits, deceased, 175 Cal. 173, 165 Pac. 537, has fully reviewed the identical evidence which was introduced in that case and also in this one, in dealing with the relations between the parties and the extent of the undue influence which was exercised by Emma L. Helmer over said Willits in procuring a will to be executed by him in her favor; and in concluding such review the court quite aptly says:

"It would be a serious reflection upon the intelligence of the profession if space should be given to a discussion of the sufficiency or insufficiency of this evidence to support the verdict. It speaks so positively and convincingly as to require no comment."

[2] As to the other points made by the appellant herein they require no extended consideration. The appellant urges as errors of law occurring at the trial and excepted to by the defendants the alleged failure of the court "to grant defendant Bertha Helmer's motion to dismiss said action as to said defendant," and also "the court's failure to grant defendants' motion for a nonsuit"; but neither argument nor authority, nor any reference to the evidence whatsoever, is urged in support of either of these contentions, and this court cannot be expected to search the record for grounds of such alleged errors which the appellant has altogether failed to urge.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 377

WILLIAMSON v. HARDY. (Civ. 3312.)

(District Court of Appeal, First District, Division 1, California. May 6, 1920.)

1. Trial ⊜108½—Asking jurors as a body whether interested in company indemnifying defendant not error.

In an action for damages for personal injuries, that plaintiff asked the jurors as a body whether or not they were "owners of stock in the Western Indemnity Company, a corporation," could not, standing alone, be *held* to furnish a basis for reversal; the indemnity company, surety for the defendant, not being a party.

2. Trial ⊜127—Statement of plaintiff's counsel concerning surety for defendant in negligence case not error.

In a negligence case, where plaintiff's counsel, during the trial, when a question arose with regard to the production of certain X-ray photographs which were in the possession of the physician of a surety company indemnifying defendant, not a party to the action, referred to such fact, there was no error justifying a reversal of the case, where the court instructed the jury to disregard the remarks.

3. Evidence ⊜471(13)—Testimony as to actions and conduct of injured person admissible.

In an action for personal injuries, court did not err in permitting witnesses for plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half; the witnesses merely testifying to matters of personal observation and not undertaking to testify as to any conclusions drawn by them therefrom as to the seriousness of her injury.

4. Negligence ⊜136(15)—Care as to meat market customer slipping on floor held for jury.

In an action for injuries from slipping upon the floor of defendant's meat market, whether defendant was negligent in permitting a piece of oiled paper, made slippery by the adhesion to it of scraps of fresh meat, to be lying on the floor where customers were required to walk, *held* for the jury.

5. Trial ⊜295(1)—Instructions to be considered as a whole.

Where the instructions are full and fair upon the whole, criticism aimed at particular and isolated portions is without merit.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

Action by Agnes Williamson against Charles S. Hardy. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, and Eugene Daney, of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff for damages arising out of injuries sustained by her through having slipped and fallen upon the floor of the defendant's meat market in the city of San Diego, her said fall having been occasioned, according to plaintiff's averments, by the slippery and unsafe condition of said floor.

[1, 2] The case was tried before a jury, and the first contention of the appellant is that during the proceedings for obtaining the jury, and also upon several occasions during the trial of the cause, counsel for plaintiff were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of the defendant against claims for damages. As to the alleged misconduct of counsel for the plaintiff during the process of procuring the jury, it is conceded by counsel

for the appellant that it is not error to inquire of the jurors if they are stockholders or interested in a certain surety company. It would seem, therefore, that the question which was put to the jurors as a body to the point whether or not they were "the owners of stock in the Western Indemnity Company, a corporation," by counsel for the plaintiff, cannot, standing alone, be held to furnish a basis for the appellant's claim. But the appellant insists that upon several occasions during the trial counsel for plaintiff persisted in making statements in the presence of the jury regarding the surety company in question which, taken in connection with the question asked upon their voir dire examination, showed a persistent intent to impress the jury with the fact that the action was being defended by said surety company. Upon an examination of the record in this regard we fail to find a sufficient basis for this claim. It is true that at one time during the trial some question arose with regard to the production of certain X-ray photographs which were in the possession of the physician of the surety company, and this led counsel for the plaintiff to refer to that fact; but we find in that connection that the court instructed the jury to disregard the remarks of counsel for plaintiff in that respect, and we can find no reason in the record for assuming that the jury disregarded that instruction. Nor do we feel that plaintiff's counsel were so far guilty of willful misconduct in connection with that episode as to justify a reversal of the case.

[3] The appellant's second contention is that the trial court committed error in permitting several witnesses who were called by the plaintiff to testify as to their observation of her actions and conduct after the date of her injuries and during a period of a year and a half or so thereafter. An inspection of the record discloses that these several witnesses merely testified to matters of personal observation, and did not undertake to testify as to any conclusions drawn by them therefrom as to the seriousness of her preceding injuries. It requires no citation of authority to sustain the view that evidence of this kind is admissible, and that objections thereto go not to the admissibility of such evidence but as to its weight; and as to the weight of such evidence the jury was the sole judge.

[4] The appellant's third contention is that upon all of the evidence in the case the court should have granted the defendant's request for a directed verdict. There is no merit in this contention. Taking the plaintiff's positive testimony that she slipped and fell upon the floor of the defendant's market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein.

[5] Finally, the appellant objects to the alleged error of the court in the giving and refusal of certain instructions. The defendant's requested instructions which the court refused to give were those which would have required the jury to bring a directed verdict in the defendant's favor, and as to these, as already stated, there was no error. As to the instructions which the court gave upon the general phases of the case, we find that upon the whole they are quite full and fair, and are not subject to the criticism which the appellant aims at particular and isolated portions of said instructions, and hence that appellant's final contention in this regard is without merit.

No errors appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 368

Ex parte SANDERS. (Cr. 911.)

(District Court of Appeal, First District, Division 2. California. May 5, 1920.)

1. Prisons ⟸15—Credits for good conduct forfeited for crime while upon parole.

One on parole is constructively a prisoner, and has the civil status of a prisoner; and, where he violates the conditions of his parole, the board of prison directors may forfeit his credits for good conduct which had already been earned, under Pen. Code, § 1588.

2. Forgery ⟸5—Implies evil intent.

The crime of forgery implies an evil intent; the two being inseparable.

3. Prisons ⟸15—Credits which might be earned in future may be forfeited.

Pen. Code, § 1588, gives the board of prison directors power to forfeit a prisoner's credits for good conduct which might be earned in the future.

Application by Russell Sanders for writ of habeas corpus, prayed to be directed to the Warden of San Quentin Prison, to secure release on ground of illegal detention. Writ denied.

Russell Sanders, in pro. per.

U. S. Webb, Atty. Gen. and John H. Riordan, Deputy Atty. Gen., for respondent.

LANGDON, P. J. The petitioner applied for a writ of habeas corpus, alleging that he was illegally restrained of his liberty by the warden of the state penitentiary. Upon the hearing, it appeared that the petitioner, as prisoner No. 30164, was received at San Quen-

tin Prison, December 21, 1916, from Los Angeles county, for the crime of forgery, under sentence to serve a term of 4 years and 6 months. On this term he was allowed the credits provided for under section 1588 of the Penal Code and the allowance of said credits reduced the term to a net sentence of 3 years, 3 months, and 15 days, entitling him to discharge under that judgment and commitment on April 6, 1920. On that date, April 6, 1920, he was discharged as convict No. 30164, but has since been held in prison by virtue of another judgment and commitment under which he was received in prison on April 6, 1913, as prisoner No. 26423 from the county of Santa Barbara, for the crime of forgery under the sentence of 8 years. The sentence imposed in Los Angeles county in 1916 was imposed to run concurrently with the first term, and was imposed while the petitioner was on parole.

On June 30, 1916, the petitioner, while serving the 8-year sentence, was released on parole. On December 16, 1916, the state board of prison directors ordered the parole of the petitioner revoked. Thereafter he was carried as a parole violator until he was returned to the prison on December 21, 1916, at which time he was received, as before stated, from Los Angeles county on a judgment of conviction of a similar crime.

On January 27, 1917, the board of prison directors heard charges preferred by the state parole officer, charging the petitioner with a violation of his parole. The prisoner was called before the board, and the charge explained to him, and he admitted it to be true. The board of prison directors thereupon adopted a resolution, ordering forfeiture of all credits earned or to be earned by petitioner on the sentence he was serving when he was paroled, as a result of which order petitioner is required to serve the 8-year sentence which he began serving on April 6, 1913. This 8-year term, with the 5 days lost from December 16, 1916, the day his parole was revoked, until December 21, 1916, the day he was returned to prison, requires his being held in custody until April 11, 1921.

[1] The petitioner's position is that the board of prison directors had no power to forfeit his credits for good conduct which had already been earned on his first sentence and which would thereafter be earned by him on said sentence because of the commission of the second crime while upon parole. While the petitioner was on parole, he was constructively a prisoner; he had the civil status of a prisoner. Section 1588, Penal Code, provides that "every convict who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him * * * shall be allowed from his term" certain credits. Said section also provides that—

"Each convict shall be held entitled to these deductions, unless the board of directors shall find that for misconduct or other cause he should not receive them."

The section also provides that—

"If any convict * * * in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that, under this section, he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just."

The "ticket of leave" under which the prisoner was released from the prison set forth the conditions which must be observed by the paroled prisoner under penalty of being returned to prison. These conditions include, of course, an observance of all the laws of the state. The prisoner violated a condition of his parole, and in doing so he violated a prison regulation. Having violated a law of the state during the period of his sentence, he forfeited his right to the credits for good conduct.

[2] The minutes of the board of prison directors show that the petitioner was brought before the board, and the charge of forgery explained to him, which he admitted, whereupon, by resolution of said board, his credits, past and future, were forfeited. Petitioner urges that he was not charged with evil intent. The crime itself implies an evil intent; the two are inseparable.

[3] The petitioner argues that as a matter of public policy, section 1588, Penal Code, should be so construed as to give to the board of directors no power to forfeit credits which might be earned in the future, as such a procedure leaves a prisoner without hope and without incentive to good conduct. This is indeed unfortunate, but there are numerous considerations of public policy connected with the question, one of the most important being that paroled prisoners shall not violate their paroles. For the purpose of accomplishing this result, it is desirable that the board have power to inflict such penalties as will act as a deterrent. There is no doubt that under the powers given the board by section 1588, Penal Code, if petitioner had broken a law of the state while actually confined in the penitentiary, the board would have had the power to forfeit his credits, past and future, upon the term he was then serving. He cannot be in a better position by reason of the fact that at the time of his offense he was being extended special privileges by the board under its powers to parole prisoners. The writ is denied, and the prisoner is remanded to the custody of the warden of the state penitentiary.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 260

Ex parte GOTTSCHALK. (Cr. 513.)

(District Court of Appeal, Third District, California. April 30, 1920.)

1. Criminal law ⊂=258(4) — Cannot change judgment to defendant's prejudice after commencement of execution of sentence.

An order, after defendant was taken into custody under a judgment giving him the option of avoiding the imprisonment by payment of the fine, which withdrew the option and directed imprisonment of defendant, changed the judgment to the defendant's prejudice after the beginning of the sentence, though the original order required payment of the fine forthwith, and was beyond the power of the justice of the peace.

2. Habeas corpus ⊂=92(1)—Statement of case on appeal from justice can be considered on habeas corpus after new trial was denied.

The statement of the case by the justice of the peace on appeal to the superior court is part of the judgment record in the superior court, and, if new trial is denied, that statement can be considered on habeas corpus proceedings in the Court of Appeals to determine whether the justice court exceeded its jurisdiction.

Application by William Gottschalk for writ of habeas corpus, to be directed to the sheriff of Yolo County to secure release of custody under a commitment of a justice of the peace. Petitioner discharged.

Edward J. Lynch, of San Francisco, and C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PREWETT, Presiding Judge pro tem. This is an application for a writ of habeas corpus. It appears from the statement of the facts accompanying the petition that one J. H. Anderson labored as a dredgerman for the Dutton Dredging Company from 12 o'clock noon on April 30th, until about 7 a. m. on the seventh day of May. His working hours were so disposed that he worked 24 hours in each 3 days, not working, however, the same number of hours each day. Up to 12 o'clock noon on May 6th he had worked 48 hours. His only work during the seventh 24 hours was from midnight until 7 a. m. on May 7th, when he voluntarily quit work. This lacks 1 hour of being 7 full days. The company paid him for 7 days and 1 hour in conformity with his claim that he worked on the last day until 9 a. m. The check which he received was for $26.30, which overpaid him in the sum of about 20 cents. He claimed that he should have received about $3 more, but his own figures do not justify this claim.

At the time that he quit work the foreman made out and delivered to him a time check for $26.30, which check he accepted without making any claim that the amount was too small. With reference to this time check he testified as follows:

"I told him [the foreman] that I would call at the office of the company in San Francisco and collect the money. Afterwards I changed my mind, and went to Sacramento instead. I did not tell the foreman that I had gone to Sacramento until several days later. The day after going to Sacramento I sent my time check to the Dredgermen's Union in San Francisco, and left it there for collection. I received the check for $26.30 about the same day that I swore to the complaint."

The time check was not presented to the company until about May 21st, and it was paid to the Dredgermen's Union on May 22d. The money did not reach the complainant until the following day. The defendant himself resides in San Francisco, and he did not have any dealings directly with Anderson. The latter did not at any time notify the company that he wanted any new provision to be made about the payment of the time check. The justice of the peace found the defendant guilty, and pronounced judgment.

[1] The judgment, as originally entered, gave the defendant the option of avoiding the imprisonment by the payment of the fine. Later, however, the justice entered an order, purporting to withdraw the option and directing the imprisonment of the defendant. This order was made after the defendant was taken into custody. It is true that the order directed that the fine be paid "forthwith," but all fines are payable forthwith, and the use of that word added nothing to the legal effect of the judgment. It is held in Ex parte Sullivan, 3 Cal. App. 193, 84 Pac. 781, that a justice of the peace has no power, after the commencement of the execution of a judgment to vary its terms adversely to the defendant.

The petitioner is discharged.

HART, J. I concur in the judgment, but am of the opinion that one point not considered in the main opinion should be given some notice.

[2] At the oral argument and in the briefs, the question whether, upon habeas corpus, this court may, in a case cognizable in justices' or police courts, examine the facts as embraced in the statement on appeal to the superior court was discussed and vigorously affirmed by the petitioner, and likewise denied by the Attorney General.

Section 1468 of the Penal Code, which is embraced within the chapter and title of the Penal Code regulating the matter of appeals in misdemeanor cases from justices' and police courts, provides:

"The appeal to the superior court from the judgment of a justice's or police court is heard

upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal."

I am of the opinion that the statement on appeal from a justice's or police court to the superior court in criminal cases, the triable jurisdiction of which is in the first-named courts, constitutes a part of the judgment roll or judgment record of the case in the superior court, where a new trial is denied. I am therefore of the opinion that, upon habeas corpus, in a criminal case so appealed to the superior court, where a new trial has been denied, it is competent and proper for this court to look into the facts as they are presented in the statement on appeal to the superior court for the purpose of aiding us in the determination of the question whether the justice's court exceeded its jurisdiction in the pronouncement of judgment of imprisonment. I do not herein intend to intimate how far this or the superior court would be permitted to go in this respect in a proceeding on habeas corpus where, upon a judgment of conviction and sentence in the justice's or police court, there has been no appeal to the superior court and the petition for the writ is based entirely on the proceedings in the said inferior court.

It follows that, in this case, this court was legally authorized to examine the facts contained in the statement on appeal to the superior court, and that for the reason stated in the main opinion the petitioner is entitled to his discharge.

I concur: BURNETT, J.

47 Cal. App. 372

WILKINSON v. ROHRER et al. (Civ. 3093.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1920.)

Municipal corporations ⟸705(11)—Negligence of plaintiff which did not contribute to the accident no ground for denying recovery.

Although plaintiff, in turning off at an intersecting street, passed to the left of the center in violation of the Motor Vehicle Law, such negligence will not bar recovery where, after he had passed the corner and was on the right side of the street, he was struck by defendant's car proceeding at an excessive rate of speed on the wrong side of the street; plaintiff's original negligence not being the proximate cause.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by J. C. Wilkinson against Ralph G. Rohrer and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Shreve & Shreve and Ralph F. Twombly, both of San Diego, for appellants.

Heskett & Sample, of San Diego, for respondent.

SHAW, J. In a collision between the automobile of plaintiff and that of defendants, the car of the former was damaged, for the recovery of which he brought this action, and obtained a judgment for $299, from which defendants have appealed.

Among other defenses interposed by defendants was that of contributory negligence of plaintiff, as to which the court made an adverse finding, and the sole ground here urged for a reversal is that this finding is not supported by the evidence.

It appears from the evidence that plaintiff was driving his car east on Bush street in the city of San Diego and, upon arriving at the intersection of Goldfinch street, which runs north and south, he turned into the same, going north. In making the turn he, instead of going to the right of the center of the intersection of the two streets, as required by the Motor Vehicle Act, entered Goldfinch street, passing to the left of said center, thus "cutting the corner." At the same time defendants were, on Goldfinch street, approaching from the north, driving their car southerly on the left-hand side of the street at a speed of some 40 miles per hour, all in violation of the provisions of the Motor Vehicle Act (St. 1919, c. 147). The collision of the two cars occurred at a point in Goldfinch street about 20 feet north of the north line of Bush street and on the east side of the center of Goldfinch street.

That plaintiff was guilty of negligence by reason of the line of travel followed in turning from Bush street into Goldfinch street may be admitted. But such fact will not bar his recovery, unless it be made to appear that such negligence was a part of the efficient cause of the collision; that is, there must have been a causal connection between his negligence in so doing and the injury complained of. At the time when the collision occurred, as shown by the record, plaintiff was driving his car upon the right-hand side of the center of the street, where he was entitled to travel, and the fact that in reaching such position he had negligently cut across the corner of the intersecting street was not a contributing cause of the collision, but, as appears from the evidence, wholly disconnected therefrom. Clearly he was where he had a right to be and where, but for the fact that defendants were on the wrong side of the street and traveling at an unlawful rate of speed, the collision would not have occurred.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

47 Cal. App. 353

HILL v. MOORE et al. (Civ. 3083.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1920.)

1. Pleading ⊂⊃345(1)—Court erred in rendering judgment for plaintiff on the pleadings in action on note where answer alleged payment.

In action on note, where answer alleged that the principal and interest had been fully paid, court erred in entering judgment on the pleadings; such payment constituting a sufficient defense.

2. Pleading ⊂⊃350(3)—Affirmative allegations of answer deemed true on motion for judgment on pleadings.

Matters affirmatively set up in the answer must, on plaintiff's motion for judgment on the pleadings, be deemed true.

3. Bills and notes ⊂⊃432—Transfer of leasehold interest in consideration of release from note precluded recovery thereon.

Where purchasers of lease who had executed note as part of the purchase price transferred their interest in the lease to third person in consideration of seller releasing them from the note, seller could not recover on note.

Appeal from Superior Court, Imperial County; E. A. Luce, Judge.

Action by M. G. Hill against M. Moore and another. Judgment for plaintiff, and defendants appeal. Reversed.

Conkling & Brown, of El Centro, for appellants.

Dan V. Noland, of Los Angeles, and J. S. Larew, of El Centro, for respondent.

SHAW, J. Appeal by defendants from a judgment entered against them upon the pleadings.

The action was upon a promissory note for $600, the making of which is admitted. Defendants in their answer not only denied the allegation of the complaint "that no part of the principal sum, nor interest, or attorney's fee therein provided has been paid," but affirmatively alleged that the whole thereof has been fully paid, and denied "that the whole thereof, or any part thereof, is now due or owing or unpaid," and as a further defense alleged that the note in question was given as a part of the consideration in the purchase of a lease of real estate transferred by plaintiff to defendants, and that thereafter defendants sold and assigned their interest in the said lease and the crops growing upon the demised premises to F. M. Griffith and H. W. Thompson, and that, as a part of the consideration for the sale and transfer thereof so made, plaintiff at the time agreed with defendants that they should be released from the payment of said $600 note, which should be returned to them.

[1-3] It thus appears the answer not only contained an express denial of the material allegation contained in the complaint as to nonpayment, but specifically alleged that the entire amount of principal and interest due upon the note had been fully paid. This alone constituted a sufficient defense to the allegations of the complaint. Moreover, the matters affirmatively set up in the answer must, under the motion for judgment upon the pleadings, be deemed to be true. McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Bradford Investment Co. v. Joost, 117 Cal. 211, 48 Pac. 1083. And, since it is alleged that a part of the consideration for defendants' transfer and assignment of the lease was plaintiff's agreement to release them from the payment of the note, proof of such fact would constitute a sufficient defense to plaintiff's right to recover on the note.

That the court erred in granting plaintiff's motion for judgment on the pleadings, followed by entry of the judgment therein, admits of no possible question.

The judgment is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 33[8]

STERN, Superintendent of Banks, v. SUNSET ROAD OIL CO. et al. (Civ. 3196.)

(District Court of Appeal, First District, Division 1, California. May 3, 1920.)

1. Sales ⊂⊃62 — Divisibility of contract dependent not only on number and separability of items, but upon object and intention.

A contract to supply a railroad company with oil and two supplemental agreements *held* not to be a divisible contract to furnish oil on the one hand for storage and on the other for current use; divisibility depending not alone upon the multiplicity or separability of items, but upon the parties' intention and the contract's object.

2. Set-off and counterclaim ⊂⊃49(1)—Recoupment proper where cause of action on assigned demands, and defendant's right against assignor originated in same indivisible contract.

Where plaintiff's cause of action on assigned demands for the delivery of current use oil to defendant and defendant's right to recoup on account of money advanced to plaintiff's assignor grew out of the same subject-matter and same indivisible contract, recoupment was proper.

3. Set-off and counterclaim ⊂⊃50 — Assignee held to take subject to debtor's right of recoupment.

Where an oil company contracted to furnish oil for a railroad company and by supplemental agreement the latter advanced the former money for development, and the former assigned demands on the latter to plaintiff,

and after notice of assignment committed a breach of contract, the defendant railroad company could recoup for money advanced to assignor in assignee's action begun after the breach, although assignee did not have notice of advance of development money, since assignee took subject to the equities and defenses covered by the entire indivisible contract and with knowledge of defendant's common-law right of recoupment.

4. Set-off and counterclaim ⇐50—"Set-off" distinguished from "recoupment" as respects assignor's breach of contract after assignment.

A "set-off" is a creation of statute, while a "recoupment" existed at common law; the former applies to different contracts, while the latter flows from the same contract which forms the foundation of plaintiff's claim, and where plaintiff's right is by assignment, if assignor's breach occurred prior to notice, defendant would have the right to set off (Code Civ. Proc. § 368), but, if subsequent, he would not, while in recoupment the time of breach would be immaterial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recoupment; Set-Off.]

5. Set-off and counterclaim ⇐21 — Party to contract held not estopped to assert recoupment against assignee.

Where assignor contracted to furnish oil to defendant railroad company and assigned demands to a bank to which the defendant made some payments, defendant was not estopped to recoup for money advanced to assignor previous to assignment which it failed to inform assignee about, since the evidence does not show assignee informed defendant it had or would advance money, and defendant could assume it was fully informed, since its director was a general manager of assignor.

6. Estoppel ⇐95—Where party failed to perform obligation to disclose facts, there can be no estoppel.

Where party claiming estoppel is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself, there is no estoppel.

7. Estoppel ⇐95—Silence will not estop where there is no duty to speak.

It must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped, amounting to intentional deceit or gross negligence, and silence, to constitute estoppel, must be willful or culpable, and result in another placing himself in an unfavorable position on the faith in or understanding of a fact, which the person remaining silent can contradict, but silence will not estop where there is no duty to speak.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Kern Valley Bank against the Sunset Road Oil Company and the San Pedro, Los Angeles & Salt Lake Railroad Company, in which W. R. Williams, as Superintendent of Banks, and later his successor in office, Charles F. Stern, were each in turn substituted as plaintiff. The Oil Company defaulted, and from a judgment for plaintiff against the defendant Railroad Company, the latter appeals. Reversed.

Dana T. Smith, of Salt Lake City, Utah, and E. E. Bennett and A. S. Halsted, both of Los Angeles, for appellant.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, and Raymond Benjamin, of San Francisco, for respondent.

KNIGHT, Judge pro tem. This action was originally commenced by the Kern Valley Bank. Prior to trial W. R. Williams, superintendent of banks, was substituted as plaintiff; he then having charge of the affairs of said Kern Valley Bank for the purposes of liquidation. Later Williams was succeeded as superintendent of banks by Charles F. Stern, and the latter was thereupon substituted as plaintiff and respondent. The action concerns the sale and delivery of oil. Judgment was rendered in favor of plaintiff and against defendant San Pedro, Los Angeles & Salt Lake Railroad Company for the sum of $8,926.35, plus $5,908.25 interest, from which judgment said defendant railroad company appeals.

The facts are substantially without conflict, and are as follows: On July 1, 1907, defendant Sunset Road Oil Company, a corporation, and its subsidiary corporation, Operators' Oil Company, contracted in writing with the defendant San Pedro, Los Angeles & Salt Lake Railroad Company to sell and deliver to the latter all oil required for the use of said railroad company for a period of five years, 200,000 barrels of which was to be stored prior to January 1, 1908, and the remainder to be delivered to and used by said railroad company for current use. Payments were to be made not later than the 15th of each calendar month for all deliveries made during the preceding calendar month. Said contract also contained provisions relating to the character of oil, the temperature deductions, etc. Later said contract was supplemented by two other agreements, the first of which is not material here. The second was executed February 4, 1908, and by proper recitals was made a part of the original contract. The two important features of the second supplemental agreement were: First, the postponement of the date for the commencement of the delivery of the storage oil until April 1, 1908, deliveries to be made thereafter daily at the rate of not less than three or more than ten carloads per day until the full amount of said storage oil was delivered; secondly, the acknowledgment by said oil companies of the payment to them by said railroad company of the sum of $60,000 on account of future deliveries of storage oil.

It was also provided in said second supplemental agreement that all payments for current use oil delivered after April 1, 1908, should be paid for in accordance with the provisions of the original agreement—that is, not later than the 15th of each calendar month.

On April 8, 1908, said oil companies assigned the payments due them under said contract to the Kern Valley Bank, in consideration for which said bank agreed to and afterwards did advance to said oil companies the sum of 25 cents a barrel on all oil shipped to said railroad company. At the time of said assignment said bank had no knowledge of the existence of said second supplemental agreement, nor of the payment to said oil companies by said railroad company of said sum of $60,000; its knowledge of the transaction between said oil companies and said railroad company being confined to the contents of the original agreement. Notice of said assignment was given to said railroad company by means of a letter, written on April 8, 1908, by the representative of said oil companies to said railroad company, in the form following:

"Please pay to the Kern Valley Bank of Bakersfield, California, at due dates, the proceeds of all oil heretofore shipped to you by us and that may be hereafter so shipped, terms our contract with you. This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank. Please make formal acknowledgment of the within order to the Kern Valley Bank and oblige."

Said railroad company replied by letter to said notice, and, after acknowledging receipt of said letter of April 8th, stated:

"I am returning this order herewith under advice of our Legal Department, for necessary correction. We cannot accept any orders for 'future payments'; in other words, a separate order should be given covering each month's voucher, and sufficient identification carried in the order with reference to your invoices as to distinctly identify the payments. * * * If you will kindly arrange to take action as suggested above, I will in the meantime issue instructions that vouchers be rendered to your company for payment through the Kern Valley Bank. In the meantime please let me have corrected order covering payment for month of April, and let future orders come in as suggested."

Said railroad company received no notice whatever from said bank concerning said assignment, nor did it have knowledge at any time of the existence of the agreement made by the bank with said oil companies, or of the advancements made or to be made by said bank of 25 cents a barrel on all oil shipped to said railroad company.

On April 15 and 16, 1908, said railroad company paid to said bank, on invoices for oil, duly assigned to said bank by having stamped twice thereon the words "Payable to the Kern Valley Bank, Bakersfield," the sums of $1,634.78 and $2,685.07, respectively, which payments were in full for all current use oil delivered prior to March 31, 1908. On May 22, 1908, said bank made demand upon said railroad company for payment of oil delivered subsequent to April 11, 1908, to which said railroad company replied by letter on May 28, 1908, to the effect that said oil companies had defaulted in their contract, and that there was nothing due said oil companies.

On November 5, 1910, this action was commenced for an accounting, to ascertain the amount of oil delivered under said contract, and to obtain a judgment against said railroad company for the amount of oil delivered, and also to obtain a judgment against the defendant Sunset Road Oil Company for the difference between the amount found to be due from said railroad company and the amount advanced by said bank to said oil companies. Said oil companies delivered no storage oil whatever, nor did they deliver current use oil of the quality or in the quantity required, said railroad company being obliged to purchase 75 per cent. of its current use oil from outside sources. Neither did said oil companies ever repay to said railroad company any part of said sum of $60,000, but against that sum said railroad company has allowed a credit of $10,905.23 for current use oil delivered subsequent to April 1, 1908, and for which no payment had been made.

The complaint alleges, on information and belief, that the total value of the oil delivered to said railroad company subsequent to April 11, 1908, was approximately $15,000, of which said bank advanced the sum of $14,125, and that $4,309 has been paid, leaving a balance due of $11,000, or thereabouts. The defendant Sunset Road Oil Company defaulted. The defendant railroad company answered by joining issue as to the value of the total shipments of oil, the amount claimed to have been advanced by said bank to said oil companies, and the assignment to said bank. It denied that it had received notice of said assignment, as alleged in the complaint, or that it had accepted or agreed to accept the same, or that it had made any payments pursuant to said assignment, but admitted that it had made payments to said bank for oil shipped prior to April 1, 1908. As a special defense it was averred that said oil companies had defaulted in the performance of their contract, by reason of which nothing was due or payable to said oil companies subsequent to April 1, 1908, at which time it was alleged said oil companies were, and that they still are, indebted to said railroad company, in excess of the sum of $40,000; in other words, the answer sets up, in addition to other defenses, its right to recoupment under the terms of said original and supplemental agreements. The trial court found that said railroad company, by reason of its conduct at the time of and subsequent to the

notice of assignment, was estopped from urging its defense of recoupment, and judgment was entered in favor of plaintiff.

Two principal questions are presented by the appeal: First, whether or not appellant may recoup itself against plaintiff to the extent of its claim against plaintiff's assignor, occasioned by the total failure of said assignor to deliver storage oil paid for in full; and, second, if it may so recoup itself, whether or not, under the facts shown by the record, appellant is estopped by reason of its conduct from urging that defense.

[1, 2] The availability of the defense of recoupment depends primarily upon the nature of the contract. If, as contended by appellant, it is an entire contract, and not a divisible one, it is quite clear that it is a proper case for recoupment. This proposition is not seriously disputed. Respondent argues that the contract is a divisible one, not that the original and the two supplemental agreements do not constitute one contract, but that the contract covers two separate obligations, distinct from each other, viz. an agreement to deliver storage oil, and an agreement to deliver current use oil, and that, since the storage oil was paid for in advance, such payment cannot now be used as the foundation for recoupment in the matter of the delivery of and the payment for the current use oil.

We are of the opinion that the terms of the contract and the circumstances of its execution do not support this view. The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it was the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract, and the contracting parties will not be allowed, under those circumstances, to perform part of the contract and default in its other parts without being held answerable for the performance of the entire contract. Parsons on Contracts, vol. 2 (9th Ed.) p. 517; Page on Contracts, vol. 3, p. 2289; 6 Rul. Case Law, 858; 13 Corp. Jur. 562.

The evidence here shows that the defendant railroad company was in need of oil to operate its railroad. It was not in the business of buying and selling oil. The oil contracted for was purchased for its own use and consumption. It was necessary that it should be continuously supplied with oil for its immediate and future use. A supply of current use oil without a supply of storage oil would have been of little value. Both were necessary to the successful operation of its railroad business. At the time of the execution of the contract the oil fields belonging to said oil companies were apparently new and undeveloped. Money was needed for their development. In order to secure the required supply of oil, either for current use or for storage, it was necessary for said railroad company to finance such development. This it did by advancing $60,000 to said oil companies. This sum was not advanced for the development of storage oil exclusively, nor for the development of current use oil alone, but it was advanced for the development of the production of both. It was paid for the purpose of facilitating such development, so as to insure a steady flow of current use oil as well as an accumulation of storage oil. The fact that it was agreed that said $60,000 should be applied as payment for storage oil is immaterial. It was advanced for the purpose of developing the oil properties of said oil companies, so that both oil for current use and storage oil might be produced. It is not reasonable to suppose that said railroad company would have advanced the sum of $60,000 without feeling assured that it was going to be furnished with current use oil during the five-year period covered by the contract, as well as with the storage oil. On the other hand, it is apparent that said oil companies would not have taken a contract to furnish current use oil alone at the price agreed upon without the privilege of also furnishing the additional 200,000 barrels of storage oil. Nor would they have entered into the second supplemental agreement to furnish the current use oil if said $60,000 had not been advanced. It will thus be seen that the obligations of the contract to furnish storage oil and current use oil cannot be separated. The contract provided that "all oil required to be used during said term (five years) by the buyer for all its purposes," etc., should be furnished. These reasons make it plain to us that the intention of the parties was to treat the contract as a whole, and that the payment of said sum of $60,000 was made and accepted by the parties accordingly.

We have then a case where the cause of action of the plaintiff on the assigned demands for the delivery of current use oil, and the right of the defendant to recoup on account of the $60,000 advanced to plaintiff's assignor for development purposes, grew out of and had their origin in the same subject-matter and in the same contract. Under such circumstances recoupment was proper. American Bridge Co. v. City of Boston, 202 Mass. 374, 88 N. E. 1089; Rockwell v. Daniels, 4 Wis. 432; Newfoundland v. Newfoundland Railway Co., 13 Law Rep. App. Cas. 199; Salt Fork Coal Co. v. Eldridge Coal Co., 170 Ill. App. 268; Seibert v. Dunn, 216 N. Y. 237, 110 N. E. 447; 34 Cyc. pp. 623, 625, 643, 376, 695.

In respondent's brief numerous authorities are cited on this point. It is unnecessary to discuss them, however, more than to say that they are based upon the theory that the con-

tracts under consideration in those cases were divisible, which, as we have seen, is not the case here.

[3, 4] The exact time when said oil companies breached their contract, whether it was prior or subsequent to the notice of assignment, can make no difference so far as the application of the doctrine of recoupment is concerned. If we were here dealing with the question of set-off instead of that of recoupment, a different rule would doubtless prevail. There is a marked difference between the two doctrines. The chief distinctions are that the former is a creation of statute, while the latter existed at common law, and that the former is applicable when there are different contracts, while the latter flows from the same contract as that which forms the foundation of plaintiff's claim. If the breach here occurred prior to the notice of assignment, there would be no question but that the assignee took the rights of the assignor subject to all equities, set-offs, and other defenses then existing. Section 368, Code Civ. Proc. A complete breach did not occur, however, until the last days of April or early in May, 1908, which was subsequent to the notice of assignment. In the contract it was provided that deliveries of storage oil should commence on April 1, 1908, and that the failure by the sellers to load cars for more than 10 consecutive days should not be considered a breach of said agreement, but that, in case of such failure to load the same, the party in default should be required to fully make up the deficiency within 20 days, which allowed said oil companies until the end of April before they were completely in default. During the last days of April or early in May, however, the representatives of the railroad company called personally on the representatives of the oil companies to ascertain what said oil companies intended to do about fulfilling their contract, at which time the representatives of the oil companies stated:

"We can't furnish the oil either in the quantity or quality stated in the contract, and we will have to quit—throw it up."

This constituted a complete breach of the contract, and it having occurred subsequent to the notice of assignment, and the action of the assignee having been commenced subsequent to such breach, the railroad company was given the right to recoup as against plaintiff's assignor to the extent of its claim arising because of such breach.

This rule of law is best illustrated by the case of American Bridge Co. of N. Y. et al. v. City of Boston, supra, wherein a contractor, on April 10, 1902, assigned certain payments due him to a bank, notice of which assignment was given on November 14, 1902. A few days subsequent to the notice of assignment the assignor abandoned the contract. Action was brought on the assignment in October, 1906. The defendant pleaded recoupment on account of the damage suffered by reason of the breach of the contract. It was held that, although the breach occurred subsequent to the notice of assignment, recoupment was a proper defense. The decision in that case is based upon the ground that the right of the defendant to claim damages for the nonperformance of the contract existed at the time of the making of the contract, at the time of assignment, and at the time of the notice of assignment, and that the assignees knew it, and they also knew it would become available to the defendant the moment the assignor should commit a breach. It is further stated in the opinion in that case that, even if the sums sued upon were due at the time of the notice of assignment, still, if the action was brought by the assignor after default, there could be no doubt that the defendant would have the right to recoup damages suffered by such default, the court saying:

"And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor. The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge; and, since they have delayed suit for these sums until after default, the defendant may recoup against them as it could have recouped against the assignor."

Neither is the situation changed by the fact that the bank did not know of the existence of the second supplemental agreement at the time of said assignment. As assignee it took subject to all equities and defenses between the original parties to the agreement existing at the time of the assignment. Those rights were not confined to those parts of the contract known to the assignee, but they embraced the equities and defenses covered by the entire contract. Fleming v. Law, 163 Cal. 227, 124 Pac. 1018; San Jose Ranch Co. v. San Jose Land Co., 132 Cal. 582, 64 Pac. 1097; 5 Corp. Jur. 963, note 28.

[5] In view of the authorities above cited it is our opinion that appellant should not have been deprived of its right to recoup, unless it was estopped from doing so by its acts and conduct.

The facts upon which the doctrine of estoppel was applied against appellant have already been related in the first part of this opinion. In this respect it is contended by respondent that on April 8, 1908, when appellant was notified of the assignment to the bank, appellant should have notified the bank that it had a claim, or intended to make a claim, against said oil companies because of the payment of said sum of $60,000; that instead of doing so it sent the assignment back to the oil companies for corrections as to the form of the assignment, and with instructions as to how the assignment should be drawn in the future; that the bank thereafter, acting in pursuance of these instructions, pre-

sented future assignments to appellant, which appellant accepted, and on April 15 and 16, 1908, made payments to the bank for current use oil in the aggregate sum of $4,328.85. From these facts respondent argues that the bank was lulled into a state of financial security and encouraged to make the advances to said oil companies.

The weakness of respondent's whole contention is, however, that the bank did nothing and said nothing which would indicate to appellant that it had advanced or intended to advance to said oil companies any money on its shipments of oil. Appellant was in total ignorance of that fact. Respondent claims that that part of the oil companies' letter of April 8, 1908, wherein it was stated, "This order to remain in full force and effect until revoked by us with the consent of said Kern Valley Bank," was of itself sufficient notice that the rights of the bank were absolute. While the language quoted may have indicated in a vague fashion that the bank had some interest in said payments which could not be canceled without its consent, the letter does not carry the effect contended for by respondent. On the contrary the letter as a whole appears to be only a direction to make payments to said bank, without disclosing any interest which the bank may have had. It does not even state in positive terms that an assignment had been actually made, and there is nothing contained in the letter from which it can even be inferred that the bank was making advances to said oil companies on shipments of oil to appellant. If any assignment can be inferred from said letter at all, it could with more assurance be assumed therefrom that the assignment was made in satisfaction of or to apply upon a past indebtedness, or that it should apply upon some particular trust, or that the bank was acting as a depositary for said oil companies merely for the purpose of receiving the funds. The fact that appellant did not assume the burden of fully informing said bank of the extent of its dealings with said oil companies does not create the barrier of an estoppel. It had the right to assume that the bank was fully informed as to the second supplemental agreement and of the payment of said sum of $60,000, when it is taken into consideration that one of the directors of said bank was the general manager of one of said oil companies and the president of the other during all of these transactions. Before respondent can successfully urge estoppel, it must be shown that respondent was not only destitute of knowledge of the real facts, but that it was without convenient or ready means of acquiring such knowledge. Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267; Huse v. Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232; 16 Cyc. 738.

[6, 7] No estoppel arises where a party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself. 16 Cyc. 741. It is plain to be seen that, had said bank made such inquiries as the law enjoined upon it to make prior to or at the time of said assignment, the present controversy would not have arisen. Nor does the fact of the payments by said railroad company to said bank on April 15 and 16, 1908, justify an estoppel. Those payments covered deliveries of current use oil made prior to April 1, 1908, which was eight days prior to the so-called notice of assignment. In order to constitute an estoppel it must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped. There must be an intentional deceit or gross negligence shown (Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668), and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict (Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915, Ann. Cas. 1917A, 1143). But where there is no duty to speak mere silence will not create an equitable estoppel. Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

Under the facts above related, and in view of the authorities cited, it is our opinion that the doctrine of equitable estoppel does not apply.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

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PEOPLE v. BICKERSTAFF. (Cr. 493.)

(District Court of Appeal, Third District, California. April 3, 1920. Opinion of Supreme Court, In Bank, Denying Hearing June 2, 1920.)

1. Intoxicating liquors ⇐134—Sale of beer containing less than 1 per cent. alcohol no crime.

Sale of beer containing less than 1 per cent. of alcohol was not prohibited by the Wyllie Act.

2. Criminal law ⇐789(3)—Instruction as to reasonable doubt of alcoholic content erroneously refused.

In a prosecution under the Wyllie Act, court erred in refusing to instruct, "If you have any reasonable doubt as to whether the beverage sold was alcoholic within the meaning of the Wyllie Act, you will return a verdict of not guilty," and "in determining the quantity of alcohol therein you are to give the defendant the benefit of every reasonable doubt, if any you have. You are to consider and weigh care-

fully all of the evidence in the case; and, if you cannot say that you are satisfied beyond all reasonable doubt and to a moral certainty that said beverage contained 1 per cent. or more, by volume, of alcohol, you will find the defendant not guilty."

3. Intoxicating liquors ⊂=131—Lack of knowledge of volume of alcohol in beer no defense under Wyllie Act.

It is no defense in a prosecution under the Wyllie Act for selling beer containing 1 per cent. or more of alcohol, that defendant did not know the liquor sold by him contained the prohibited amount of alcohol.

4. Criminal law ⊂=330, 561(1)—Burden on state to prove guilt beyond reasonable doubt.

A defendant in a criminal case is never required or expected to prove his innocence, but the burden is on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime beyond all reasonable doubt and to a moral certainty; and, if the jury cannot say, after a careful consideration of all of the evidence in the case, that the guilt of the defendant has thereby been established beyond all reasonable doubt and to a moral certainty, it is its sworn duty to acquit the defendant.

5. Criminal law ⊂=834(5)—Requested instruction as to embodying rule as to reasonable doubt should have been given without modification.

Where defendant requested the court to instruct: "That under the law no jury should, nor has the right to, convict the defendant of a crime upon mere suspicion, however strong (nor simply because there may be a preponderance of all of the evidence in the case against him), nor merely because there is or may be strong reason to suspect that he is guilty (but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt)"—court erred in modifying the instructions by striking out the words inclosed in parentheses.

6. Criminal law ⊂=834(5)—Requested instruction embodying rule as to reasonable doubt should have been given without modification.

Where accused requested court to instruct: "That mere probabilities are not sufficient to warrant a conviction (nor is it sufficient that a greater weight of evidence supports the allegation of the information, if it does), nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty. (To warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is considered together)"—court erred in modifying the instruction by striking out the words included in parentheses.

7. Criminal law ⊂=782(1)—Defendant entitled to instructions as to conditions of evidence requiring acquittal.

Accused is entitled to instructions telling the jury in clear language the conditions of the evidence that would make it their duty to acquit.

On Consideration in Supreme Court of Petition for Hearing.

8. Criminal law ⊂=806(3)—Court should not repeat instructions.

Trial judge should take care to give to the jury once and in clear language every principle of law applicable to the particular case; and, when he has done this he is not required to repeat any of them, no matter how many separate instructions are asked which may include them, and such is true with regard to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the prosecution.

9. Criminal law ⊂=789(9)—Instruction on reasonable doubt not erroneous.

An instruction that reasonable doubt "is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon the testimony, reason, and common sense, and which leaves the mind in such a state that you cannot say that you feel fully and entirely satisfied of the defendant's guilt. In other words, it is that state of mind, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are to act conscientiously upon it"—although not as full and clear as the instruction usually given, was not erroneous.

10. Criminal law ⊂=789(2)—Courts should adhere to precedents in framing instructions on reasonable doubt.

Trial judges should adhere to the well-established precedents in framing or approving instructions on the subject of reasonable doubt, and should avoid any attempt to frame new definitions of the term.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

J. A. Bickerstaff was convicted of selling alcoholic liquor in no-license territory and appeals. Reversed in District Court of Appeals and hearing denied in Supreme Court.

P. H. Ryan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

ELLISON, Presiding Judge pro tem. An information was filed against the defendant in the superior court of the county of Humboldt, state of California, wherein he was accused of the crime of selling alcoholic liquors in no-license territory, the particular allegation being "that heretofore, to wit, on the 29th day of July, A. D. 1919, the said J. A. Bickerstaff within the boundary of said 'no-license' territory, in supervisorial district No. 2, at and in the county of Humboldt,

state of California, did willfully, knowingly, and unlawfully sell, furnish, distribute and give away alcoholic liquors, to wit, beer and which was not so mixed with other drugs as to prevent its use as a beverage, to one William McKay." After trial had the defendant was convicted, and from the judgment pronounced upon the verdict he prosecutes this appeal.

The appellant calls attention to many matters occurring during the trial which he claims were error and prejudicial to his rights. We deem it not necessary to state all of them, and in deciding the case shall only discuss those that seem to be of the most importance.

The prosecution was had under the so-called Wyllie Act (St. 1911, p. 599). In construing said act the court determined that it prohibited the sale of beer regardless of the amount of alcohol contained in it, and regardless of whether it contained any alcohol at all, or not. Thus, in one instruction the jury were informed:

"I charge you that if you find from the evidence beyond a reasonable doubt that at the time and place set forth in the information, the defendant did sell, furnish, or give to William McKay beer or any other malt liquor, then I instruct you that it is not necessary that you should find that said beer or other malt liquor contained 1 per cent. or more, by volume of alcohol or that you should find that it contained any alcohol at all, but it is enough if you find beyond a reasonable doubt that the defendant did at the time and place set forth in the information sell, furnish, or give to said William McKay beer or malt liquor to warrant you in bringing in a verdict of guilty."

The jury were given other instructions along the same lines. This was manifestly error, and in direct contradiction to the decisions of the higher courts of this state heretofore rendered.

The case of People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121, involved the construction of the meaning of this particular part of the Wyllie Local Option Law. In fact, it is known that the district attorney of Colusa county purposely framed his information in that case for the purpose of getting a direct decision of the higher courts as to whether the selling of beer of less than 1 per cent. by volume of alcohol was a crime or not, and in filing his information, in order that the matter might be squarely presented to the courts uninfluenced by any and all other considerations, he inserted in his information that the liquors sold by the defendant in that case were malt liquors containing less than 1 per cent. by volume of alcohol. And it was his argument in that case that the statute made the selling of malt liquors, regardless of the amount of alcohol contained in them, a crime, and that the words "any other liquor or mixture * * * which contains one per cent. by volume, or more, of alcohol" were not intended to and did not qualify the previous words, "spirituous, vinous and malt liquors." In deciding the case against the contention of the district attorney, the court used, among other expressions, the following:

"In the case of People v. Mueller, No. 231 (18 Cal. App. Dec., p. 220), this court was called upon to consider the propositions above stated, and we there expressed the opinion that, while in charging the offense of selling or keeping for sale spirituous, vinous or malt liquors, it was not necessary to allege that such liquors contained the amount of alcohol specified in section 21, a conviction could not be sustained under such an indictment unless such liquors were shown to be intoxicating. This conclusion was reached mainly from the proposition, declared in the opinion in said case, that the terms 'spirituous,' 'vinous,' and 'malt,' as generically designating certain kinds of liquors, must have been used by the Legislature in their popular sense—that is to say, that they were used to describe, generically, those alcoholic liquors commonly known as 'spirituous,' 'vinous,' and 'malt,' and which, it is known, will produce intoxication. * * * We are still of the opinion, however, that the Legislature did not intend to make it unlawful for one to engage in the business of selling nonintoxicating liquors. In other words, it is not reasonable to suppose that it was the legislative intent to contraband the traffic in spirituous, vinous, or malt liquors possessing no intoxicating quality. To the contrary, it seems very clear, when we consider the ultimate object of the Local Option Law, that the Legislature thus aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and that, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and did establish a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. This conclusion is arrived at by a view of section 21 of the act by the light of the rule of construction, ejusdem generis, above referred to. In its practical application, this rule simply means that 'general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.' * * * Or, as this maxim was stated by Lord Tenterden * * *: 'Where a statute or other document enumerates several classes or persons of things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated.' This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, viz. that every part of a statute should, if possible, be upheld and given its appropriate force. * * * But, in this case,

since it is plainly manifest, as stated, that the purpose of the Local Option Law is to suppress drunkenness and consequently the traffic in intoxicating liquors in those subdivisions where its operation is properly and legally invoked, the rule of ejusdem generis may be applied to the construction of section 21 without doing violence to or rendering inoperative any part of said section or of the law. Indeed, a construction of section 21 by the light of that doctrine will manifestly lead to the upholding of all the provisions of the law agreeably to the evident legislative design at the bottom of its enactment."

After decision by the appellate court in this case, a petition to have the case heard in the Supreme Court was denied. In denying it the Supreme Court necessarily approved of the disposition made of the case by the appellate court, because, as stated, the case presented no question for the consideration of either court other than the construction of this particular section of the Wyllie Local Option Law.

[1, 2] The giving of the instruction by the court, telling the jury that the amount of alcohol contained in the beer alleged to have been sold was entirely immaterial was error which necessitates a reversal of the judgment. On this feature of the case the defendant presented certain instructions, and asked that they be given to the jury, but the request was refused. Said instructions were in harmony with the decisions of the courts of this state, and should have been given. Among them was the instruction numbered 17, which reads as follows:

"If you have any reasonable doubt as to whether the beverage sold was alcoholic within the meaning of the Wyllie Act you will return a verdict of not guilty, and in this connection I charge you that alcoholic liquor as used in the Wyllis Act means liquor which contains 1 per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

Also instruction 18, which reads as follows:

"I charge you that if the beverage which defendant sold to McKay contained less than the 1 per cent. by volume, of alcohol, it was not unlawful to sell the same, and in determining the quantity of alcohol therein you are to give the defendant the benefit of every reasonable doubt, if any you have. You are to consider and weigh carefully all of the evidence in the case, and if you cannot say that you are satisfied beyond all reasonable doubt and to a moral certainty that said beverage contained 1 per cent. or more, by volume, of alcohol, you will find the defendant not guilty."

These instructions contained a clear and accurate statement of the law and of the rights of the defendant, and it is beyond controversy that he was entitled to have them read to the jury upon the trial of his case.

As the case may be tried again, some other matters are presented that should be considered. It was the claim of the defendant that at the time he sold the beer he honestly believed and had a right to believe, that it contained less than 1 per cent. by volume of alcohol, and asked that the case be submitted to the jury upon that theory, and asked for a direct instruction to the jury that, if they believed that the defendant acted in good faith in selling the beer and in the belief that it contained less than 1 per cent. by volume of alcohol, he should be acquitted. The court refused to give this instruction, and its action is assigned as error.

In the case of People v. Pera, 36 Cal. App. 292, 171 Pac. 1091, a similar question was raised, and it was decided against the contention of the appellant therein. In that case it was said:

"It is complained that the court erred, and thus seriously prejudiced the rights of the accused by instructing the jury that it was not necessary to the consummation of a crime of the character of the one with which the defendant is here charged that there should exist and be shown an intent to commit the act, and that, therefore, all that the jury were required to find, to reach a verdict of guilty, was that the defendant kept a place of public resort for the purpose of selling and distributing alcoholic liquors within no-license territory—that the specific intent with which the act was done was immaterial. We think the rule as declared by the instruction is correct, in so far as it relates to a case of this character. The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of 'no-license territories' uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense. In Commonwealth v. Holstein, 132 Pa. St. 357 (19 Atl. 273), the court, having before it a case in which the defendant had been convicted of the unlawful sale of alcoholic liquor, said: 'It is not necessary to sustain a conviction for selling intoxicating liquors under the act of 1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and conviction under it would be rare.'"

And in the case of People v. Allen, reported in 37 Cal. App. at page 180, 174 Pac. at page 374, the case of People v. Pera, 36 Cal. App. 292, 171 Pac. 1091, is referred to and approved, and it is added:

"Section 13 of the act of April 4, 1911 (Stats. 1911, p. 599), provides as follows: 'It shall be unlawful for any person * * * within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof.' (Nothing in said section 16 has reference to the facts in this case.) Plainly the rule applies in cases arising under this section, as it did in People v. Pera, which arose under the same statute though for a different offense."

[3] Under those decisions it must be held that it is the law in this state that the selling of alcoholic liquors containing 1 per cent. or more by volume of alcohol in no-license territory is forbidden, and that it is not a defense for the defendant to prove that he did not know the liquor sold by him contained the prohibited amount of alcohol.

We think the court erred in not giving some of the instructions asked by the defendant's counsel and in giving other instructions than those above referred to.

Upon the question of reasonable doubt the court instructed the jury as follows:

"As the term 'reasonable doubt' is used a number of times in the instructions given, you will bear in mind that it is always used in the same sense. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon the testimony, reason, and common sense, and which leaves the mind in such a state that you cannot say that you feel fully and entirely satisfied of the defendant's guilt. In other words, it is that state of mind, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are to act conscientiously upon it."

An instruction, telling the jury that a fair doubt can be based upon reason and common sense, has been repeatedly condemned by the Supreme Court of this state. The latter part of the instruction is in approved language, but the first part weakens its force and effect.

In People v. Paulsell, 115 Cal. at page 12, 46 Pac. at page 734, it is said:

"If experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt are to be here allowed, and each trial court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel. In the present case, it is sufficient to say that the court introduced the new and unused phrase 'common sense,' and told the jury that the doubt must be based upon that. Counsel for appellant argues—after giving some of the definitions of common sense to be found in the dictionaries—that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life, which was held to be unsound by this court in People v. Brannon, 47 Cal. 96; People v. Ah Sing, 51 Cal. 372, and People v. Bemmerly, 87 Cal. 121. It is sufficient to say, however, that the phrase 'common sense' is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own common sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used. For this reason the judgment must be reversed."

We hold that it was error to give the instruction as to reasonable doubt, modified by the expression that it must be based upon reason and common sense.

In the same connection, attention is called to the very plain and explicit instruction asked by the defendant, numbered 6, and which was refused by the court. It reads as follows:

"By reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the guilt of the defendant."

This was a clear statement of the law, and should have been given as requested.

[4] We think also defendant's instruction numbered 5 should have been given. It reads as follows:

"A defendant in a criminal case is never required or expected to prove his innocence, but the burden is on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime, beyond all reasonable doubt and to a moral certainty; and, if the jury cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the defendant has thereby been established beyond all reasonable doubt and to a moral certainty, it is their sworn duty to acquit the defendant."

We find in the instructions of the court which were given no explicit, clear statement of the defendant's rights as embodied in this proposed instruction.

[5] Also, instruction 8, asked by the defendant, should have been given. It reads as follows:

"The court instructs you that under the law no jury should, nor has it the right to, convict the defendant of a crime upon mere suspicion, however strong (nor simply because there may be a preponderance of all of the evidence in the case against him), nor merely because there is or may be strong reason to suspect that he is guilty (but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt)."

The court modified the above instruction by striking out the words inclosed in parentheses, and, as thus modified, gave it to the jury. We think the defendant was entitled to have the instruction read to the jury as presented. It contained an accurate statement of the law and his rights, and he was entitled to have it presented to the jury.

[6] The defendant asked for instruction No. 12, which reads as follows:

"I further instruct you that mere probabilities are not sufficient to warrant a conviction (nor is it sufficient that a greater weight of evidence supports the allegations of the information, if it does), nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty. (To warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is considered together.)"

The court struck out all of said instructions embraced within the parentheses, and, as thus modified, gave it to the jury. As asked, it contained a correct statement of the law, and the defendant was entitled to have it given to the jury.

[7] We are of the opinion that the law, as stated in these requested instructions was not covered by the instructions given. The defendant was entitled to instructions telling the jury in clear language the conditions of the evidence that would make it their duty to acquit him.

Some other matters are referred to by defendant's counsel as having occurred at the trial, especially in the impanelment of the jury, which he claims were prejudicial to the defendant's rights, but, as it is not probable that the same incidents will be repeated upon the second trial, we deem it unnecessary in disposing of the case to enter into a discussion as to what effect, if any, such incidents had upon his rights.

For the reasons stated, the judgment is reversed, and the cause remanded for a new trial.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. [8] The petition for a rehearing is denied. We think it necessary to say, however, that we do not approve of all that is said in the opinion of the District Court of Appeal on the subject of the instructions given and refused. The opinion appears to approve the pernicious practice, sometimes indulged in by the trial courts, of repeating over and over again instructions couched in varying language, but embodying the same principle of law. This is especially prevalent with regard to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the prosecution. Repetitions of this character are not necessary, and should be avoided as far as possible. Several of the instructions criticized in this case were given, in effect, in other instructions, using somewhat different forms of expression, but having the same meaning. The trial judge should take care to give to the jury, once and in clear language, every principle of law applicable to the particular case. When he has done this, he is not required to repeat any of them, no matter how many separate instructions are asked which may include them. Such continual repetition tends to give undue emphasis to the particular point to which they may relate, and operates to confuse the jury in their consideration of the evidence.

[9, 10] The instruction defining reasonable doubt, criticized in People v. Paulsell, 115 Cal. 12, 46 Pac. 734, was approved in People v. White, 116 Cal. 17, 47 Pac. 771, and in People v. Shaughnessy, 110 Cal. 604, 43 Pac. 2. The instruction given on that subject in the present case is not substantially different from that under consideration in the three cases just cited, and we think it should not be considered erroneous, although it is not as full and possibly not as clear as the instruction usually given. We fully approve what is said in the Paulsell Case, to the effect that trial judges should adhere to the well-established precedents in framing or approving instructions on the subject of reasonable doubt, and should avoid any attempt to frame new definitions of the term.

All concur.

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PEOPLE v. T. WAH HING. (Cr. 503.)

(District Court of Appeal, Third District, California. May 3, 1920. Hearing Denied by Supreme Court July 1, 1920.)

1. Statutes ⟸114(4)—Title of state Medical Practice Act held sufficiently comprehensive to include punishment for practicing without a certificate.

Title of state Medical Practice Act, reading "An act to regulate the examination of applicants for license, and the practice of those licensed to treat diseases, * * * to establish a board of medical examiners * * * and to repeal an act entitled 'An act for the regulation of practice of medicine,'" etc., *held* sufficiently comprehensive to include provisions as to punishment of a person holding himself out as entitled to practice medicine without a certificate under section 17, and therefore not violative of Const. art. 4, § 24.

2. Physicians and surgeons ⟸6(9)—Information charging practice of medicine without a certificate held sufficient.

Information charging that defendant "did then and there willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted * * * without having at the time of so doing a valid unrevoked certificate from the state medical examiners of the state of California" *held* sufficient in prosecution for violation of Medical Practice Act, § 17, as against contention that it did not give the name of any patient or disease treated or the mode or system of treatment practiced.

3. Physicians and surgeons ⟸6(10)—Evidence held to sustain conviction for practicing without a certificate.

In prosecution for practicing medicine without a certificate in violation of Medical Practice Act, § 17, evidence *held* to sustain conviction.

4. Physicians and surgeons ⟸6(10)—Burden of proving possession of certificate entitling him to practice medicine is on defendant.

In prosecution for practicing medicine without a certificate in violation of Medical Practice Act, § 17, the state by proving that defendant practiced medicine established a prima facie case shifting the burden on defendant of proving that he had the necessary certificate; such fact being within defendant's knowledge.

5. Criminal law ⟸789(17) — Instruction on reasonable doubt held not erroneous.

Instruction: "The term 'reasonable doubt' as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence in the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess"—*held* not erroneous.

6. Criminal law ⟸90(3)—Police court of Sacramento held not to have jurisdiction of prosecution for violation of state Medical Practice Act.

Charter of City of Sacramento, § 164, subd. 1, giving police court of such city jurisdiction "of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California," did not give such police court jurisdiction over prosecution for violation of the state Medical Practice Act, since the charter provision merely confers on such court, as to misdemeanors committed within the limits of the city under the general laws of the state, concurrent jurisdiction with justices' court of Sacramento county, and does not confer jurisdiction where the maximum penalty is by fine exceeding $500 or imprisonment exceeding six months; such charter provision neither superseding nor conflicting with Pen. Code, § 1425, as to jurisdiction of justices' courts.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

T. Wah Hing was convicted of practicing medicine without a certificate, and from judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

T. H. Christiansen, Robert B. McMillan, S. Luke Howe, C. E. McLaughlin, and C. P. McLaughlin, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. Defendant was charged by an information filed in the superior court of Sacramento county with a violation of section 17 of the state Medical Practice Act, approved June 2, 1913 (Stats. 1913, p. 722). The information alleges that:

"The said T. Wah Hing on the ——— day of August, 1919, at the county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in the state of California, without having at the time of so doing a valid unrevoked certificate from the state board of medical examiners of the state of California."

The defendant was tried and convicted and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] The defendant attacks the constitutionality of the law on the ground that the title of the act is not sufficiently comprehensive to include the matters contained in said section 17. A similar objection was raised to the title of this act in People v. Jordan, 172 Cal. 391, 156 Pac. 451, and was decided adversely to appellant's contention. In that case it was contended that the title of the Medical Practice Act violated the provisions of section 24 of article 4 of the Constitution, in that the title was not sufficiently expressive of its contents. The court, in passing upon this contention, said:

"It is first contended that the title of the act is not sufficiently expressive of its contents, and that section 24 of article 4 of the Constitution is violated thereby. Analyzed further, the contention is that the title of the act does not suggest a purpose of the Legislature to regulate the business or practice of those who engage in healing or treating the sick or deformed, but to regulate only the matter of the examination of those who chose to apply for certificates, which documents are to merely certify that the holders thereof have been duly examined and licensed. This contention, if it were conceded to be well founded, would result in a construction to be given to the act which would permit all persons whomsoever to practice medicine, or any mode or system of healing, without being licensed, and would make the matter of procuring a license or certificate merely optional. Admittedly the body of the act is broad and comprehensive enough to regulate the practice of all persons who shall engage in the business of treating the sick or deformed. * * * A liberal rule of construction has been adopted, however, in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being intrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. * * * It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents.' Abeel v. Clark, 84 Cal. 226 (24 Pac. 383). * * * To our minds, by the title of the act here being considered, wherein it set forth the purpose to regulate the examination of applicants for license to treat the sick or deformed, there is suggested at once that the state has proposed to require examinations to be made and licenses to be issued to persons who shall engage in that business. The prohibition that persons not so licensed shall be denied the right to practice seems pertinent and germane to the subject expressed in the title. Several of the illustrative cases given in Ex parte Liddell, 93 Cal. 633 (29 Pac. 261), are directly in point.

"Our conclusion on this branch of the case is that the objection as stated in the briefs that the title of the act is not sufficient in its expression of the purposes declared in the body of the act itself is without merit."

[2] The defendant claims that the information is insufficient in that it "does not conform to the sections of the Penal Code (sections 950, 952) requiring clearness and certainty in charging crime"; that it does not give the name of any patient, or disease treated, the mode or system of treatment practiced, but "charges that defendant practiced, attempted to practice, and held himself out as practicing a mode or system of healing the sick and afflicted."

The information in this case is substantially the same as the information that was before the Supreme Court in People v. Ratledge, 172 Cal. 401, 156 Pac. 455, and which the court held sufficiently charged a violation of section 17 of the said Medical Practice Act. The court said:

"The information is attacked upon the ground that it charges 'the crime of practicing medicine without a certificate from the medical board,' the contention being that no such crime is denounced by the law. It is true that the statute does not contain the quoted words, but clearly they are used merely for purposes of general description of the offense as they are followed by the averment that the crime was 'committed as follows: That the said T. F. Ratledge on the 30th day of October, 1914, at, and in the county of Los Angeles, state of California, did willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the board of medical examiners of the state of California.' This sufficiently charges a violation of section 17 of the Medical Practice Act (Stats. 1913, p. 734), and is not open to the criticism that it seeks to impute many offenses to defendant because any one of the acts or omissions averred and conjunctively pleaded would suffice as the basis of an information. [Citing cases.] This information does not fall within the rule declared in People v. Plath, 166 Cal. 227 (135 Pac. 954)."

It is argued on behalf of appellant that the evidence is insufficient to justify the verdict. It appears from the record that on the 13th day of August, 1919, one Mrs. Francis Sweeney, who was then employed by the state board of medical examiners, called at the office of the defendant in Sacramento and asked him if he was Dr. T. Wah Hing, to which defendant replied that he was. She told him that she was afflicted with nervousness and not able to sleep. He felt her pulse, said he would give her some medicine to cure her, and gave her a package of herbs, giving directions as to their use and charged her $3.50, which she paid. She then left his office and returned shortly after with one Edward P. Morse, then a special agent of the state board of medical examiners. The defendant stated to said Morse that he had treated Mrs. Sweeney for nervousness and prescribed medicine for her and had charged her $3.50. He told Morse that he was a regular practicing physician, and had been for 20 years in Sacramento; that he treated any kind of a case; that he gave internal and external remedies. He took Morse to his drug store in the rear of this office, where there was a large assortment of herbs and drugs. He also exhibited to Morse a record of his patients showing various names and dates, and amounts against those names. There was also introduced in evidence a card which reads:

"Telephone Main 725. Dr. T. Wah Hing, Chinese Physician and Surgeon, also Eye, Ear, Nose and Throat. Office 725 J Street, Sacra-

mento, Cal. Office Hours, 9 to 11 a. m., 1 to 3, 7 to 9 p. m."

This card was handed to Mr. Morse by the defendant.

[3] This evidence is ample and sufficient to sustain the conviction of the defendant, and in addition to the foregoing there was other and additional evidence which tends strongly to support the verdict.

The defendant claims that the judgment should be reversed for the reason that no proof was offered showing that the defendant did not, at the time charged in the information have a valid, unrevoked certificate from the state board of medical examiners. A similar question was before the Supreme Court in People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402. In that case the defendant was charged by information with the crime of willfully and unlawfully practicing medicine without having first procured a certificate to so practice as required by law. At the trial uncontradicted evidence was introduced showing that defendant had been practicing medicine, but no evidence was introduced on either side showing, or tending to show, that defendant had not a certificate to so practice as required by law. The court instructed the jury, in effect, that the burden was upon the defendant to establish that he had a certificate to practice medicine as provided by law, and if he failed to prove that he had such certificate, then it must be taken as true that he had not procured a certificate to so practice medicine.

[4] The court, in sustaining this instruction, among other things, said:

"Mr. Greenleaf, in his work on Evidence, vol. 1, § 79, under the heading 'Negative Allegations,' says: 'But when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.' * * *

"In 1 Jones' Law of Evidence, § 179, under the heading 'Burden as to Particular Facts Lying Peculiarly Within Knowledge of a Party,' is said: 'This is often illustrated in prosecutions for selling liquors or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and, if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense the burden is upon the defendant to prove the fact so clearly within his own knowledge.' * * *

"We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence."

[5] Complaint is made that the court erred in its instructions upon the doctrine of reasonable doubt. After fully instructing the jury on this subject in the oft-approved language of Chief Justice Shaw, the court gave the following instruction, which the defendant claims is error:

"The term reasonable doubt as applied to the evidence in criminal cases means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess."

A similar instruction to this was held by this court not to be erroneous in the case of people v. Del Cerro, 9 Cal. App. 764, 100 Pac. 887, and the court there said "that, rightly understood, the instruction is in reality within the definition of the doctrine of reasonable doubt as given by Chief Justice Shaw."

Other objections are based upon the modification and the refusal of certain instructions. We have examined these objections, and, without entering upon a discussion of them in detail, we think it is sufficient to say that they are without merit. The jury was very fully and fairly instructed by the court.

Finally, the appellant claims that under the charter of the city of Sacramento, ratified by the Legislature in 1911 (Stats. 1911, Extra Session, p. 305), the police court of said city has jurisdiction over all misdemeanors, no matter what may be the amount of the fine or the length of imprisonment. This contention of appellant is based on the first subdivision of section 164 of the said charter, which provides as follows:

"Said police court shall have jurisdiction: (1) Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California."

[6] We cannot agree with appellant in this contention. It is nowhere provided in said charter that the police court of the city of Sacramento shall have jurisdiction of misdemeanors where the maximum penalty is by fine exceeding $500, or imprisonment exceeding six months.

This court held in the Matter of the Application of Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060, that—

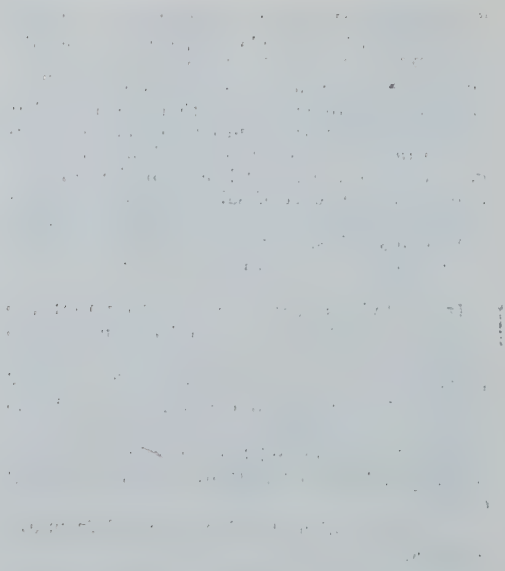
The provisions of said charter creating a police court in the city of Sacramento did not

"confer upon the court so established exclusive' jurisdiction of all simple misdemeanors committed within the limits of the city. The word 'exclusive' is nowhere used in those provisions. It is obvious to our minds that the most that was intended by those provisions of the charter, so far as are concerned misdemeanors committed under the general laws of the state, is that the police court of said city shall have concurrent jurisdiction with the justices' courts of the county of such misdemeanors when they are committed within the limits of said city."

It is obvious from the foregoing that the jurisdiction of the said police court as to misdemeanors committed under the general laws of the state is the same as the justices' courts of Sacramento county. There is no provision of said charter that supersedes or that is in conflict with or repugnant to any of the provisions of sections 1425 of the Penal Code.

The judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.



183 Cal. 171

ELLISON et al. v. HENION. (S. F. 8552.)

(Supreme Court of California. June 16, 1920. Rehearing Denied July 15, 1920.)

1. Payment ⟸16(1)—Note taken for open account does not discharge original debt.

Where notes are taken in the ordinary course for what have previously been open accounts, the indebtedness for which they are taken is not paid, in the sense that it is absolutely discharged; and if default be made upon the notes, an action can be maintained on the original indebtedness, as if the notes had never been given.

2. Assignments ⟸79—Transfer of note for indebtedness on open accounts transfers the original debt.

The transfer of notes taken in ordinary course for what have previously been open accounts transfers the original debt, precluding original creditor from thereafter maintaining an action thereon.

3. Guaranty ⟸53(2)—Creditor could not recover against guarantor after transfer of note.

Where note evidencing debt on open account was transferred, the original creditor could not recover on the original debt as against the debtor's guarantor.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Henry H. Ellison and others, copartners doing business as John B. Ellison & Sons, against H. S. Henion. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank J. Gordon, Welles Whitmore, and R. McMurchie, all of Oakland, for appellant.

Rothchild, Golden & Rothchild and J. A. Pritchard, all of San Francisco, for respondents.

OLNEY, J. This is an appeal by the defendant from a money judgment against him. The following facts appear without dispute: The defendant and two men by the name of Pike were stockholders and officers of a corporation known as the Pike Woolen Company, and the defendant and one of the Pikes executed to the plaintiffs a joint guaranty of any indebtedness that the woolen company might incur to them. The woolen company did incur such an indebtedness in the sum of $4,436.81. Thereafter the woolen company became embarrassed financially, and for the purpose of arranging its indebtedness executed two notes, one for $6,000 and one for $7,000, in favor of a representative of its creditors, including the plaintiffs. These notes represented the aggregate of the debts due the creditors, including the debt to the plaintiffs. The note for $6,000 was signed by the defendant's coguarantor, Pike, and his wife, as well as by the company, and, as security for its payment, Pike and his wife also executed a deed of trust of certain property of their own. The court finds, and we may assume that the finding is justified by the evidence, that the defendant consented to the plaintiffs taking these notes. Payments were made on the notes from time to time, but finally the woolen company defaulted upon them, and the payee of the notes, the representative of the creditors, threatened to sell the property of the Pikes covered by the trust deed. Thereupon the Pikes, or one or the other of them, arranged with the payee of the notes for their purchase or return upon the payment of $5,000.

The defendant claims that the arrangement was for the purchase of the notes, and the plaintiffs claim that it was for the return of the notes to the woolen company. But, whatever may have been the negotiation between the Pikes and the payee, the thing that was finally done was that, in consideration of $5,000 paid him, the payee of the notes indorsed them to one of the Pikes. The uncontradicted testimony also is that the notes remained outstanding as obligations of the woolen company, and that the $5,000 which was paid for the notes was obtained by Pike from a third person by a second hypothecation of his property. The $5,000 was distributed by the payee of the notes among the

creditors whom he represented, in proportion to their claims. Including their share of this, the plaintiffs received on account of their claim against the woolen company a total of $2,174.03, leaving a balance of $2,262.78, on which they received nothing.

Under these circumstances the plaintiffs brought the present action against the defendant; the complaint containing two counts, one on the joint guaranty of the defendant and Pike for the recovery of the unpaid balance mentioned, and the other on the defendant's liability for his proportion of that balance as a stockholder of the woolen company. The answer of the defendant pleaded payment of the obligation of the woolen company to the plaintiffs, and also set out as a separate defense the facts stated above with reference to the giving of the two notes, and their subsequent transfer to Pike. The trial court found that the original indebtedness of the woolen company to the plaintiffs had not been paid, and also, in effect, that the facts alleged as a separate defense were not true. This latter finding must have been an inadvertence, for the facts stated appear without conflict, and for the most part in the testimony for the plaintiffs, as well as in that for the defendant. This finding must therefore be considered as not sustained by the evidence. The trial court concluded that the plaintiffs were entitled to recover on both counts, and gave judgment to that effect.

It would seem to be quite evident that the plaintiffs cannot recover against the defendant as the guarantor of a debt of the woolen company, or as a stockholder of the company proportionately liable for its debt, if the plaintiffs had, before the commencement of their action, parted with the debt which is the basis of the action. The real question in the case is: Had they so parted?

[1] No question is made but that the original debt of the woolen company to the plaintiffs was covered into the two notes given the representative of the creditors. There is question made as to whether the two notes were taken in payment. The question, however, would seem to be one largely as to the use of terms, since the fact is clear that the notes were simply taken in ordinary course for what had previously been open accounts. It is well established that in such a case the indebtedness for which the notes are taken is not paid in the sense that it is absolutely discharged. If default be made upon the notes, an action can be maintained upon the original indebtedness, as if the notes had never been given.

[2] But, on the other hand, the notes evidence the debt, and if they are transferred the debt is transferred with them, and the original creditor can thereafter maintain no action upon it. It no longer belongs to him. That the original debt for which a note has been taken passes with the transfer of the note was directly decided in Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. There the plaintiff brought an action to recover from the defendant as a stockholder of a certain corporation his proportion of a certain indebtedness of the corporation. It appeared that the corporation had been originally indebted for money advanced to it and gave its note to its creditor for the amount. The creditor then transferred the note to the plaintiff. The trial court found the note to be invalid as against the corporation, because of want of authority for its execution, but found that the original indebtedness of the corporation had been assigned by the original creditor to the plaintiff and granted a recovery upon it. On appeal, this finding of an assignment was attacked as not supported by the evidence. The only evidence on the point was that the note had been transferred to the plaintiff. It was held that this was enough; that the transfer of the note was in fact a transfer of the original debt as between the original creditor and the plaintiff, although the note was void as to the corporation. If the transfer of a void note be in effect an assignment of the indebtedness which it was intended to evidence, much more must the transfer of a valid note be in effect an assignment of the indebtedness which it does in fact evidence. See, also, 7 Cyc. 816; Harris v. Johnston, 7 U. S. (3 Cranch) 317, 2 L. Ed. 450; Looney v. District of Columbia, 113 U. S. 258, 5 Sup. Ct. 463, 28 L. Ed. 974; Davis v. Reilly, 1 L. R. Q. B. [1898] 1.

In the present case there is no question as to the fact of the transfer of the notes taken for the indebtedness of the woolen company. They were, as we have said, indorsed and delivered to Pike by the payee, the representative of the woolen company's creditors, upon the payment to him of $5,000. The indorsements were special; that is, to the order of Pike. There is no escape from the conclusion that by this transfer the creditors parted, not only with the notes, but with the debts for which the notes were given. In other words, when the plaintiffs brought this action, they were not the owners of or interested in the obligation whose guaranty they seek to enforce in one count, and the stockholder's liability pertaining to which they seek to enforce in the other.

The plaintiffs seek to avoid this conclusion by the claim that the payee did not intend to sell the notes to Pike, but to return them to the woolen company, and rely upon testimony of the payee to that effect. But, whatever he intended, the thing which he did was to transfer the notes by indorsement and delivery, and the legal effect of that which he did cannot be varied in this action, to which Pike is not a party, by evidence that he intended something else. There is, in fact, no evidence here

sufficient to warrant a reformation of his transaction with Pike; but, even if there were, it would be immaterial. Until the transaction is reformed, and the transfer in effect canceled, something which can be done only in an action against Pike, the transfer must be given effect. As long as the transfer stands uncanceled, the woolen company is liable to Pike upon the notes. To hold that it was also liable to the plaintiffs upon the original indebtedness for which the notes were given would be to subject it to a double liability for the same obligation.

[3] If the plaintiffs are not the owners of the obligation of the woolen company, as we believe it is plain they are not, it would seem to follow almost as of course that they cannot recover on a guaranty of that obligation, or upon the defendant's liability as a stockholder for his proportion of it. Whatever rights may exist in these respects would seem plainly to be in Pike as the owner of the notes which evidence the basic obligation. Plaintiffs' counsel, nevertheless, contend to the contrary in respect to the guaranty; their argument being that the obligation of the guarantor is an independent obligation, which, of course, it is, in a sense, and therefore not transferred by a transfer of the obligation guaranteed, and cite Black v. Sippy, 15 Or. 574, 16 Pac. 418, as in point. An examination of this case shows, however, that it is rather an authority for the view we have expressed. A statute of Oregon made both husband and wife liable for supplies furnished the family. The defendant's husband purchased certain family supplies, and gave his note for the purchase price. The firm which furnished the supplies then assigned the note to the plaintiff, and, the note not being paid, the plaintiff brought suit, not against the husband on his note, but against the wife upon her statutory liability. If, under these circumstances, it had been held that the obligation of the wife had not passed to the assignee of the note, but remained in the assignor, in whose favor the obligation was originally incurred, the case might perhaps be considered as tending to sustain the position of plaintiffs' counsel here. But that is exactly what was not held. On the contrary, it was held that the transfer of the note, evidencing as it did the debt, transferred the wife's liability for the debt, and the assignee of the note was allowed to recover against her. The decision would seem to be very closely in point here in favor of the view we have expressed. In any case, the correctness of that view seems to us almost self-evident.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

183 Cal. 145

LYON & HOAG v. RAILROAD COMMISSION et al. (S. F. 9142.)

(Supreme Court of California. June 11, 1920. Rehearing Denied July 8, 1920.)

1. Constitutional law ⟸278(1)—Eminent domain ⟸2(1)—Compelling public utility to operate at loss is "taking of property without compensation."

The state has no power to compel the continued operation of a public utility at a loss, where the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use, since to compel the operation of the public utility at a loss is a taking of property without compensation in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

2. Corporations ⟸382½, New, vol. 16 Key-No. Series—Theory on which a state exercises control over public utilities stated.

The theory on which the state exercises control of a public utility is that the property so used is thereby dedicated to a public use, the owner retaining the right to receive a reasonable compensation for use of the property and for the service performed in the operation and maintenance thereof, but, where owner abandons the dedicated property to the public, there is no further basis on which the regulatory power can be predicated.

3. Public Service Commissions ⟸35 — Question not raised before Railroad Commission not considered by court on certiorari.

A question not raised before the Railroad Commission will not be considered by court on certiorari to review the commission's order.

4. Waters and water courses ⟸188(3)—Railroad Commission could not compel operation of waterworks at a loss after abandonment thereof.

Where owner of subdivision which had been furnishing water to purchasers of lots in subdivision abandoned the waterworks, and where at the request of the city officials and the Railroad Commission a waterworks company took charge and operated the waterworks so abandoned, Railroad Commission was powerless to compel the subdivision owner to resume operation at a loss.

Application for certiorari by Lyon & Hoag, a corporation, against the Railroad Commission and others, to review order of said Commission. Order annulled.

J. E. McCurdy, of San Mateo, and Walter H. Linforth, of San Francisco, for petitioner.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for Railroad Commission.

Stoney, Rouleau, Stoney & Palmer, of San Francisco, for other respondents.

WILBUR, J. Petitioner seeks the review of an order of the Railroad Commission

requiring it to re-establish its service of domestic water in a certain residence district of the city and county of San Francisco known as Lincoln Manor. Petitioner subdivided this tract, and, for the purpose of furnishing domestic water to the purchasers of lots therein, laid water pipes in the streets thereof, purchased water from the Spring Valley Water Company, and, by means of a pumping system, distributed it to the purchasers of lots within the tract. As fast as lots were sold and water connections desired for residences located thereon the same were made. The same water rates were charged by the petitioner as by the Spring Valley Water Company. As soon as all the lots in the tract were sold, the petitioner discontinued said water service and offered to give its water system free of charge to the Spring Valley Water Company for the purpose of a continuance of such service by the latter company. Inasmuch as said service required an expenditure for pumping the water, the latter company refused to accept the responsibility. The lot owners appealed to the Railroad Commission for relief, and, upon the hearing of their petition, an order was made requiring the petitioner to resume such service.

Petitioner claims that it is not a public utility. It also claims, if it is a public utility, that the control over it is vested in the board of supervisors of the city and county of San Francisco, and not in the Railroad Commission. In view of our conclusion that the state has no power, either directly or through the board of supervisors of the city and county of San Francisco or the Railroad Commission of the state of California, to make the order in question, it is unnecessary to determine either of the foregoing points raised by the petitioner.

[1] The state has no power to compel the continued operation of a public utility at a loss, where the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use. Since the submission of this case the Supreme Court of the United States has passed upon this question, and for that reason a discussion of the various decisions cited by the respondent in support of the order of the Railroad Commission is unnecessary. That court decided that "a carrier cannot be compelled to carry on even a branch of its business at a loss, much less the whole business of carriage." Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. ——. A similar conclusion was suggested by our earlier decision in Fellows v. City of Los Angeles, 151 Cal. 52, 64, 90 Pac. 137, 141, where it was said:

"We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved and we express no opinion concerning them."

[2] The basis of the conclusion that the state cannot compel the operation of a public utility at a loss is that such an order is a taking of property without compensation and therefore violates the Fourteenth Amendment to the federal Constitution. Brooks-Scanlon Co. v. R. R. Comm., supra; North Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745. The theory on which the state exercises control over a public utility is that the property so used is thereby dedicated to a public use. The dedication is qualified, however, in that the owner retains the right to receive a reasonable compensation for use of such property and for the service performed in the operation and maintenance thereof. Where, as in this case, the owner is willing to and does in fact abandon all the dedicated property to the public, there is no further basis upon which the regulatory power can be predicated. To require the former owner, after such abandonment, to continue to operate the property at a loss for the benefit of the public, would be a taking of such excessive cost of operation from such owner without compensation. The numerous cases cited by the respondent merely hold that a public corporation can be required to operate certain portions of its system at a loss, where the general business of which such system forms a part can be profitably operated. State ex rel. Caster v. Kansas Postal Telegraph-Cable Co., 96 Kan. 298, 150 Pac. 544; State ex rel. Public Service Commission v. Missouri Southern Railroad Co., 214 S. W. 381; People ex rel. Hubbard v. Colorado Title & Trust Co., 178 Pac. 6.

[3, 4] No case has been cited in which it has been held that authority exists to compel a public utility to operate at a loss on its whole system and investment, and the foregoing decisions of the Supreme Court of the United States determine that it cannot be done. This, we understand, is fully conceded by the respondent Railroad Commission. It contends, however, that the petitioner should be compelled to continue the service for a reasonable time pending its application to

the Railroad Commission for leave to abandon its service, of for increased rates to enable it to profitably continue such service. No such question was raised before the Railroad Commission. There the whole controversy was as to whether or not the petitioner was a public utility corporation and subject to the jurisdiction of the Railroad Commission. The commission found that petitioner had wholly abandoned its water pipes and pumping plant August 10, 1918, and that thereafter the same had been operated and used by the Spring Valley Water Company at the request of the city officials of San Francisco and of the Railroad Commission. The order of the Railroad Commission under review was made June 10, 1919. We conclude that after such a complete abandonment to the public of all its property devoted to a public use the Railroad Commission is powerless to compel the petitioner to resume operations at a loss. The order of the Railroad Commission required the petitioner to resume service, without additional compensation, and therefore at a continued loss.

The order under review is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; OLNEY, J.

183 Cal. 186

BROWN v. ANDERSON-COTTONWOOD IRR. DIST. (S. F. 9126.)

(Supreme Court of California. June 16, 1920.)

1. Lost instruments ⟸7—Complaint for reissuance of lost bond held insufficient.

In action against irrigation district for reissuance of lost bond, complaint *held* insufficient to entitle plaintiff to relief under Civ. Code, § 329, in that it failed to allege that the bond had been lost or destroyed in the state, or in a calamity such as a fire or earthquake, as required by such statute.

2. Lost instruments ⟸3—Equity can give relief, notwithstanding special statutory proceeding.

The restoration of lost instruments is an old and well-established function of equity; its jurisdiction in such respect not being impaired by the enactment of statutes providing for special proceedings for the same purpose, unless the intent to make such special proceedings exclusive appears.

3. Lost instruments ⟸7—Complaint held sufficient to give equity jurisdiction.

Complaint *held* to state facts entitling plaintiff to decree in equity requiring reissuance by defendant irrigation district of lost bond, notwithstanding insufficiency of complaint under Civ. Code, § 329; such statute not impairing the jurisdiction of equity to afford relief.

4. Lost instruments ⟸3—Demand for duplicate bond not a condition precedent.

A demand on irrigation district for issuance of duplicate bond was not a condition precedent to an action in equity by owner of lost bond for reissuance of bond.

5. Lost instruments ⟸10—Decree canceling original bond in suit for reissuance of lost bond improper.

In action in equity against irrigation district for reissuance of lost bond, plaintiff was not entitled to decree canceling the original bond, since, such action not being in rem, the decree would not be effective as to third persons, who might get possession of original bond with right to enforce it.

6. Lost instruments ⟸2 — Duplicate bond pursuant to decree does not impose liability, where original bond is capable of enforcement.

Owner of lost irrigation bond, who has procured issuance of duplicate in equitable action therefor, cannot enforce bond against irrigation district, where the lost bond subsequently appears in the hands of a third person entitled to enforce it against the district.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Ada I. Brown against the Anderson-Cottonwood Irrigation District. Judgment for plaintiff, and defendant appeals. Affirmed, as modified.

Carr & Kennedy, of Redding, for appellant.

Tum Suden & Tum Suden, of San Francisco, for respondent.

OLNEY, J. This is an appeal by the defendant from a judgment entered against it upon its failure to answer after the overruling of a demurrer which it had interposed to the plaintiff's complaint. The question is therefore as to the sufficiency of the complaint.

[1] The complaint alleged in brief that the plaintiff was the owner of a $1,000 bond issued by the defendant, a public irrigation district, and that the bond had been lost, and prayed for a decree directing the issuance to the plaintiff of a new bond, and the cancellation of the one lost. The prayer and certain of the allegations of the complaint make it certain that the plaintiff had in mind to proceed under section 329 of the Civil Code. That section provides that—

"Whenever a bond * * * of a corporation * * * has * * * been lost or destroyed in this state by fire, earthquake, or other calamity, the owner thereof may bring an action against such corporation * * * for the purpose of obtaining a new or duplicate bond. * * *"

The principal ground of demurrer to the complaint was that it alleged merely that the bond had been lost or destroyed, and not that it had been lost or destroyed in this state,

or in any calamity such as a fire or earthquake. Viewed as the initiation of a proceeding under the Code section, the complaint was certainly insufficient in these particulars. The section by its terms plainly applies only to a loss or destruction in this state through some calamity, such as a fire or earthquake, and this the complaint did not allege.

[2] But it does not follow that the complaint was open to demurrer as failing to show a case wherein the plaintiff was entitled to relief. The Code section does not purport to prescribe the only case in which a lost or destroyed instrument may be restored, or to prescribe the procedure which alone can be followed to obtain such restoration. It provides merely that in certain cases a certain procedure may be followed for that purpose. The restoration of lost instruments is an old and well-established function of courts of equity, and it is likewise well established that their jurisdiction in this respect is not impaired by the passage of statutes providing for special proceedings for the same purpose, unless the intent to make such special proceedings exclusive appears. 25 Cyc. 1609. Such intent does not appear in the statutes of this state.

[3] Viewed, not as the initiation of a proceeding under the Code section, but as the equivalent under our reformed procedure of a bill in equity, the complaint is sufficient in the particulars under discussion, since to entitle the plaintiff to relief in equity the loss or destruction of the instrument is alone sufficient, and it is not necessary that it be lost or destroyed in any particular manner. It is wholly immaterial that the plaintiff mistakenly conceived that upon the facts stated in the complaint she was entitled to maintain an action under the authority of the Code section. It was necessary only that the complaint show that she had in fact a cause of action of some sort, and was entitled to relief. Showing this, the complaint is sufficient, and, the truth of its allegations being established either by evidence or by the admission of the defendant, as by its failure to answer, the plaintiff is entitled to have the relief which the facts established justify, although that relief may not be exactly what she conceived she was entitled to.

[4] The defendant also makes the point that viewed as the equivalent of a bill in equity, the complaint is yet insufficient because it fails to allege any demand upon the defendant for the issuance of a duplicate bond before the commencement of the action. It is true that the defendant would not be in the wrong until such demand was made and refused. But a suit in equity of this character is not one for relief against a wrong committed by the defendant, but is one to enforce a right in the plaintiff. The plaintiff's right to a duplicate bond depends wholly on the loss of the original, and a demand upon the defendant is not an element of the right and therefore not of the plaintiff's cause of action. Under these circumstances, the presence or absence of a prior demand upon and refusal by the defendant is material only on the question of the defendant being liable for costs. The case comes directly within the principle of Randolph v. Harris, 28 Cal. 561, 565, 87 Am. Dec. 139, where in a suit of this character it was held that a prior tender to the defendant of an indemnity bond was material only as to the matter of costs. Upon the point of the plaintiff's right to maintain the suit there is no distinction between a prior demand upon the defendant and a prior tender to it of an indemnity bond. Both are necessary to put the defendant in the wrong, but neither is an element of the right sought to be enforced. If one is not a condition precedent to the right to maintain the suit, there is no reason why the other should be. See, also, Gray v. Dougherty, 25 Cal. 266, 282, and Farmer's Exchange Bank v. Altura, etc., Co., 129 Cal. 263, 270, 61 Pac. 1077. The action of the lower court in overruling the defendant's demurrer was therefore correct.

[5] This conclusion, however, does not entirely dispose of the matter. The plaintiff was not entitled to relief under the Code section, but only to such relief as might be given by the court under its general equity powers. The plaintiff, however, after the overruling of the demurrer and the defendant's failure to answer, proceeded under the Code section, and the relief decreed by the judgment was that provided by the Code section. To the extent to which the relief so decreed exceeded or departed from that properly allowable in a suit in equity for the restoration of a lost instrument, the judgment is at fault. The Code section provides for a judgment not merely directing the issuing of a duplicate instrument, but also canceling the original instrument, and the judgment in this case so provides. It is difficult to see how literal effect can be given to this provision, in view of the fact that the original bond is supposedly lost or destroyed, so that its actual cancellation is an impossibility. Presumably what is meant is that the original bond be judicially declared to be null and void. Such a judicial declaration would of course be wholly ineffective as to third persons, unless the action be one in rem. It is not necessary to determine whether an action under the Code section would be of that character.

[6] The present action is not one under the Code section, and is purely in personam. The court not having the power to declare the bond void as to third persons, it should not be declared void as between the plaintiff and defendant, If, in spite of its supposed loss or destruction, it should subsequently appear in the hands of a third person entitled

to enforce it against the defendant, the plaintiff should have no right to enforce the duplicate bond issued in substitution for it. But she would have this right, if in the present action the original bond has been declared void as between her and the defendant. The plaintiff has no right to a decree which would or might have this effect. The judgment appealed from is therefore modified, by striking out the last paragraph thereof, beginning with the word "Wherefore," and ending with the word "herein," and substituting in lieu thereof the following:

"Wherefore, by reason of the premises, the court does hereby order, adjudge, and decree that in substitution for that certain $1,000 gold bond with attached coupons, specified in the complaint herein, and issued by the defendant herein, Anderson-Cottonwood Irrigation District, and evidencing an obligation of the defendant for the payment of a principal sum of $1,000, with the interest to accrue thereon, the said defendant do execute and issue to Ada I. Brown, the plaintiff herein, a duplicate bond of like tenor and import, together with duplicate coupons attached of like tenor and import, upon the plaintiff paying to the defendant all costs incurred by the latter in the premises, the same being hereby taxed at $———, together with the expenses of the execution and issue of said duplicate bond and coupons, and upon the plaintiff executing unto the defendant an indemnity bond in the sum of $2,000, in form and with sureties approved by the court, indemnifying defendant against any loss or liability which may be suffered by it by reason of the execution and issuance of said duplicate bond and coupons distinct from and in addition to the liability of defendant heretofore evidenced by the bond and coupons for which such duplicate bond and coupons are to be executed and issued in substitution."

As so modified, the judgment is affirmed; each party to bear its own costs on appeal.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

183 Cal. 182

HUTCHISON v. BARR. (L. A. 6093.)

(Supreme Court of California. June 16, 1920.)

1. Pleading ⟹403(5)—Answer in foreclosure suit cured defect in complaint.

Where the answer of defendant successor of mortgagor in suit to foreclose admitted she was owner of the fee of the mortgaged property at commencement of the action, any defect in the complaint resulting from failure to plead such fact was cured.

2. Trial ⟹36, 391—Neither proof nor finding of admitted fact necessary.

In suit to foreclose a mortgage, where the fact that defendant was the owner of the fee at commencement of action was admitted, neither proof nor finding was necessary on such phase of the case.

3. Mortgages ⟹427(1)—Successor in interest of mortgagor could have been made defendant without joining mortgagor.

Defendant in suit to foreclose, as the successor in interest of the mortgagor, could have been made defendant in the first instance, without joining the mortgagor.

4. Mortgages ⟹427(1)—Mortgagor necessary party, if mortgagee insists on deficiency judgment.

In suit to foreclose, the mortgagor was a proper part to the action, and, under Code Civ. Proc. § 726, would have been a necessary party, if plaintiff mortgagee had insisted upon a personal deficiency judgment.

5. Mortgages ⟹427(1)—Dismissal of mortgagor did not affect right to judgment of foreclosure against successor.

Where the right to a deficiency judgment was ultimately abandoned by plaintiff mortgagee in suit to foreclose, and it appeared by the answer of the mortgagor's successor in interest that the mortgagor had divested itself of title, and that its successor was owner in fee, the mortgagor was not a necessary party, and dismissal of it did not affect plaintiff mortgagee's right to obtain judgment of foreclosure.

Department 2.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by D. E. Hutchison against Florence A. Barr and others. From judgment for plaintiff, foreclosing the mortgage, defendant named appeals. Affirmed, with penalty for frivolous appeal.

F. E. Davis, of Los Angeles, for appellant.
Leland S. Bower, of Los Angeles, for respondent.

LENNON, J. This action—one to foreclose a real property mortgage—was commenced April 3, 1918. The complaint, which was in the usual form of an action to foreclose, alleged, among other things, that the corporation defendant, Walter G. McCarty Company, was, on the 1st day of September, 1914, the owner in fee of the property designated and described in the complaint and that on the said 1st day of September, 1914, the corporation defendant executed to E. W. Grannis, plaintiff's assignor, as security for a promissory note in the sum of $2,000, the mortgage in suit upon the property described in the complaint. Plaintiff's complaint failed, however, to allege who was the owner of the mortgaged property at the time of the commencement of the action. The defendant Florence A. Barr was made a defendant in the action upon the allegation that she, as purchaser, had or claimed some interest in the mortgaged property which was subordinate to and subject to the lien of

plaintiff's mortgage. The record shows an entry of her default for failure to answer within the time allowed therefor. The record is silent, however, as to whether the default was set aside; but it presumably was, for the record shows that this defendant later "for herself alone, and not for her codefendants," answered the plaintiff's complaint.

In her answer, after denying all of the material allegations of the complaint for lack of information and belief, it was specifically and affirmatively admitted and alleged that defendant Florence A. Barr, as purchaser, had an interest in the mortgaged property and was the owner thereof in fee at the time of the commencement of the action. None of the other defendants answered, and shortly prior to the trial of the action the plaintiff directed, and there was thereupon entered, a dismissal of the action as to the mortgagor, the corporation defendant, and all of the other parties originally joined as defendants, save and except the defendant Florence A. Barr. Upon the issues raised by her answer the trial court found in substantial accord with the allegations of the complaint and, among other things, that the corporation defendant executed the note and mortgage in suit on the 1st day of September, 1914, and that on that date the corporation defendant was the owner in fee of the mortgaged property. The findings make no mention of who was the owner of the fee of the mortgaged property at the time of the commencement of the action, but there is a finding "that the defendant Florence A. Barr has an interest in said * * * real property and that her said interest is subsequent to and subject to plaintiff's mortgage lien," and the judgment provided that she be paid any surplus over and above the mortgage indebtedness. Judgment was accordingly entered for the plaintiff, foreclosing the mortgage, from which the defendant Florence A. Barr alone has appealed upon the judgment roll.

[1] The answer of the defendant Florence A. Barr admitted she was the owner of the fee of the mortgaged property at the time of the commencement of the action, and therefore cured the defect in the complaint, if any, resulting from the failure to plead that fact. Schenck v. Fire Ins. Co., 71 Cal. 28, 11 Pac. 807; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; Shively v. Land & Water Co., 99 Cal. 259, 33 Pac. 848; County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Abner Doble Co. v. Keystone Co., 145 Cal. 490, 78 Pac. 1050; McGillivray v. Miller, 3 Cal. App. 188, 84 Pac. 778; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073; Grangers' Union v. Ashe, 12 Cal. App. 757; Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635; Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892.

[2] That the defendant Florence A. Barr was the owner of the fee of the mortgaged premises at the time of the commencement of the action was, as we have seen by the averment of her answer, an admitted fact in the case, and consequently neither proof nor finding was necessary upon that phase of the case. Taylor v. C. P. R. R., 67 Cal. 615, 8 Pac. 436; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500; Pomeroy v. Gregory, 66 Cal. 572, 6 Pac. 492; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenomy v. White, 115 Cal. 339, 47 Pac. 109; Conway v. Supreme Council, 137 Cal. 386, 70 Pac. 223; Muller v. Rowell, 110 Cal. 318, 42 Pac. 804.

[3] The defendant Florence A. Barr, as a successor in interest of the mortgagor, could have been made defendant in the first instance without joining the mortgagor. Cal. Title Ins. Co. v. Miller, 3 Cal. App. 54, 84 Pac. 453; Bigelow v. Bush, 6 Paige (N. Y.) 343; Ingham v. Weed, 5 Cal. Unrep. 645, 48 Pac. 318. The purpose of the action to foreclose was "to subject to sale the title of the mortgagor—that is, such title as he had at the date of his mortgage—and to cut off all the rights of parties subsequently becoming interested therein." Burton v. Lies, 21 Cal. 88, 92; Goodenow v. Ewer, 16 Cal. 461, 468, 76 Am. Dec. 540; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561.

[4] The mortgagor, the corporation defendant, was a proper party to the action, and would have been a necessary party thereto, if the plaintiff had insisted upon a personal deficiency judgment as was originally prayed for. Code Civ. Proc. § 726. However, inasmuch as the right to a deficiency judgment was ultimately abandoned by plaintiff, and it appearing upon the coming in of the answer of defendant Florence A. Barr that the mortgagor had divested itself of the title to the mortgaged property, and that defendant Florence A. Barr was the owner in fee of the property at the time of the commencement of the action, the mortgagor was no longer a necessary party.

[5] The dismissal of the defendant corporation did not, therefore, affect the right of the plaintiff to obtain a judgment of foreclosure against the defendant Florence A. Barr, for the record as a whole disclosed a cause of action against the grantee of the mortgagor. San Diego Realty Co. v. Hill, 168 Cal. 637, 143 Pac. 1021; McLaughlin v. Stewart, 1 Ont. Law Rep. 295; 27 Cyc. 1583.

The judgment appealed from is affirmed, with a penalty of $50 against the defendant Florence A. Barr for the institution and prosecution of a frivolous appeal.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 199

CONNER v. BANK OF BAKERSFIELD
(two cases). (L. A. 6025, 6058.)

(Supreme Court of California. June 17, 1920. Rehearing Denied July 15, 1920.)

1. Judgment ⊂⊃713(2)—Conclusive on matters in issue or which might have been decided.

A judgment is conclusive in all other actions involving the same question, and on all matters involved in the issues which might have been litigated and decided.

2. Interpleader ⊂⊃26—Defendant can put in issue plaintiff's right to compel interpleader.

Defendant in interpleader has the right to put in issue the question whether or not the facts are such as to entitle plaintiff to compel defendants to interplead.

3. Interpleader ⊂⊃32—Right to compel interpleader only question which can be litigated.

In action to compel interpleader, the only question which can be litigated between plaintiff and defendants is the right to compel interpleader, and neither defendant can obtain affirmative relief against plaintiff, and their claims against him arising out of the subject-matter of the interpleader cannot be put in issue.

4. Interpleader ⊂⊃11—Bank entitled to interplead conflicting claimants of fund.

Where a bank was holder of a fund admittedly due from it in which it claimed no interest, but there were conflicting claims to the fund between which the bank could not decide without risk of injury to itself, under Code Civ. Proc. § 386, it had the right to bring an action to compel the conflicting claimants to interplead.

5. Interpleader ⊂⊃10—Plaintiff must be disinterested stakeholder.

Plaintiff in interpleader must be a disinterested stakeholder, and dispute as to the amount due is fatal to the action.

6. Interpleader ⊂⊃10—Bank could not have interpleaded adverse claimants of proceeds of interest-bearing check.

Had a check for the proceeds of which the bank on which it was drawn required adverse claimants to interplead itself been interest-bearing. claim of one of the claimants to interest would have had the effect of putting in issue the extent of the obligation of the bank on the check, and the action could not have been maintained.

7. Judgment ⊂⊃713(2) — Estoppel in subsequent action to claim greater obligation than admitted in interpleader suit.

If a defendant in an interpleader suit failed to question the extent of the obligation of plaintiff, he is estopped from later attempting to claim a greater obligation than that admitted and consented to in the interpleader.

8. Interpleader ⊂⊃32 — Bank interpleading drawer and holder of certified check could not be compelled to litigate other liability.

A bank which interpleaded its depositor, who drew a certified check, and the holder of the check, could not have been compelled to litigate any liability in the action other than its admitted one for the amount of the check until it was first determined on which contract, the one with the depositor, or the one effected by the certification, it was liable.

9. Judgment ⊂⊃590(4)—Defendant did not waive claim to damages by failing to set it up as bar to suit for interpleader.

Holder of a certified check did not waive her claim for damages against the bank through its failure to pay it, by failing to set up such claim as a bar to the bank's interpleader suit against herself and the drawer of the check, on the ground the bank had an interest in the outcome of the litigation because of its liability for damages, if the holder was found entitled to payment.

10. Interpleader ⊂⊃10—Interest of plaintiff to defeat suit must be in subject-matter.

An interest of plaintiff in interpleader to defeat the relief prayed must be in the very thing or fund itself which is the subject-matter of the controversy.

11. Interest ⊂⊃61—No action for interest as damages after payment in absence of agreement.

Ordinarily interest which is allowed as damages is strictly incidental to the debt, and no action for such damages can be maintained after the debt ceases by payment of the principal as such, in the absence of an agreement reserving the right, in view of Civ. Code, § 3290, a rule which cannot be invoked where the conditions of payment are such that the person entitled cannot assert the claim to damages at time of payment.

12. Interest ⊂⊃62—Bank which severed claim to interest as damages from obligation on certified check cannot complain of subsequent action for such damages.

Where a bank which had certified a check severed the holder's claim to interest as damages for failure to pay from the original obligation by compelling the holder to prove her right to the amount of the check in its interpleader suit against the holder and the drawer without giving the holder an opportunity to present her claim for damages, it cannot complain of the holder's subsequent action for such interest as damages.

13. Interest ⊂⊃20—Deposit of fund in court in interpleader action stopped running.

Holder of certified check, which bank failed to pay, interpleading drawer and holder for proceeds, *held* entitled, as damages for the failure to pay, only to interest from the date of the refusal to the date of the deposit of the fund in court in its interpleader action.

Department 2.

Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Sarah L. Conner, executrix of the last will of C. L. Conner, deceased, against the Bank of Bakersfield, a corporation. From a judgment for plaintiff, both parties appeal. Affirmed.

Peter A. Breen, of San Francisco, and C. C. Cowgill, of Sonoma, for plaintiff.

J. W. Wiley and Wiley & Lambert, all of Bakersfield, for defendant.

LENNON, J. On July 21, 1910, defendant, the Bank of Bakersfield, certified a check in the sum of $3,799.66, drawn by G. J. Plantz and payable to the Kern Valley Bank. Plantz then delivered the check to the Kern Valley Bank for the account of C. L. Conner. Conner died a short time thereafter and plaintiff herein was appointed executrix of his will. On May 19, 1911, plaintiff presented said check to the Bank of Bakersfield, which refused payment. On July 20, 1911, this bank commenced an action in interpleader requesting that said executrix and Plantz be required to set out their conflicting claims to the money called for by the check. The executrix and Plantz thereupon interpleaded between themselves and the case came on for trial on September 21, 1912, on which date the amount of the check, namely, $3,799.66, was deposited in court by the bank. On December 9, 1912, the court rendered judgment in favor of the executrix and on March 6, 1917, when this judgment became final, the fund deposited in court was paid by the clerk to the executrix in accordance with the judgment. The present action was brought by the executrix to recover from the Bank of Bakersfield damages for its refusal to pay the check when presented. The lower court sustained a general demurrer to the complaint, and ordered judgment thereon in favor of defendant, which judgment was reversed by this court. Conner v. Bank of Bakersfield, 174 Cal. 400, 163 Pac. 353. Defendant then answered. At the trial plaintiff waived all claims for damages except the claim for interest at the rate of 7 per cent. per annum on said $3,799.66 from May 19, 1911, to March 6, 1917. The court gave judgment for plaintiff for $356.10 as damages; that sum being interest at 7 per cent. on $3,799.66 from May 19, 1911, the date of the presentation of said check, to September 21, 1912, the date of deposit in court. The bank appeals from this judgment, claiming that plaintiff is not entitled to any damages. An appeal is also taken by the executrix, who contends that the amount awarded is too small. The appeals were presented together.

The contention of the bank in this case is that the plaintiff herein, by stipulating in the interpleader suit that the bank was only a stakeholder in so far as the interpleader suit was concerned, and that the check might be deposited in court, and by litigating her claim to the fund without objection, released the bank from any liability for damages.

"In Southern Pac. R. R. Co. v. United States, 168 U. S. 1, it is said: 'The general principle announced in numerous cases in this court is that the right, question, or fact, definitely put in issue and directly determined by the court of competent jurisdiction as a ground of recovery, cannot be contested in a subsequent dispute between the same parties or their privies.'" Green v. Thornton, 130 Cal. 482, 485, 62 Pac. 750, 751.

[1] Moreover, a judgment is conclusive in all other actions involving the same question and upon all matters involved in the issues which might have been litigated and decided in the case. Bingham v. Kearney, 136 Cal. 176, 68 Pac. 597. A party cannot, however, be held to be precluded from pursuing, in a subsequent action, matters which were not within the issues in the former action, and the present plaintiff can only be held to have waived her right to obtain damages for the refusal to pay the check in the event that she was entitled to set up this right in the interpleader suit and failed to do so.

[2] A defendant in interpleader has the right to put in issue the question as to whether or not the facts were such as to entitle the plaintiff to compel the defendants to interplead. It has therefore been held in effect that, if the defendants in interpleader have fully litigated their claims without objection, they will be deemed to have consented to the remedy invoked and granted, and will not later be heard to object that the plaintiff's complaint did not state a cause of action for interpleader or that plaintiff's obligation to them was anything more or less than they consented and acknowledged it to be in the first instance for the purposes of interpleader. San Francisco Savings Union v. Long, 123 Cal. 107, 55 Pac. 708.

[3] However, in an action to compel interpleader, the only question which can be litigated between the plaintiff and the defendants therein is the right to compel interpleader. Neither of the defendants in such an action can obtain affirmative relief against the plaintiff and their claims against the plaintiff, if any, arising out of the subject-matter of the interpleader, cannot be put in issue in the interpleader suit, but will be considered only when presented in another and different action. Los Angeles v. Amidor, 140 Cal. 400, 73 Pac. 1049; Conner v. Bank of Bakersfield, supra.

[4, 5] The Bank of Bakersfield was the holder of a fund which admittedly was due from it and in which it claimed no interest whatever, but there were conflicting claims to the fund between which the bank could not decide without risk of injury to itself. It therefore had the right to bring an action to compel the conflicting claimants to the fund to interplead. Code Civ. Proc. § 386. It is true that the plaintiff in interpleader must be a disinterested stakeholder and a dispute as to the amount due is fatal to the action.

[6, 7] Had the check itself been interest-bearing, plaintiff's claim to interest would have had the effect of putting in issue the extent of the obligation of the bank on the check and, therefore, the action could not have been maintained. Appeal of the Bridesburg Manufacturing Co., 106 Pa. 275. In such a case, if a defendant failed to question the extent of the obligation of the plaintiff, he would be estopped from later attempting to claim a greater obligation than that admitted and consented to in the interpleader. But in the instant case the check was not interest-bearing, and there is no question but that the amount deposited by the bank in the interpleader suit was all that was due on the bank's original obligation.

[8] In the interpleader suit the bank admitted an obligation due either to a depositor, Plantz, or the holder of a certified check, the executrix. Both obligations were contractual in nature, and no other or different liability was admitted by the bank in that action, nor could it have been compelled to litigate any liability in that action. No claim for damages for breach of contract could be litigated until it was first determined upon which contract the bank was liable, and it was for the purpose of determining the latter question that the interpleader suit was brought. The claim now set up by the executrix is a claim for damages for breach of contract by refusing to pay on demand, the measure of such damages being interest on the amount of the check from the date of the refusal, and it was incumbent upon the executrix to prove her right to receive payment as against Plantz before asserting this claim to damages. While the bank admitted its liability on the original obligation to whichever defendant proved his claim to be superior, it admitted no liability for refusal to pay on demand, and, for all that appeared in the interpleader suit, it might have had defenses to a claim for damages for breach of contract, such as insufficiency of the demand for payment, etc.

[9, 10] The claim for damages for breach of contract was therefore dependent upon the outcome of the interpleader suit, but could not be litigated in that suit, for it was a claim for affirmative relief by one of the defendants against the plaintiff, and was not part of the original obligation which constituted the subject-matter of the controversy. Los Angeles v. Amidor, supra. Nor did the executrix waive her claim to damages by failing to set it up as a bar to the interpleader suit upon the ground that the bank had an interest in the outcome of the litigation because of its liability for damages in the event that the executrix was found to have been entitled to payment. The interest of the bank was not of such a nature as to prevent it from being a mere stakeholder of the fund which was the subject-matter of the interpleader suit. An interest of the plaintiff in interpleader in order to defeat the relief therein prayed for, must be in the very thing or fund itself, which is the subject-matter of the controversy.

"An interest in the legal question at issue to be determined by the result of the litigation will not prejudice the plaintiff's right to the relief. If, therefore, the plaintiff has with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property—this is no objection to his maintaining a suit for an interpleader." Pomeroy's Equity Jurisprudence, vol. 4, § 1472; Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571.

[11, 12] Ordinarily interest which is allowed as damages is strictly incidental to the debt and no action for such damages can be maintained after the debt ceases by payment of the principal as such in the absence of an agreement reserving the right. Sutherland on Damages (4th Ed.) vol. 1, § 372; Civ. Code, § 3290. This rule cannot be invoked, however, where the conditions of payment are such that the person entitled to payment is precluded from asserting the claim to damages at the time of payment. The bank severed the claim to interest as damages from the original obligation by compelling the executrix to prove her right to the amount of the check in the interpleader suit without an opportunity to present the claim for damages. The bank is not, therefore, in a position to complain of the present action. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21.

The statements in the conclusions of law and judgment of the court in the interpleader suit to the effect that upon payment to the executrix the bank should be absolved from further liability on the check to both or either of said defendants undoubtedly refer to the liability for the amount of the check alone, which, as above stated, was the only liability on the part of the bank which could have been passed upon by the court under the issues in that case. Likewise the stipulation was not extraneous in its application, but went only to the extent of recognizing the bank as a stakeholder for the purposes of the interpleader action.

[13] While the present plaintiff is not estopped from bringing this action for damages, she cannot be held entitled to a greater amount of damages than that awarded by the trial court, namely, interest from the date of refusal to the date of deposit in court. This is so because:

"Where there is a legal contest between persons other than the debtor, rendering it doubtful to whom the debt should be paid, the debtor is not generally chargeable with interest during such contest, although if the fund in such cases has been used by the debtor and has earned interest the court will allow interest thereon notwithstanding the pendency of the litigation. * * * Where a fund in litigation or the

amount of a disputed claim is deposited in court, or subject to its order, interest is not recoverable thereon during the time it remains so deposited." 22 Cyc. p. 1558.

"Where a bill of interpleader is properly filed, the payment of the money into court stops the running of interest; but if the fund is not paid into court it is proper to compute interest up to the rendition of the final decree." 23 Cyc. 29; Sutherland on Damages (4th Ed.) vol. 1, p. 1223.

When a debtor has deposited the money beyond his control in the custody of the court and within the reach of the rightful owner he has done all that the law requires of him. Under such circumstances, in the absence of fraud or collusion, he cannot be held for damages for a continuing breach of contract because of the wrongful claims of third parties. If the plaintiff in interpleader were liable for interest as damages from the date of the refusal to pay until the payment to the person entitled, the burden of the loss caused by the necessity of deciding between conflicting claims would be thrust upon the innocent stakeholder, thus producing the very result which the action of interpleader was designed to avoid.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 177

In re McGREW.

Appeal of GILBERT.

(S. F. 9141.)

(Supreme Court of California. June 16, 1920. Rehearing Denied July 15, 1920.)

1. Appeal and error ⇐1011(1)—Finding on conflicting evidence not disturbed.

A fact finding supported by evidence, though conflicting, will not be disturbed on appeal.

2. Adoption ⇐3—Statutory requirements must be strictly followed.

The proceeding for adoption is a special one, and the requirements of the statute must be strictly construed, particularly with respect to the jurisdiction of the court.

3. Adoption ⇐10—Only court of county of petitioner's residence has jurisdiction to order adoption.

Under Civ. Code, § 226, declaring that one who desires to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides, the court of the county in which the person desiring to adopt the child resides is the only one which has jurisdiction to declare and order an adoption, so an order of adoption of the superior court of a county of which the petitioner was not a resident is void for want of jurisdiction.

4. Bastards ⇐13—Father of illegitimate child may adopt.

Under Civ. Code, § 230, the father of an illegitimate child may adopt it, so that it will be deemed legitimate, though he is not married to the mother, by receiving it into his home, though the home into which he receives it, etc., is one in which he and the mother are living.

5. Adoption ⇐16—Father who had adopted bastard has sufficient interest to attack adoption by another.

The father of a bastard who had adopted the child by receiving it in his home so as to give it the rights of a legitimate child, under Civ. Code, § 230, has sufficient interest, being not only the natural, but the lawful, father to attack adoption by another.

6. Appeal and error ⇐1167—Mere error of pleading or procedure no ground for reversal.

Under Const. art. 6, § 4½, the fact that relief from a void order of adoption should have been sought by bill in equity instead of petition or motion, the six-month period allowed by Code Civ. Proc. § 473, permitting such attacks, having expired, is no ground for reversing an order setting aside the previous order of adoption; the error being only one of pleading or procedure.

7. Appeal and error ⇐916(1)—No presumption as to how pleading was entitled.

Where a pleading seeking vacation of order of adoption was in all respects a formal pleading, save perhaps the title, which was not shown by the record, the appellate court will not presume anything on the subject; it being claimed the proceeding should be by independent action instead of petition.

8. Judgment ⇐18(3)—Defect in entitling pleading not invalidating judgment.

Under Code Civ. Proc. § 1046, a defect in the title of a pleading will not invalidate a judgment if it intelligibly refers to the action or proceeding; so, where the pleading attacking an order of adoption was in all other respects formal, it cannot be attacked because entitled as a petition instead of an independent pleading.

Department 1.

Appeal from Superior Court, City and County of San Francisco; J. W. Mahon, Judge.

In the matter of the adoption of Francelia McGrew, a minor. On petition of Leland Chester Zimmerman, an order declaring the child was adopted by Hazel McGrew Gilbert was vacated, and she appeals. Affirmed.

Byron C. Parker, of San Francisco (Thomas P. Wickes, of San Francisco, of counsel), for appellant.

Dahlin & Jackson, of San Francisco, for respondent.

SHAW, J. This is an appeal from an order purporting to vacate a previous order

whereby the court had declared that the child, Francelia McGrew, was duly adopted by the appellant, Hazel McGrew, she being then unmarried.

The record shows that the order of adoption was made by a judge of the superior court of the city and county of San Francisco on June 19, 1917. The petition for adoption was filed by Hazel McGrew, stating that the child was then six weeks of age and was an illegitimate child of the petitioner's sister, Naomi McGrew, that the petitioner was a resident of San Francisco, was over 21 years of age, and was willing to and desired to adopt said child, and that the mother of the child consented thereto. The consent of the mother was duly signed and filed, and also an agreement by Hazel McGrew, as required by the statute. The order of adoption was in due form and included findings of every fact required by the statute, including the finding that the petitioner, Hazel McGrew, was at that time residing in the city and county of San Francisco.

In May, 1919, the respondent, Zimmerman, filed a petition in the matter of said adoption praying that the order of adoption be vacated, and that he be awarded the care and custody of the child. In his petition he alleged that at the time of filing her petition and of procuring the order of adoption on June 19, 1917, the said petitioner, Hazel McGrew, was not a resident of the city and county of San Francisco, but was a resident of the county of Sonoma, state of California. He further alleged that he was the father of the child, that he and the mother of the child were living together as husband and wife in San Francisco at the time of said adoption, and that after the birth of the child, and prior to June 19, 1917, he had adopted the child as his own legitimate child by publicly acknowledging it as his own child, receiving it into his home, and treating it as if it was his legitimate child in the manner provided in section 230 of the Civil Code; that some ten weeks after the birth of the child he moved to Lassen county, where he secured a better position than he had in San Francisco; that in September, 1917, he was drafted and was held in the service of the United States from that time until the latter part of April, 1919, a short time before he filed said application to vacate the order; and that he had no knowledge whatever of the making of said order of adoption until after his return from overseas. This petition was filed on May 8, 1919.

The court found that these allegations were true, and particularly that at the time of the filing of the petition and obtaining the order of adoption by Hazel McGrew she was not a resident of the city and county of San Francisco, but was a resident of Sonoma county, and that ever since its birth said Zimmerman at all times publicly acknowledged said child as his child and received it with the consent of its mother into his family, where he and its mother resided and kept house together, and at all times since the birth of said child supported and otherwise treated said child as if it were legitimate, and that he thereby adopted the same as his own legitimate child.

[1] It is claimed by the appellant that these findings are not supported by the evidence. We do not deem it necessary to give the details of the evidence. It is sufficient to say, that while there was some conflict, there was satisfactory evidence sufficient to sustain the findings of the court on both propositions. It may be proper to say here also that the father and mother of the child had become acquainted in Sonoma county, and the mother had become pregnant of this child, and that some four months before its birth the father desired to marry the mother and was prevented from so doing by the objections of the girl's mother; that he went with her to San Francisco and there hired rooms in which he lived with her until after said adoption order was made and until the latter part of July, 1917, when he went to Lassen county as aforesaid; that upon being drafted into the army he had made an allotment for the transmission by the government of the legal proportion of his pay to the child's mother for the support of herself and her child in accordance with the federal law on the subject.

[2, 3] The statute provides that one who desires to adopt a child may, "for that purpose, petition the superior court of the county in which the petitioner resides," and it also declares that, if the persons whose consent is necessary are not residents of said county, their written consent may be procured, and must be filed in the superior court of the said county at the time of the application and adoption. Civ. Code, § 226. This means that the court of the county in which the person desiring to adopt the child resides is the only county which has jurisdiction to declare and order an adoption. The proceeding for adoption is a special one, and the requirements of the statute must be strictly construed, particularly with respect to the jurisdiction of the court. Ex parte Clark, 87 Cal. 640, 25 Pac. 967; Estate of Williams, 102 Cal. 77, 36 Pac. 407, 41 Am. St. Rep. 163; Estate of McCombs, 174 Cal. 214, 162 Pac. 897. It follows, therefore, that the order of adoption, being made by a court without jurisdiction, is void.

[4, 5] The appellant objects further that the order, being valid on its face, cannot be set aside or vacated at the instance of any person having no interest in the matter, and that the father of an illegitimate child has no such legal interest as would entitle him to apply to have the order vacated. It is to be observed that the mother of the child died in the early part of April, 1919, prior to the return of the father from the United States

service. It may be doubted whether the interest of the father of an illegitimate child in its welfare, after the death of the mother, is insufficient to authorize him to apply to vacate the order of adoption of said child by some other person. The question is not in the case, however, and we need not consider it. The court found that the father had duly adopted it in the manner provided by section 230. In the language of that section, "such child is thereupon deemed for all purposes legitimate from the time of its birth." It is well settled that such adoption can be made by a father of an illegitimate child who has not been married to its mother at the time of such adoption. Garner v. Judd, 136 Cal. 394, 68 Pac. 1026; Baker v. Jones, 166 Cal. 113, 135 Pac. 288; Estate of McNamara, 183 Pac. 552. These cases also declare that such adoption may be made, although the only home the father has and the home in which he receives it is a home in which he is living with the mother as husband and wife, although they are not married. Consequently Zimmerman was not only the natural father, but was also the lawful father, of the child and as such he had the legal status necessary to authorize him to maintain this proceeding to vacate the order.

[6-8] Appellant also objects to the procedure followed by Zimmerman. She contends that the six months allowed by section 473 of the Code of Civil Procedure within which to apply for relief by motion or petition in the case itself had fully expired before the petition was filed, and that the only other mode by which relief on the ground of fraud or mistake can be obtained is by an action in the nature of a bill in equity. If the point were good, a proposition which it is not necessary here to determine, it would not be sufficient as ground for reversal, since it would be an error in procedure and pleading only. Const., art. 6, § 4½. But it is not well taken. The record shows that the petition of Zimmerman stated facts sufficient to constitute a cause of action to set aside the order on the grounds that it was procured by fraud and that it was made by a tribunal that had no jurisdiction to act in the matter, that a copy of the petition and order to show cause was duly served on the appellant, and that she appeared in court at the trial and contested the matter without making any objection to the form of the proceeding, or to the manner of service of process. It does not even appear that the pleading filed by Zimmerman and said to be a petition was not in fact and form a complaint in an independent action to vacate the order of adoption. It is in all formal respects a pleading of that character, except perhaps in the title, and the record before us does not show how the paper is entitled. So far as we know, it was properly entitled as an independent action, and we will not presume anything on that subject which is not shown by the record. A mere defect in the title of a paper in the case does not operate to invalidate a judgment if it intelligently refers to the action or proceeding. Code Civ. Proc., § 1046.

The order appealed from is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

183 Cal. 167

SAUNDERS v. SIMMS. (L. A. 5439.)

(Supreme Court of California. June 14, 1920.)

1. Executors and administrators ⟸202(1) — Enforcement of revived judgment not limited to execution.

Code Civ. Proc. § 685, which has an introductory clause, "execution after five years," and thereafter provides that judgment may be enforced or carried into execution after the lapse of five years by leave of the court, does not limit enforcement of a judgment revived by leave of the court to enforcement by execution, but permits its enforcement by claim and suit against the administrator of the estate of a judgment debtor as provided by sections 1498, 1504, 1505.

2. Executors and administrators ⟸421—Suit to enforce payment of judgment not action for new judgment.

A suit against administrator based on a judgment against deceased to obtain judgment for payment of the claim against the estate in due course of administration is not an action for new judgment liability, but, under Code Civ. Proc. § 1504, only establishes the validity of the claim the same as if it had been allowed by the administrator and approved by the court.

3. Judgment ⟸855—Statute for relief of judgment gives courts discretion to remove limitations.

Code Civ. Proc. § 685, authorizing enforcement of judgments after lapse of five years by leave of the court, merely authorizes the courts in their discretion to permit the enforcement by the ordinary process provided by law of a judgment otherwise barred by section 336.

4. Divorce ⟸311—Child cannot satisfy judgment against father for support furnished by mother.

Where, in divorce proceedings, the custody of a minor daughter has been awarded to her mother and her father was ordered to pay fixed sums for her support until her majority, a release of the father by the daughter after she became of age is no bar against recovery by the mother, who provided support for the daughter, of the unpaid installments.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Alpharetta Saunders against Dan W. Simms as administrator with the will an-

nexed of the estate of Albert S. Collins, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Simms & Fulwider, of Los Angeles, for appellant.

H. V. Weisel, of Anaheim, and William & Rutan, of Santa Ana, for respondent.

SLOANE, J. The respondent on this appeal obtained a judgment in her action for divorce against her husband, Albert S. Collins, awarding her the custody of their minor child, Lida Collins, and requiring the defendant to pay to plaintiff, respondent here, the sum of $15 per month for the support of the minor. No payments were made under this judgment. Respondent furnished from her own resources the child's maintenance until she became of age. The accrued amounts due, owing, and unpaid at that time under the judgment aggregated the sum of $1,200 besides interest.

The judgment debtor, Albert S. Collins, died in the county of Orange on the 4th of August, 1916, some 16 years after the entry of the judgment and about 10 years after the last installment on the payments fell due. On the 17th of May, 1917, the respondent here applied to the superior court of San Bernardino county, where the original action was had, for leave to enforce the judgment under the provisions of section 685 of the Code of Civil Procedure.

This section in so far as pertinent to this case, is as follows:

"Sec. 685. *Execution After Five Years.*—In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings."

The court in this instance made an order that the judgment "may be enforced and carried into effect," and found that with accrued interest the sum of $2,112 was owing and unpaid. The order further recited: "That plaintiff is hereby given the right to enforce the same as provided by law against the estate of Albert S. Collins, deceased."

The judgment thus fortified and revived was thereupon presented as a claim against the estate of the deceased judgment debtor, and upon its rejection by the failure of the administrator to act thereon within ten days suit was instituted by respondent against the administrator in the county of Orange, where the probate proceedings were pending, to have the judgment adjudged a valid claim against the estate, to be paid in due course of administration. Judgment was so made and entered in the superior court of Orange county, and it is from this judgment that the appeal is taken.

Appellant concedes the jurisdiction of the San Bernardino superior court to entertain the motion and to grant leave to enforce the judgment by execution after the period of the statute of limitations had run, but contends that no authority is given, under section 685, to grant any further relief than could be obtained under an execution, and disputes the jurisdiction of the superior court of Orange county to give the judgment appealed from.

[1] We fail to understand upon what theory of construction appellant claims that the relief granted by section 685 in case of a money judgment is limited to enforcement by execution. It is true the text of the section is introduced by the disconnected clause "execution after five years," but it is apparent from the context, which provides that "in all cases the judgment may be enforced or carried into execution after the lapse of five years," that the word "execution" is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments. Where a judgment debtor has died, it is directed by section 1505 of the Code of Civil Procedure that no execution shall issue on the judgment, but that it shall be presented to the executor or administrator like any other claim. Section 1498 of the Code of Civil Procedure provides that where a claim is rejected the holder may bring suit; and it is declared by section 1504, of Code of Civil Procedure, that a judgment rendered against an executor or administrator "upon any claim for money against the estate" only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. This is the method for enforcing a judgment after the death of a judgment debtor substituted by law in place of enforcement by writ of execution. It is the same procedure that would have been required after the death of the judgment debtor if the statute of limitations had not run on the demand. We see no reason why this sort of relief may not be granted under section 685, as well as that by issuance and levy of a writ of execution.

[2] The suit to obtain judgment for payment of a claim in due course of administration is not, as appellant seems to think, an action to establish a new judgment liability, based upon the old, but, as set forth in section 1504 of the Code of Civil Procedure, only establishes the validity of the claim in the same manner as if it had been allowed by the administrator and approved by the court. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Estate of More, 121 Cal. 638, 54 Pac. 148. And it is held that the allowance of a claim is not in any true sense a judgment. Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53. There is nothing in Doehla v. Phillips, 151 Cal. 489, 91 Pac. 330, and other decisions cited by appellant, contrary to the view expressed. In the cases cited executions

were issued because they happened to afford appropriate and adequate relief, but there is nothing to indicate that some other appropriate means for collecting the judgment could not be resorted to in a proper case.

[3] Section 685 is a limitation upon the operation of the statute of limitations under section 336 of the Code of Civil Procedure to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute. That is what was done in this instance.

[4] As a further defense in this action the defendant introduced an agreement of settlement executed between Lida Collins, the daughter, and the administrator of the father's estate, executed after she became of age, in which she attempted to release the estate from liability under this order for maintenance. Appellant argues that the daughter was the real beneficiary of the maintenance fund, and the respondent her mother, merely a trustee. The original judgment of the court directed the payment of this money to the mother to assist her in the support of the child placed in her custody. Having furnished such support from her own resources she is clearly entitled to recover it in this proceeding in her own name and for her own reimbursement, and the trial court properly disregarded the attempted release by the daughter.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

183 Cal. 206

MUNSON v. FISHBURN et al. (L. A. 4909.)

(Supreme Court of California. June 19, 1920. Rehearing Denied July 19, 1920.)

1. Joint adventures ⟸4(1)—Duty of parties defined.

Associates in a common enterprise have the duty to each other to make full disclosures of any preference or profit not common to all associates.

2. Corporations ⟸30(2) — False representation that option holders were subscribers on same basis warrants rescission.

Option owners and promoters will not be allowed to retain profits realized from the exercise of the option unless the fact of such interest is disclosed in advance, and the claim of disclosure of profits will not relieve them from a rescission or damages because of false representations that they had no interest in the options, but were subscribers to the stock of a corporation on the same basis as plaintiff, whom they thereby induced to subscribe.

3. Fraud ⟸27—False representation that defendants have subscribed for stock on same terms held actionable.

The principle that a false statement as to price paid is actionable is equally applicable to false representations that others have subscribed for corporate stock on the same terms on which it is sought to and did induce plaintiff to subscribe.

4. Corporations ⟸80(12)—Return of stock held to put sellers in statu quo.

Where stock was issued directly to plaintiff from a corporation but, at the instance of defendants and in compliance with their agreement to sell him one share for every dollar subscribed and paid on a syndicate agreement which was induced by fraud, if plaintiff's offer to return the stock to defendants had been accomplished, it would have put defendants in statu quo.

5. Corporations ⟸80(10)—Four months' delay no defense to action by stock subscriber for damages.

Laches arising solely from four months' delay is no defense to an action by subscriber to stock for damages, and this is sufficient to defeat a general demurrer.

6. Corporations ⟸80(10)—Delay of a stock subscriber in bringing action for rescission held not laches.

Where a stock subscriber did not learn of a fraud and his right to rescind until about four months previous to action, and then promptly offered to rescind, his four months' delay in consulting an attorney was not so unreasonable as to amount to laches, where determination of his legal rights was difficult.

7. Corporations ⟸80(10)—Payment of assessments to preserve stock for tender to seller does not prevent rescission.

Plaintiff's payment of corporate stock assessments after discovery of fraud inducing its purchase does not constitute affirmance barring his action for rescission, since he was entitled to preserve the property so he could tender it back.

8. Corporations ⟸80(12) — Damages sufficiently alleged for rescission of purchase of stock.

Allegation that plaintiff was induced to purchase corporate stock at a fictitious value because of representation that defendants had purchased upon the same basis, and that plaintiff subsequently found that they were joint owners with another of options to be purchased by the corporation, and that the value of the stock purchased had never been greater than three-fifths of the fictitious value which he paid, *held* sufficient allegation of damages for rescission; it not being necessary to plead and prove the precise amount as in case of deceit.

9. Sales ⟸130(2)—Exact damage need not be shown in action for rescission.

In an action for rescission of a sale for fraud, the exact amount of damage need not be shown, provided it be in an appreciable sum.

10. Fraud ⟸47, 59(1)—Damages measured by amount paid for stock with 7 per cent. interest less value of stock upon discovering fraud.

Where the action is for damages for fraudulent representations inducing the purchase of corporate stock, plaintiff must allege and prove a definite amount and the measure of damages, which would be the amounts paid, including assessments on the stock, with interest at 7 per cent. from the dates of such payments, less the value of the stock at the time of discovering the fraud.

11. Corporations ⟸80(6) — False statement that defendants had purchased stock on same basis held actionable.

Where the value of defendant's connection with a syndicate may not be capable of ascertainment, nevertheless, if plaintiff was induced to purchase corporate stock by defendants' false representations as to their purchase of such stock on the same basis, and thus change his position in reliance thereon, the lessened value of the stock would constitute damage for purpose of rescission, and the complaint on such theory is sufficient.

12. Corporations ⟸80(12)—Rescission of purchase of stock induced by fraud not limited to rescission against corporation.

Though defendants were not vested with any discretion in purchasing property for the corporation and never owned the stock which they, by fraudulent representations, induced plaintiff to purchase, yet, where the stock was taken upon their false representations that they had purchased stock on the same basis that plaintiff was induced to purchase, they failed to disclose their interest with another in options on land the company was taking, and plaintiff could rescind as against them, and was not limited to rescission against the corporation.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by S. M. Munson against J. E. Fishburn and others. Judgment for defendants, and plaintiff appeals. Reversed.

James S. Bennett, of Los Angeles, for appellant.

O'Melveny, Stevens & Milliken, John E. Biby, Walter K. Tuller, Edwin A. Meserve, Shirley E. Meserve, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

LAWLOR, J. This is an appeal from a judgment on demurrer entered in favor of the defendants and against the plaintiff. The action was brought by the plaintiff for the rescission of a contract by which he subscribed to a syndicate to be formed by the defendants to acquire certain land, or for damages if rescission should be found to be inequitable.

It is alleged in the complaint that the defendants J. E. Fishburn, president of the National Bank of California, R. I. Rogers, vice president of said bank, R. A. Rowan & Co., a corporation, and W. H. Joyce were the owners of options to buy a certain tract of 2,800 acres of land in Los Angeles county; that a syndicate was formed for the purchase of said land; that, for the purpose of inducing the plaintiff to subscribe for shares in the syndicate and thereby become a copurchaser of the land with the defendants and other subscribers, "defendants and each of them represented to plaintiff that the defendants R. A. Rowan & Co. and W. H. Joyce were the owners of the options to purchase the land"; that the price to the subscribers to the syndicate was $850 per acre, payable as follows: $920,000 in cash on December 9, 1912, and the balance in two installments of equal amount in five and ten years, respectively, from the date of the exercise of the said options; that the said price was about $87.50 per acre in excess of the price to the said option owners, who were to receive and retain the difference for their options and services; that Fishburn and Rogers had subscribed to said syndicate and would pay on an equal basis with the other subscribers the sum of $25,000, respectively, into the said subscription fund of $920,000; "that, relying upon said representations that * * * Fishburn and Rogers had each subscribed the sum of $25,000 to said syndicate agreement on an equal basis with plaintiff and would pay in the amount of their said subscriptions, * * * plaintiff on or about the 10th day of November, 1912, signed said syndicate agreement and subscribed thereto the sum of $5,000," and thereafter paid said sum to defendants Rowan & Co. and Joyce; "that, had it been disclosed to plaintiff that * * * Fishburn and Rogers * * * had an interest in said options or in said profits, plaintiff would not have subscribed to said syndicate agreement or paid in the amount of his said subscription or any part thereof or at all become a party to said syndicate agreement;" that these representations were false in this, "that it was understood and agreed by and between defendants * * * that the amounts of said subscriptions * * * made by * * * Rogers and Fishburn, respectively, when paid in by them, should be returned to them, respectively, as their shares of the profit of $87.50 per acre mentioned in said syndicate agreement as being received and retained by * * * R. A. Rowan & Co. and Joyce"; that Fishburn and Rogers were the owners of a one-tenth interest, respectively, in the options represented to the plaintiff as being owned exclusively by the disclosed option owners, Rowan & Co. and Joyce; that at the time plaintiff signed the syndicate agreement the names of Fishburn and Rogers appeared as subscribers thereto with their sub-

scriptions in the sum of $25,000 each, and that they concealed from and failed to disclose to plaintiff that there was an agreement between them to the effect that the subscriptions of the undisclosed option owners should be returned to them as their share of said profits.

It is further alleged that on December 3, 1912, the amount of the subscription fund having been paid in ahead of time, the purchase of the land was made, and a corporation, known as the Laguna Land & Water Company, organized; that this corporation was capitalized at $2,000,000, and stock was issued and divided into 2,000,000 shares of the par value of $1 each; that 920,000 shares of this stock were issued to the option owners, Rowan & Co. and Joyce, in consideration of the transfer of the land to the corporation; that these 920,000 shares were distributed to the subscribers to the syndicate at the rate of one share for each dollar subscribed; that on the same day 25,000 shares were issued to each of the defendants Fishburn and Rogers, although they did not pay their subscriptions until January 24, 1913; that on the last-mentioned date they made a pretended payment to Rowan & Co. and Joyce of the amount of their subscriptions, and that at the same time, and pursuant to the agreement that the amount of their subscriptions, when paid, should be returned to them as their share of the profits, they received back from Rowan & Co. and Joyce the identical amount paid in by them.

The complaint then alleges that the plaintiff first discovered the fraud on June 1, 1915, but was not aware, until some time in November, 1915, of his right to rescind. On November 29, 1915, plaintiff notified the defendants that he rescinded the agreement, tendered back the stock which had been issued to him, demanded his money, and, being refused, brought this suit.

The demurrer was to the second amended complaint as amended, on the following general grounds:

"(1) That the same does not state facts sufficient to constitute a cause of action.

"(2) That the same is uncertain in the following respects, and each of them:

"(a) It cannot be ascertained how the payment of $25,000 made by J. E. Fishburn was a pretended or fictitious payment.

"(b) It cannot be ascertained how the payment of $25,000 made by R. I. Rogers was a pretended or fictitious payment."

The demurrer was sustained without leave to amend, and judgment was entered in favor of the defendants with costs.

[1] 1. It is well settled that associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates. In Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106, the defendant had secured an option on a certain tract of land for the sum of $27,500. He told one Whitlock that, if he would find him a purchaser who would pay $33,000 for the property, he (defendant) would pay Whitlock $3,000. Whitlock organized a corporation to make the purchase, and himself subscribed to the fund being raised to make the payment, but he did not disclose to his associates or cosubscribers that he was to get a profit. The court said:

"When he did this, he assumed as to his associates, under a well-established rule of law, a relation analogous to that which exists between partners, and was precluded from making any secret profit out of the contemplated purchase at their expense. *The implied understanding between joint purchasers is that each is engaging in an enterprise solely for the mutual and common benefit and advantage of all, and that each has a common interest with the others, according to the amount of his subscription.*" (Italics ours.)

The principle of that case was followed in California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 293, 149 Pac. 595, 599, which quotes from the syllabus of the former case as follows:

"Promoters of a corporation formed for the express purpose of purchasing a particular piece of property occupy a fiduciary relation to their cosubscribers, and are bound to truthfully declare to their associates any personal interest they may have in the matter of the purchase. Without such disclosures they cannot legally profit at the expense of their associates, and if they were guilty of any misrepresentations of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered."

See, also, Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496; Smith v. Goethe, 147 Cal. 725, 82 Pac. 384; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 361, 78 Pac. 550, 104 Am. St. Rep. 42; Sims v. Petaluma Gaslight Co., 131 Cal. 656, 63 Pac. 1011; San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

[2] While it is true that in some of the cases just cited, for example the Calaveras Case, it was not disclosed by the promoters that any one connected with the organization of the enterprise was to get a profit, and in the instant case it was made known to the subscribers that Rowan & Co. and Joyce were to receive the profits, nevertheless the same principle applies. Fishburn and Rogers held themselves out to the public as subscribers who had enough faith in the venture to risk $25,000 on it, and, because of this and the position they occupied in the financial world, plaintiff was induced to subscribe to the syndicate, which he alleges he would not have done had he known that they were interested

in the options to an extent equal to the amount of their subscriptions. The law imposed upon these defendants the same duty to disclose their interest in the options as it imposed upon Rowan & Co. and Joyce. There could be no question of plaintiff's right of action if there had been no disclosures as to the profits, for it is well settled that an option holder or promoter will not be allowed to retain profits, realized from the exercise of the option, unless the fact of his interest in the option is disclosed in advance. We think that Fishburn and Rogers, in addition to being option owners, were joint promoters with Rowan & Co. and Joyce, and hence were equally bound to make known to prospective subscribers the nature and extent of their interest in the enterprise. If we understand defendants' position, it is this: That, since the amount of the profits to accrue was fully disclosed to the plaintiff, he will not be heard to complain that he was not informed as to whom the profits would go. But this position ignores the claim of the plaintiff that he is entitled to rescission or damages because of the false representations that Fishburn and Rogers had no interest in the options but were subscribers on the same basis as himself, and that he was induced by these false representations to subscribe, which he would not otherwise have done.

[3] In Talmage v. Sanitary Security Co., 31 App. Div. 498, 52 N. Y. Supp. 139, where three actions were brought to rescind subscriptions to the capital stock of the defendant company and recover the installments paid thereon on the ground that certain men of standing in the community had held themselves out as subscribers, when in reality their stock was given to them, the court said:

"We think that the representations were material. The fact that other persons had subscribed to the stock of the defendant in a large amount (especially that the two experts mentioned had thought well enough of the scheme to invest in it) would naturally influence the determination of the plaintiffs in reference to subscribing to the stock. With the exception of men of extremely cool judgment and great confidence in their own judgment, we all are apt to be influenced in our action and conduct by the action and conduct of our fellows. Especially is this the case in speculations. * * * Now, of course, what concerns the purchaser is the value of the property. In itself, the price paid by the vendor is not of any moment, but it is of vital importance to the purchaser in forming his judgment as to value. The law recognizes this fact, and holds a false statement as to price paid actionable. *The principle is equally applicable to representations that other persons have purchased similar property, or subscribed for stock on the same terms upon which it is sought to induce any person to become a subscriber.*" (Italics ours.)

See, also, Garrett Co. v. Clark, 42 Misc. Rep. 610, 87 N. Y. Supp. 580; Rose v. Merchants' Trust Co., 96 N. Y. Supp. 956, 29 L. R. A. [N. S.] 477, note; 20 N. Y. Ann. Cas. 86, notes; 2 Elliott on Contracts, 105.

[4] 2. Defendants contend that in any event plaintiff could not have rescission for three reasons:

"First, it was impossible to put defendants in statu quo; second, plaintiff himself was guilty of laches; third, by paying assessments on the stock with full knowledge of the facts plaintiff himself affirmed the transaction."

We think there is no merit in any of these contentions.

As to the first, it is sufficient to point out that the agreement of the defendants was in effect an agreement to sell to the plaintiff one share of the corporate stock for every dollar he subscribed and paid upon the syndicate agreement; that, while it is true that the stock was issued to plaintiff directly from the corporation, nevertheless it was so issued at the instance of the defendants and in compliance with the said agreement; and that, if the offer by the plaintiffs to return to the defendants the stock received by him had been accepted by them, it would have put them in statu quo.

[5, 6] Upon the second point it may be observed that laches arising solely from a delay of four months is no defense to an action for damages, and that this is sufficient to defeat a general demurrer. With regard to the right to rescind the complaint shows that the plaintiff did not discover that Fishburn and Rogers were interested in the profits going to Rowan & Co. and Joyce until after June 1, 1915, and did not learn that he had a right to rescind on account of that fact until some time in November, 1915, and that the offer to rescind was made on November 29, 1915. Under the peculiar circumstances of this case and in view of the difficulty of determining the law as to the rights of a person in the position of the plaintiff, it is not surprising that he did not suspect that he had a right to rescind until he learned in November that other subscribers to the agreement, upon discovering the facts, had effected a rescission. Under the rule applied in Hannah v. Steinman, 159 Cal. 142, 152, 112 Pac. 1094, the delay of four months in consulting an attorney cannot be said to be so unreasonable as to amount to laches.

[7] Nor do we think that defendants' third contention that the payment of assessments by plaintiff after his discovery of the fraud constituted an affirmance of the transaction which bars his cause of action for rescission, if for no other reason than that he was entitled to preserve the property so that he might be in a position to tender it back if he should later seek recission.

[8, 9] 3. The cause was argued in department and submitted for decision. The submission was subsequently vacated, and the cause set for further argument on the question:

"What injury is it necessary to show in a case where there is a rescission only, as distinguished from a suit for damages?"

In this connection defendants, in their memorandum filed following resubmission, contend that—

"If plaintiff did not show either that the property purchased was worth less than he paid for it or that it would have been worth more than it actually was worth if the representations had been true—in other words, if he did not show pecuniary injury—then he has not shown anything justifying either rescission or damages."

As already appears, it is alleged that at the time the plaintiff paid the $5,000 to Rowan & Co. and Joyce the interest which he thereby acquired had "a fictitious market value" of $5,000, which value was created "by reason of the belief of the subscribers" that Fishburn and Rogers had subscribed on the same basis as the other subscribers, that it subsequently became known to the subscribers that Fishburn and Rogers had not subscribed on the same basis, but were joint owners of the options with the other defendants, and that, by reason of this knowledge, plaintiff's stock became worth no more than $2,500, and has never since been of a greater value than $3,000. In our opinion, this is a sufficient allegation of damages for rescission. It is, of course, well-settled that in an action of damages for deceit the plaintiff must allege and prove the precise amount thereof. But this is not the rule where rescission is sought. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011, was an action for rescission and to recover the money paid by the plaintiff to the defendant as the price of certain corporate stock upon the asserted fraudulent representations of defendant as to patent rights. It is said, at page 387 of 152 Cal., at page 1014 of 92 Pac.:

"It is also claimed that the complaint is insufficient because of the absence of any showing therein that any pecuniary damage was caused by the fraud alleged. It is true that there is no express allegation that plaintiff suffered pecuniary damage therefrom, but in cases of this character this is not necessary. That fraud which has produced, and will produce, no injury will not justify a rescission, nor support an action either for rescission or for damages, is an established principle of law and equity. But there is no rule that the injury must be of such a nature that it can be accurately measured in money. And we know of no rule of pleading which, in an action based upon a rescission between the parties or seeking to enforce such rescission, requires a statement that the fraud complained of had caused or would cause a specific amount of damages. It may be conceded that it must be shown that the plaintiff, by reason of the fraud, suffered an injury of a pecuniary nature, that is, an injury to his property rights, as distinguished from a mere injury to his feelings, but it will be sufficient if the facts alleged show that material injury will necessarily ensue from the fraud, although the amount of the pecuniary loss is not stated."

In Wainscott v. Occidental, etc., Association, 98 Cal. 253, 33 Pac. 88, the plaintiff sued to rescind certain conveyances which he asserted he had been induced to make through the defendant's false representations. The court said:

"'If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.' Pomeroy's Equity Jurisprudence, § 898. * * * In an action to rescind upon the ground of fraud, the fraud is the essential thing, and, while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance."

This rule finds support in the following quotation from Black on Rescission and Cancellation, vol. 2, p. 901:

"When a stock subscription has been obtained by fraud, the subscriber is entitled to maintain a bill in equity to annul the same, without alleging or proving that he has sustained any pecuniary loss by reason of the fraud."

See, also, Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 195, 135 Pac. 496; Stern v. Lumber Co. (C. C.) 134 Fed. 509; Mack v. Latta, 83 App. Div. 242, 82 N. Y. Supp. 130, 135; Commonwealth Bonding, etc., Co. v. Bomar (Tex. Civ. App.) 169 S. W. 1060; Johns v. Coffee, 74 Wash. 189, 133 Pa. 4; 22 Standard Encyc. Procedure, 1001, note 66; Cook on Corporations, vol. 1, p. 447; Elliott on Contracts, vol. 1, p. 164; 14 Corpus Juris, 614, note 58.

In the recent case of Stillwell v. Rankin, 55 Mont. 130, 174 Pac. 186, the suit was brought to secure the rescission of a contract for the purchase of certain shares of stock. The alleged fraudulent representations upon which plaintiff based his cause of action were as follows: That, plaintiff being a stockholder in the company, defendant, an officer of the company, "stated to plaintiff that 100 shares of the stock had been turned back to the company by a subscriber who was unable to pay for it, and solicited plaintiff to purchase the stock 'to help the said company out,'" and plaintiff alleged that "in reliance thereon he agreed to purchase the stock (which otherwise he would not have purchased)." We quote from the opinion:

"Is it essential to the statement of a cause of action for the rescission of a contract for fraud that the plaintiff allege that he has suffered pecuniary loss? Authorities may be found which answer in the affirmative and most emphatically but curiously enough do not insist that the amount of such loss is material, if it is at all appreciable. * * * Courts of equity like courts of law, * * * do not concern themselves with wrongs which do not produce injury; but 'injury' and 'pecuniary loss' are not synonymous terms. * * * Most of the courts

and text-writers employ the term 'damage' in the sense of injury; a few restrict its meaning to financial loss. We prefer to adhere to the rule which gives to the term its broader significance, as including either pecuniary loss *or the alteration of one's position to his prejudice.* * * * If the allegations of this complaint are true, plaintiff was induced by fraudulent representations to assume obligations which otherwise he would not have assumed, and to purchase property which otherwise he would not have purchased. We deem the allegations sufficient to disclose damage within the meaning of that term which we adopt." (Italics ours.)

In Vulcan Fire Ins. Co. v. Jorgenson, 33 Cal. App. 763, 166 Pac. 835, the plaintiff sued to recover an alleged balance due on a subscription for certain shares of its capital stock. The defendant set up in his cross-complaint that his subscription was procured upon the false representation that a certain bank president, upon whose integrity and business capacity the defendant placed special reliance, was connected with the insurance corporation, and asked for the rescission of the contract and the recovery of the money paid. Judgment went for the defendant. Among the grounds urged for a reversal of the judgment was:

"That the record contains no allegation, evidence, or finding that the cross-complainant was in any way pecuniarily damaged by the alleged false representations."

The appellate court said:

"That such representations * * * are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered is well settled."

This language was objected to in a petition for a hearing in this court, but the petition was denied. In Davis v. Butler, 154 Cal., 623, 627, 98 Pac. 1047, 1049, it was said, citing Spreckels v. Gorrill, supra:

"It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced by false representations to buy property which would, if the representations had been true, have been worth more than it actually was worth."

The case of Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, is cited by defendants. In that case the plaintiff had been induced, through false representations made by the defendant as to former profits in conducting the business, to purchase an interest in the defendant's stock of hardware and agricultural implements. The opinion declares:

"The complaint states no cause of action so far as it relates to fraudulent representations respecting the question of former profits of the business. It contains no allegation that the plaintiff was induced thereby to pay a higher price for the goods than he would otherwise have done, nor is it averred that the business was not profitable after the plaintiff bought into it. In other words, there is nothing in the complaint to show that the plaintiff was in any way injured by the representations, admitting them to have been false. * * * In order to entitle a party to rescind a contract, he must not only show the fraud, but that as a result thereof some damage has resulted to him."

It was not held in that case or in any other cited by the defendants nor do we know of any case holding that the damage suffered must be capable of exact calculation in order to entitle the party injured to rescind the contract. It is only necessary that the allegation and proof must show an "appreciable" amount of loss.

[10, 11] Plaintiff alleges, in effect, that he was induced by the false representations to subscribe to the syndicate, and that the shares issued to him would, if the representations had been true, have been worth $2,000 more than their actual value at the time of the discovery of the fraud. By these false representations, it is alleged, the plaintiff was induced to part with his money, and, to the extent of the difference between the alleged market value of the stock, $3,000, and the sum which such stock would have been worth if the representations had been true, $5,000, the plaintiff has suffered a pecuniary loss of $2,000. In every case of fraud, either where damages or rescission is sought, it must be alleged and proved that the complainant has suffered material injury. But it is the character of the fraud constituting the cause of action which determines the extent to which the pleading and proof must go in order to establish damage. As already pointed out, plaintiff assumes to state his cause of action on the alternative theory, that, if he is not entitled to rescission damages may be awarded. First, as to rescission: It is clear from the authorities we have cited that the exact amount of damage need not be shown, provided it be in an "appreciable" sum. Where the action is for damages, however, the plaintiff must alllege and prove that by reason of the fraud he has suffered damage in a definite amount. In the one case damage is predicated on the change in position; in the other on the extent of the pecuniary loss. The measure of damages here would be the amounts paid in by the plaintiff, including the assessments, with interest thereon at the rate of 7 per cent. from the dates of such payments, less the value of the stock at the time of the discovery of the fraud. Plaintiff alleges that the factor which induced him to subscribe to the syndicate was his confidence in the financial standing and business judgment of Fishburn and Rogers, who, it was represented, had already subscribed for 25,000 shares on the same basis as that upon which he was asked to invest. While the value of the connection of Fishburn and Rogers with the

syndicate may not be capable of ascertainment, nevertheless, if the plaintiff was induced by the defendants' false representations to change his position in reliance thereon, the lessened value of the stock would constitute damage for the purpose of rescission. The plaintiff "was placed in a worse position than he otherwise would have been." Pomeroy's Eq. Juris. (4th Ed.) vol. 2, § 898. We think the complaint is sufficient under either theory.

[12] 4. Nor can we agree with defendants' contention, made in their memorandum filed following the resubmission of the case:

"If there is any right of rescission, * * * it is a right to rescind against the corporation, and there is no right on the part of a subscriber to rescind a subscription as against other share holders or promoters."

The only authorities which defendants cite on this point are Western Bank v. Addie, L. R. 1 H. L. Cas. 185; Love v. Love, 145 Ill. App. 150, and Sim v. Edenborn (C. C.) 163 Fed. 655. The first of these cases held that the false representations of directors are imputable to the corporation, and one "who has been induced to purchase stock in reliance on such representations cannot be held to his contract." Love v. Love, supra, was a bill in equity for the partition of certain premises, and "the sole question" was "whether the lower court erred in appointing a receiver." Rescission was not in any way involved. In Sim v. Edenborn, supra, the court held that the original complaint outlined a cause of action in equity, while purporting to be a case at law and praying for damages at law. Defendants' demurrer was therefore sustained. But in Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441, a case arising out of the same transaction, the defendant was the principal promoter and organizer of a syndicate, and the plaintiff asked that he be released from a contract which he had made as a subscriber to the syndicate on the ground that the defendant, by inducing him to become a party to the agreement, was guilty of fraud. The court said, at page 226 of 203 N. Y., at page 446 of 96 N. E.:

"It is, of course, true that, in an action between two parties to a contract, one cannot avoid it as against the other, who is entirely innocent, on the ground that he was induced to make it by the fraud of a third party, wholly disconnected with the transaction. So far as I can find, however, this principle has never been applied in an action by the injured party against a person claiming protection as agent under the contract which he had fraudulently induced. But beyond this I do not think that it can be said that the moneys of plaintiff's assignors were not paid to defendant under a contract for his benefit, and to which he was a party. He was the promoter of the enterprise, and procured the execution of the syndicate agreement. By its express terms it was made by each subscriber, not only with the other subscribers, but also with him, as a syndicate manager, and it was for his benefit, not only in authorizing him to purchase the property in question, but also in conferring upon him general powers as a manager. If the contract be regarded as a single one between each subscriber on one side, and his fellow subscribers and the managers on the other, it must follow that the fraud of either of the latter in inducing it would be a ground for rescinding it against all parties. If the agreement should be regarded as embracing two contracts, one made by each subscriber with his fellow subscribers, and a second one made by him with defendant as agent and manager, it may be that in an action between the subscribers the contract could not be avoided, because of the latter's fraud, although I have doubts about that. In Metropolitan Coal Consumers' Case, 66 Law Times [N. S.] 700, it was held, after consideration of the principle now being urged by defendant, that a subscriber could be relieved from a subscription for corporation shares because of false statements made by promoters in a prospectus issued before the corporation was organized, 'although not made by the company or its agents.' But, however this may be, this is an action between the subscriber and the agent, between whom in terms there existed a contract authorizing the transactions here involved, and in view of this and the surrounding circumstances I do not think it possible for the latter to say that he was not a party to the contract and to the transactions which occurred under it, within the rule now being discussed."

In our opinion the principle there invoked is applicable to the facts alleged in this case. The defendants do not question the correctness of this principle, but they attempt to distinguish that case from the one at bar in that: (1) Whereas in the New York case "the property which the corporation acquired was the defendant's own property," here "the defendants never owned the tract of land and never owned the stock"; and (2) the defendants here were not vested with any discretion in purchasing property for the corporation, whereas in the Heckscher Case the defendant was authorized to exercise a discretion. As to the first ground of attempted distinction, we are not disposed to hold that, although defendants held the options on the land in question and undoubtedly did receive any profits there may have been in the transaction, the contract of subscription may not be rescinded as against them, because they did not have the title to the shares which plaintiff received or to the land which those shares represented. Nor, in the view we take, would the other distinction attempted to be drawn by defendants make any difference. Plaintiff's cause of action is based, not on the abuse of any discretion on the part of defendants in purchasing the land on which they held the options, but on their failure to disclose to him the interest which Fishburn and Rogers had therein. As we have said, a fiduciary relationship existed

between the defendants and the plaintiff, and, assuming, as we must, that the allegations of the complaint are true, the defendants should not be allowed to reap the benefit arising from their abuse of the confidence reposed in them.

It follows that the demurrer should have been overruled.

Judgment reversed.

We concur: SHAW, J.; OLNEY, J.

47 Cal. App. 290

ARNOLD v. LA BELLE OIL CO.
(Civ. 3181.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920.)

1. Corporations ⊂=432(4)—Contract purporting to be signed by officers prima facie proof of execution by officers so as to shift burden of proof.

In an action on a contract against a corporation, where the document on its face purported to have been signed by the president and secretary, and had attached thereto and impressed thereon the seal of the corporation, plaintiff made a prima facie case by introducing it in evidence, such showing being sufficient to shift the burden of proof on the corporation to show that the persons signing the contract were not officers.

2. Brokers ⊂=43(3)—Letter employing broker to sell land sufficient.

A letter to a broker concerning the sale of land *held* a sufficient memorandum under Civ. Code, § 1624, subd. 6.

3. Brokers ⊂=43(2)—Statute as to appointment of broker does not require formal written contract.

Civ. Code, § 1624, subd. 6, requiring an agreement employing broker to be in writing, etc., does not require any formal contract; it being sufficient that the fact of employment be expressed in writing, signed by the party to be charged, or his agent.

4. Brokers ⊂=43(2)—Statute as to appointment of broker by writing held not to apply to executive corporate officer.

When Civ. Code, § 1624, is construed with and in the light of sections 2309, 2310, requiring an agent's authority to execute a contract in writing to be itself in writing, it does not apply to the executive officers of a corporation, and hence a writing, employing an agent to sell land, was sufficient where signed by an executive officer of the corporation, though the name of the secretary was not appended and the corporate seal was not attached thereto.

5. Corporations ⊂=407(3)—Corporation may appoint acting secretary to execute written appointment of broker to sell land.

Assuming that a written appointment of broker by a corporation must be signed by the secretary and the corporate seal attached, under Civ. Code, § 1624, subd. 6, a particular person, although not the regularly elected, qualified, or acting secretary, but appointed by the directors to act in the latter's absence, could execute such an instrument in such capacity.

6. Corporations ⊂=426(6)—Corporation by resolution of directors could ratify writing appointing broker to sell land.

Assuming that a writing by an executive officer of a corporation employing a broker to sell land was not a sufficient memorandum under Civ. Code, § 1624, because not signed by the secretary of the corporation, such writing became sufficient where the board of directors by resolution ratified the action of the corporate officer executing the writing, under section 2310.

7. Brokers ⊂=57(2)—Entitled to agreed compensation on sale to purchaser for less than contemplated.

Where broker was employed to procure a purchaser for land at a certain price per acre, and was to get 5 per cent. of the price, as paid to the owner, he was entitled to such agreed percentage, where he furnished a purchaser at a less price, accepted by the owner.

8. Brokers ⊂=57(2)—Subsequent modification of sale contract cannot defeat broker's compensation.

Modification of a contract of sale of land by mutual consent of the owner and a purchaser could not defeat the broker's right to the agreed compensation.

9. Brokers ⊂=75—Entitled to compensation as price was paid.

Where broker was to receive 5 per cent. commission "in the manner as and when paid to us," he was entitled to such percentage of all payments made by the purchaser, and was not required to wait until the full purchase price was paid.

10. Brokers ⊂=75—Not entitled to percentage out of due, but unpaid, installments.

A broker, entitled to 5 per cent. of the purchase price, "in the manner as and when" payments were received by the owner, was not entitled to recover commissions on payments due, but not yet made, though the purchaser was able, willing, and ready to pay.

11. Appeal and error ⊂=768—Failure to deny statement conceded truth on appeal.

Where plaintiff on appeal, on objection of defendant in an action to recover broker's commissions for sale of land to an allowance in the judgment of commissions on unpaid installments, claimed that it was stipulated at the trial that the installments would have been paid by the purchaser had it not been impounded by attachment, and that judgment was to pass for the amount of the commission on such unpaid installment if plaintiff was entitled to judgment at all, it was assumed that appellant conceded the truth of such statement, where he did not deny it.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Ralph Arnold against the La Belle Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Black & Black, of Los Angeles, for appellant.

E. S. Williams, of Los Angeles, for respondent.

THOMAS, J. The plaintiff seeks to recover the sum of $4,362.43, claimed to be due and unpaid at the time of the commencement of this action, and the further sum of $300, claimed to have become due, owing and unpaid "subsequent to the filing of the original complaint herein and the commencement of this action, and prior to the date of trial," by virtue of certain of the terms of a written instrument, which, in words and figures, is as follows:

"January 15, 1912.

"Mr. Ralph Arnold, 700 H. W. Hellman Building, Los Angeles, California.—Dear Sir: Until further notice, or until the La Belle Oil Company has sold its property in the Midway Oil Field to some other person or persons, you are authorized by us to offer for sale to your clients the north ½ of the southwest quarter of section 4, township 32 south range 23 E. M. D. B. & M. its 80 acres, more or less, at $4,000.00 per acre, on such terms and conditions as we, i. e. yourself and ourselves may mutually agree upon, and in the event of your effecting a sale of our land in section 4 (above described) or in the event of our effecting sale to any of your clients through your efforts or assistance, we agree to pay you five per cent. (5%) commission on the total sales price, in the manner as and when paid to us.

"It is understood that this is not meant as an exclusive option, and in the event of our being able to make a bona fide sale before we might be able to serve notice on you of our desire so to do, and in the event such sale be made to some other person or persons than those we may have come in contact with outside of your efforts, you will agree that there be no commission due you except and alone where you have participated.

"If the above is a true and correct understanding of our agreement, kindly sign a duplicate of this, signifying your acceptance.

"Very truly yours,

"La Belle Oil Company,

"[Signed] W. P. Cunningham, President.

"Acting Secretary:

"W. P. Thompson.

"[Corporate Seal of La Belle Oil Company.]

"Approved Jan. 15, 1912.

"[Signed] Ralph Arnold."

By proper allegation it is shown that plaintiff has fully complied with the terms of the foregoing instrument.

There was a demurrer to the amended complaint, which was overruled. Except for the mere formal parts, and the fact that it admits that the amount claimed to be due has not been paid, etc., defendant's answer denies each and every material allegation of the complaint. On the issues thus presented the case was tried by the court without a jury. At the close of plaintiff's case defendant moved for nonsuit, which motion was denied. Judgment went for plaintiff for the amount of his commission of 5 per cent. on the payments actually made to and received by the La Belle Oil Company prior to the commencement of the action, and also on the balance of $6,000, "which would have been paid prior to the trial if not impounded by the attachment herein." In short, the court found that all of the allegations of the complaint, as amended, as well as those of the supplemental complaint, were, and each of them was, true. The appeal is from the judgment so entered.

Finding No. 11 of the court reads as follows:

"The court finds that while it is true that there was no express resolution of the board of directors of said corporation defendant authorizing said written agreement with said plaintiff, there were no meetings of the board of directors of said corporation defendant from September 17, 1910, to March 13, 1912, and that during the whole of that period, and including the time when said agreement with said plaintiff was made, the directors of said defendant conducted the business of said defendant by informal discussion and conference between all of the directors except one of them to wit, F. E. Woodley, who did not give his attention to the affairs of said defendant corporation, and that at the time said agreement was made with said plaintiff and at all times thereafter all of said directors, excepting said Woodley, knew of and about said agreement, and that the same was made on behalf of said defendant corporation by its president and secretary, and discussed the same between them, and that said corporation did not, nor did any of its directors, at any time disavow said agreement or the execution thereof or dissent therefrom or claim to or notify said plaintiff that the same was not binding in any respect upon said defendant corporation; and the court further finds that said agreement with said plaintiff was specifically, expressly, and unanimously ratified in a written resolution of the board of directors of said defendant corporation at a regular meeting of said board held on June 12, 1912, at which a quorum of the directors of said corporation defendant was present and voting. The court finds that said agreement with said plaintiff or said plaintiff's agency was never terminated by notice or otherwise by said defendant."

It is urged by appellant here, as in the court below:

"(1) That the instrument quoted in full above and which is designated in the record as Plaintiff's Exhibit 1, was not proven; that without proper authorization said exhibit was not the act of defendant, and that no evidence was offered to show authorization; (2) that appellant was entitled to judgment at the close of plaintiff's case"

—in other words, errors of law occurring at the trial.

It is contended that the evidence is insufficient to show that Mr. Cunningham was president, or that Thompson was secretary, of the defendant company at the time of the execution and delivery by those parties of Plaintiff's Exhibit 1 to the plaintiff. The evidence on this point was by the plaintiff

himself, which was that Mr. Cunningham, the president, and Mr. Thompson, the acting secretary of the La Belle Oil Company, signed Plaintiff's Exhibit No. 1 in his presence. Following this testimony the instrument was offered in evidence. To this defendant objected on the ground that it does not purport on its face to be authorized by the defendant corporation, and until the authorization be produced it is incompetent and immaterial. This objection was by the court overruled.

At the threshold of this matter it may be observed that the defendant's answer, so far as it refers to the allegations of the complaint, simply denies that the instrument in question was binding upon the defendant, for the reason that defendant never authorized its name to be signed or its seal attached thereto. By its answer defendant, in legal effect, admits the execution and delivery of the instrument to plaintiff by the officers of the defendant corporation, but denies that those officers had authority from it so to do.

[1] The evidence, as it stood at the time of the offer of the instrument in evidence, we think made a prima facie case. Indeed, the instrument, Plaintiff's Exhibit No. 1, might have been introduced without the introduction of any preliminary oral evidence. Had such been the situation, a prima facie case to that extent would have been established, for the reason that the document on its face purported to have been signed by the president and secretary, and had attached thereto and impressed thereon the seal of the defendant corporation. Such a showing was sufficient to shift the burden of proof on defendant. McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260. For these reasons we think this ruling correct.

[2, 3] As supporting appellant's position, our attention is called to several decisions of the Supreme Court of this state, to wit, Curtin v. Salmon, etc., Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132, Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634, Blood v. La Serena, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, Salfield v. Sutter, etc., Co., 94 Cal. 546, 29 Pac. 1105, and Alta Silver M. Co. v. Alta Placer M. Co., 78 Cal. 629, 21 Pac. 373, but we think none of these in point here. So far as applicable to the case at bar, section 1624 of the Civil Code reads as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

We think no discussion is necessary to bring conviction that Plaintiff's Exhibit No. 1 is at least a "memorandum in writing" such as will bring it within the purview of this section. It seems to have been the uniform holding of the Supreme and appellate courts of this state that this section does not require any formal contract. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent. And the decisions of the Supreme Court of this state, as well as of this court, are in accord with the general rule on the subject in this country and England.

[4-6] The question, therefore, with which we are confronted here may be put as follows: "Is Plaintiff's Exhibit No. 1 the contract of the corporation?" We have already stated that plaintiff has established, prima facie, that it was. Supplementing this, a witness offered by defendant in its own behalf—Mr. W. P. Cunningham—in response to the very first question asked, testified that he was the president of the defendant corporation, and, in response to the second question, answered that he had been such "from its organization." In addition to this, we find in the record of the minutes of the board of directors of the defendant corporation, under date of June 12, 1915, that the following resolution was unanimously adopted:

"Resolved, that whereas Ralph Arnold has acted in the matter of sale and transfer of the La Belle Oil Company's property as special representative in a special agreement with W. P. Cunningham and W. P. Thompson, he should receive a commission of five per cent. (5%) on such deal as when paid to the La Belle Oil Company; therefore, be it resolved that the president and secretary are authorized to issue the company's check and pay the said Ralph Arnold five per cent. on such amount as the La Belle Oil Company received from the California Counties Oil Company as and when received."

The cases cited by appellant as supporting the contention that the exhibit in question is not the "contract" of the defendant corporation, as we have already intimated, are not in point, particularly in this: That when section 1624, supra, is construed with and in the light of sections 2309 and 2310 of the Civil Code—requiring an agent's authority to execute a contract in writing to be itself in writing—it does not, we think, apply to the executive officers of a corporation. "It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed." McCartney v. Clover, etc., Co., 232 Fed. 697, 146 C. C. A. 623. In the case just cited it is shown that—

"There are numerous authorities in which deeds and mortgages executed on behalf of corporations by executive officers without any resolution of the board, or any authority in writing, have been sustained."

From this we think it must be obvious that Plaintiff's Exhibit No. 1 was the act of the corporation, irrespective of the fact that the name of the secretary, actual or acting, might not have been appended, or the corporate seal attached thereto. We think, too, that even were the foregoing condition a prerequisite to the execution of an instrument such as is before us, a showing that a particular person, although not the regularly elected, qualified, or acting secretary, but appointed by the directors to act in the latter's absence, executed such instrument in such capacity, would be a sufficient compliance with the requirement referred to. Therefore, even although such prerequisite authorization be essential—which, as we have seen, is not—and it were held that such authority was not given in the first instance, still, under section 2310, supra, the resolution which we have quoted is, in our opinion, a complete ratification of the action of the corporation's officers, as already set forth, and as such there can be no question but that the exhibit before us is the "contract" or "memorandum in writing" conferring authority to plaintiff to act on behalf of the corporation for the purposes set forth therein.

[7] There is no attempt on the part of plaintiff to recover anything on the theory of quantum meruit or implied contract to pay for benefits. He is claiming under and by virtue of the specific terms and provisions of Plaintiff's Exhibit No. 1. By the terms of said exhibit it will be seen that plaintiff was authorized "to offer for sale * * * 80 acres, more or less, at $4,000 per acre, on such terms and conditions as we * * * may eventually agree upon." Plaintiff procured a purchaser, not at $4,000 per acre, or a total of $320,000, but for the total sum of $300,000, as will appear from Plaintiff's Exhibit No. 2. This was accepted by the defendant corporation on April 9, 1912, which entered into the agreement as set forth in Plaintiff's Exhibit 2 with the purchaser therein mentioned, viz., the California Counties Oil Company, a corporation, under which agreement the latter went into possession and did work upon the property. When this was done, plaintiff was entitled to the compensation agreed upon, according to the terms of Plaintiff's Exhibit No. 1. Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328; Boland v. Ashurst Oil, etc., Co., 145 Cal. 405, 78 Pac. 871; Levy v. Wolf, 2 Cal. App. 491, 84 Pac. 313; Justy v. Erro, 16 Cal. App. 519, 117 Pac. 575; McMillan v. Beves, 147 Fed. 218, 77 C. C. A. 444.

It is contended by appellant that the said California Counties Oil Company abandoned the latter contract. The evidence here does not support this contention. But it does appear that this contract or agreement was modified by mutual consent of the parties thereto on the 28th day of November, 1916, by which modification it is provided, among other things, that—

"It is hereby understood and agreed by all the parties hereto that the intent and purpose of this agreement is to cancel and set aside the agreement of April 9, 1912. * * * Should the said party of the second part [the California Counties Oil Company] fail to make the said payment * * * within ten days * * * then this agreement shall be of no effect, and shall immediately become null and void, and shall in no wise affect the said agreement of April 9, 1912."

By this modification the price originally agreed to be paid—$300,000—was reduced to and fixed at the sum of $187,294.19. Of this amount the purchaser, the California Counties Oil Company, had paid to the defendant corporation, before the commencement of this action, the whole thereof, except the sum of $6,000, and said defendant had paid the plaintiff a commission amounting to $4,752.20, or 5 per cent. on the sum of $95,045.47. Thereafter, and before the commencement of this action, the said California Counties Oil Company paid said defendant the further sum of $86,248.72, under and by virtue of the contract of April 9, 1912, as modified as aforesaid. No commission on this amount, or any portion of it, has ever been paid to plaintiff.

[8] It is maintained by appellant that respondent was not entitled to commission on payments made to it under the said modification of Plaintiff's Exhibit No. 2, because "there is absolutely no testimony to show that respondent had anything to do with the execution of Plaintiff's Exhibit No. 3 [the modification agreement]." There is no merit in this contention. There is no reason shown why respondent should have had anything to do with it. As we have already seen, he was entitled to his compensation under Plaintiff's Exhibit No. 1, and according to the terms thereof. No subsequent agreement or modification of the original agreement between the vendee and the vendor therein could affect plaintiff's rights. Were it otherwise, the bars would be all down, and every agent who had rendered valuable service might by such legerdemain as suggested here, be defrauded, not only out of a portion but out of the whole of the compensation agreed to be paid to him for procuring a purchaser of property.

[9] By the terms of Plaintiff's Exhibit No. 1 plaintiff was to receive his said commission "in the manner as and when paid to us"—defendant. This is but another way of saying:

"You are not to receive your 5 per cent. on the whole of the purchase price when the deal

is closed, but as fast as the purchaser pays in to us we will deduct the commission from such payment and remit to you."

Indeed, this is all plaintiff contends for. The construction placed upon this phrase by defendant evidently is that in reality plaintiff was entitled to nothing until the full purchase price was paid, but that, notwithstanding this, the defendant had paid plaintiff the sum of $4,752.20, although under no legal obligation so to do. With the facts before us we are unable to accede to any such construction. It is conceded by defendant that the sum of $86,248.72 has actually been paid to it on account of the sale made originally to the purchaser, who was brought to it by plaintiff, and that it has paid plaintiff no commission thereon. He is entitled to it, as found by the learned trial judge.

[10, 11] It is next urged by appellant that—

"The judgment of the lower court includes commission on the sum of $6,000 payments due, but not yet made under Exhibit 3. To reiterate, respondent's contract calls for commissions only 'in the manner as and when' payments are received by appellant. It is but idle speculation to say that the purchaser is able, willing, and ready to pay. It may or may not become insolvent before it does so. The fact is that no payment has been made, and commission dependent thereon is not due. The judgment of the lower court must be modified at least in respect to this item."

In answer to this respondent claims that—

Said $6,000 became payable prior to the trial, "it being stipulated at the trial that the same would have been paid had it not been impounded by the attachment of the plaintiff herein. The matter is alleged in the supplemental complaint printed on pages 15 and 16 of the supplement to appellant's opening brief. It was the understanding of the trial court and of ourselves that the stipulation of the defendant was that judgment might pass for the amount of the commission on this sum of $6,000 as well as on the other amounts already paid if the plaintiff was entitled to judgment at all, and we do not understand why counsel raises this question now."

This statement of counsel for respondent is neither answered nor denied. Such being the case, coupled with the fact that the court actually found for the plaintiff on this item, as already seen, it will be assumed that appellant concedes the truth of such statement, and that the finding was proper. Colkins v. Doolittle, 188 Pac. 601; Welch v. Alcott, 198 Pac. 626.

No other point raised by appellant need be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

(47 Cal. App. 445)

SCHWARZ v. BOHLE et ux. (Civ. 3328.)

(District Court of Appeal, First District, Division 1, California. May 11, 1920. Hearing Denied by Supreme Court July 10, 1920.)

1. **Judgment ⟸688—Judgment in action to quiet title against administrator held res judicata as to heirs.**

Judgment in a former action to quiet title, brought by plaintiff against his deceased wife's administrator, was binding on her estate and conclusive against deceased's daughter and heir and the daughter's husband, and was res judicata as to them.

2. **Vendor and purchaser ⟸13—Disclaimer by party not having interest no consideration for oral promise to deed land.**

Where, in a husband's action against his deceased wife's estate to quiet title, it was decreed that land was community property, so that deceased's daughter had no interest in it, her disclaimer of interest in such action could furnish no consideration for plaintiff's oral promise to deed her the premises upon demand.

3. **Frauds, statute of ⟸71—Oral promise to deed land void, in absence of fraudulent conduct.**

An oral promise to deed land is void under the statute of frauds (Civ. Code, § 1624), in the absence of such fraudulent conduct as would take the case out of the statute.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frank R. Schwarz against Frederick H. Bohle and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Theodore L. Breslauer, of San Francisco (Harold C. Faulkner, of San Francisco, of counsel), for appellants.

McPike & Murray, of San Francisco, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover possession of the premises involved in it from the defendants, who were alleged to be tenants of the plaintiff and to have failed to pay their rent, and also failed and refused to surrender possession of the premises to the plaintiff as the owner thereof. The answer of the defendants denied their relation as tenants of the plaintiff and denied that the plaintiff was the owner of the premises. As a further answer to the plaintiff's complaint the defendants alleged that one Julia Schwarz, deceased, the wife of the plaintiff, and the mother of the defendant Eva Anna Bohle, was in her lifetime the owner of the premises in question; that she died intestate, and that after her death the plaintiff in this action represented to the said defendant Eva Anna Bohle that if she would disclaim to him all interest in

the property he would clear the title, and would thereafter on demand grant said premises to said Eva Anna Bohle; and that relying on such representations she disclaimed all her right, title, and interest in said property to said plaintiff, but that said plaintiff upon her demand has refused to convey said property to her; wherefore she prays that she be adjudged the owner of said property, and that the plaintiff be required to deed the same to her.

Upon the trial of the cause the plaintiff testified that the property in question was purchased by himself and his said wife, Julia Schwarz, as community property; that upon her death an administrator was appointed of her estate; that the plaintiff thereupon commenced an action against said administrator and also against the two children of himself and his deceased wife, of whom Eva Bohle was one, to quiet title to the premises, alleging the same to have been community property; and that he since his wife's death was the sole and absolute owner thereof. The administrator filed a general denial in said action; the other two defendants filed disclaimers therein. Upon the trial of that action the plaintiff recovered judgment decreeing him to be the sole owner of the property. The judgment roll in that case was then introduced in evidence in this case, and the plaintiff rested. Thereupon the defendants undertook to offer evidence in support of the affirmative averments of their answer to the effect that the plaintiff had orally promised the defendant herein, Eva Anna Bohle, that if she would give him a disclaimer in the former suit he would convey the premises to her upon demand. The court refused to permit the defendants to make this proof upon the two grounds that, if it was offered as an attack upon the former judgment, it was inadmissible, since that judgment was res adjudicata between the parties to this action; and if, on the other hand, it was offered by the defendant in an effort to establish an oral trust in the plaintiff to convey the premises to the said defendant Eva Anna Bohle, their pleadings were wholly insufficient to permit oral proof of such trust. The court thereupon rendered its judgment in the plaintiff's favor, and from such judgment the defendants prosecute this appeal.

[1] We are satisfied that the trial court committed no error in its aforesaid rulings upon the trial of this cause. The judgment entered in the former action to quiet title against the administrator of the estate of Julia Schwarz, deceased, was, of course, binding upon her estate, and would have been binding and conclusive as against the heirs of said deceased, even if they had not been parties to and have filed disclaimers in said action. Cunningham v. Ashley, 45 Cal. 485; McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681. It would therefore have been res adjudicata against these defendants if they had undertaken in this action to attack the same.

But the defendants, by their affirmative pleading in this case, make no attack upon said judgment, and in fact in their briefs herein expressly disclaim any intent to assail said judgment. The defendants' sole contention, as disclosed by their said pleading, is that the plaintiff received from Eva Anna Bohle a disclaimer of any interest in said premises derived from her deceased mother upon his oral promise to thereafter deed said premises to her, and that he has refused to make said deed. There are no averments of actual fraud in this pleading, nor is there the slightest attempt to bring this case as to its pleadings within the case of Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and the later cases approving its doctrine as to constructive fraud. The utmost that can be said of the defendants' case, as presented both in their said pleading and in their proposed proofs, is that they are attempting to enforce an oral agreement to convey real estate.

[2, 3] There are several insuperable obstacles in the way of the defendants' success. The judgment in the former case decreed that the property in question in both cases was the community property of the plaintiff and his deceased wife, and hence passed to him solely and absolutely upon her death. The defendants, as we have seen, are bound by that judgment, and in fact do not assail it. It was thus conclusively determined that the defendant herein Eva Anna Bohle never had any interest whatever in said property. Her disclaimer, therefore, could furnish no consideration for the plaintiff's oral promise to deed her the premises upon demand, and it was therefore such a promise which, even if made, equity would not enforce. The provisions of section 1624 of the Civil Code embracing the statute of frauds is another insurmountable barrier to the defendants' recovery in this action, in the absence of those elements of fraudulent conduct on the plaintiff's part taking the case outside of the requirements of said statute. The trial court properly ruled that the defendants had presented no such case in their pleadings as would permit them to make their proffered proofs.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 400

PEOPLE v. WHITE. (Cr. 494.)

(District Court of Appeal, Third District, California. May 8, 1920.)

1. Criminal law ⟸412(3)—Statements of prisoners in cell admissible.

Statements voluntarily made by prisoners in a cell indicative of a purpose on the part of both to fabricate a defense to the charge were admissible in evidence.

2. Criminal law ⟸1169(1)—Admission of evidence harmless.

Where the evidence conclusively shows that defendants committed the offense charged, judgment of conviction will not be reversed on account of erroneous admission of evidence.

3. Indictment and information ⟸161(6)—Court could correct name of prosecutrix after jury was drawn.

Where information for rape through clerical error designated prosecutrix as "Carlson" instead of "Larsen," the court could, after the completion of the jury, under its inherent powers or under Penal Code, § 1008, permit the name to be changed.

4. Criminal law ⟸1032(1)—Objection to change in information waived by failure to object.

Where defendant by his silence acquiesced in suggestion of state's attorney of a clerical error in the information in the name of the prosecutrix, and court changed the name, he will not be heard to complain thereof on appeal.

5. Criminal law ⟸1141(1)—Presumptions in favor of regularity of proceedings below.

On appeal the presumptions are in favor of the regularity of the proceedings in the lower court.

6. Criminal law ⟸1186(4)—Erroneous change in information not reversible error.

If it was error for the court to change the name of the prosecutrix in the information after the jury was complete, conviction will not be reversed where there was no prejudice to the substantial rights of the defendant.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Raymond White was convicted of rape, and from the judgment of conviction and an order denying his motion for new trial, he appeals. Affirmed.

Charles Kasch, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1, 2] Appellant was convicted of the crime of rape, and he appeals from the judgment and the order denying his motion for a new trial. He was jointly charged with one Willard Carlson, but he was tried separately. The prosecutrix was 15 years of age, and the evidence shows quite conclusively that she was the victim of a brutal assault committed by the defendants acting in concert. Indeed, it would have been surprising if the jury had failed to convict appellant. We make these observations to indicate in what light we should view the two alleged errors upon which appellant relies for a reversal. The first of these relates to the introduction in evidence of a conversation between the two defendants while they were confined in jail before the trial. The testimony was given by a constable, who was secreted in one of the cells near those occupied by White and Carlson. Their statements were purely voluntary, and they were indicative of a purpose on the part of both defendants to fabricate a defense to the charge. At least the statements were capable of such construction, and it was entirely proper to submit them to the jurors for their consideration. The statements are too indecent for publication, but it is sufficient to say that they agreed as to what their testimony should be. That they should consider it necessary to make such agreement affords some evidence of a guilty mind. Innocent men might inquire of each other as to their recollection of an event or their knowledge of an alleged offense, but they are not at all likely to plunge immediately into a proposal and acceptance of a certain definite statement to be made by each in answer to a criminal charge. We are entirely satisfied that it was a proper circumstance for the jury to consider, but at any rate, under the rule that now prevails in this state, if the ruling was erroneous, it should not operate to overthrow the verdict.

[3-5] The other objection is probably worthy of more serious consideration. As to it the only record is contained in the following minutes of the clerk:

"The jury being now complete, * * * the clerk thereupon read the information to the jury and stated defendant's plea of not guilty. Thereupon the district attorney requested and was granted permission of the court to amend the information on its face by striking out the word 'Carlson' and inserting in lieu thereof the word 'Larsen.'"

In reference to this matter, appellant asseverates that he—

"was denied the right of trial by jury. The jury that returned the verdict was never impaneled or sworn to try him on the charge upon which he was convicted. At the time the jury that convicted him was sworn, the charge upon which he was convicted had not been filed against him. He never had an opportunity to challenge peremptorily or for any cause any of the jurors. In short, this was the most irregular trial which, in my opinion, has ever been submitted for review."

This is assuredly quite a picturesque and impressive impeachment of the district attorney and the trial judge, but it is entirely un-

warranted by the facts in the cause. We are justified in representing the situation as follows: Appellant was regularly and properly charged by an information with said crime committed June 30, 1919, in said county of Mendocino, against the person of Jennie Carlson. He was arraigned and pleaded not guilty, and the case was set for trial. A jury was impaneled according to law, and then the district attorney ascertained that a clerical mistake had been made in stating the name of the prosecutrix, that her real name was "Jennie Larsen," and not "Carlson," as it appeared, and asked the court's permission to make the change. To this request no objection was made by appellant, and by his silence he acquiesced in the suggestion. Thereupon the court granted permission to have the mistake thus corrected. This was done, and the cause proceeded to trial without any objection or suggestion that a different offense had been charged by changing the name of the prosecutrix; it being understood by all parties that only one offense was claimed by the district attorney, and that the amendment was sought for the reason already stated. The trial disclosed the name of the prosecuting witness to be Jennie Larsen, and it was shown very clearly that at the time and place and in the manner alleged in the information said offense was committed against her. He was convicted, and for the first time on appeal, he makes the point that another offense was charged by the amendment, and that for such offense he was never arraigned and was not legally put upon trial. Under such circumstances, can he successfully urge such objection? To ask the question is to answer it. The court had the right to permit the error to be corrected, it was plainly its duty to do so, and such action would not have been subject to objection, if any had been made. But, as we have seen, appellant acquiesced in the course that was pursued, and that affords an additional reason why he should not now be heard to complain. It is true that we have stated the case more fully than the record discloses, but as to this point we simply have the minutes of the clerk; they do not purport, nor are they expected, to contain the whole record, and the presumptions are in favor of the regularity of the proceedings. In the absence of any showing to the contrary we have a right to assume, therefore, what is altogether probable, namely, that the change was made for the reason suggested.

As to another arraignment and another plea, they were, of course, not called for, since but one offense was charged, and as to that the defendant was allowed every right which the law provides. It would have been an idle and foolish thing to repeat the arraignment and to reimpanel the jury simply because the court had permitted an amendment to the information for the purpose of properly identifying and describing the offense that was committed by the appellant.

We may add that the court would have inherent power to permit such a clerical mistake to be corrected, but section 1008 of the Penal Code expressly authorized amendments as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant."

[6] Of course, there was no prejudice to the substantial rights of the defendant caused by the course herein pursued. Indeed, if we may assume that the proceedings were irregular, then no substantial wrong has been committed, and no injustice has been suffered. In this connection, the case of People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184, may be read with interest and profit. It is ample authority to justify the rejection of appellant's contentions as opposed to the established principles of modern criminal procedure.

We think the judgment and order should be affirmed; and it is so ordered.

We concur: HART, J.; NICOL, Presiding Judge, pro tem.

47 Cal. App. 435

UPLINGER v. YONKIN. (Civ. 2795.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

1. Evidence ⟹347—Foreign judgment may be proved by authenticated copy.

A foreign judgment may be proved by an authenticated copy of the judgment alone, without the judgment roll.

2. Evidence ⟹383(5)—Certificate attached to judgment established general jurisdiction of foreign court.

Certificate attached to judgment of foreign court, stating that such court was a court of record having a seal, was sufficient to establish, prima facie, that the foreign court was a court of general jurisdiction.

3. Evidence ⟹80(1)—Foreign laws presumed same as those of forum.

In the absence of evidence to the contrary, it is presumed that the law of a foreign state as to the requirement of notice of time of trial is the same as the law of the forum.

4. Judgment ⟹113—Notice of trial to defaulting defendant not necessary.

Notice of date of trial provided for by Code Civ. Proc. § 594, need not be given to a defaulting defendant.

5. Judgment ⟸504(1)—Based on trial without notice erroneous, but not void.

A trial and judgment, given without notice of date of trial required by Code Civ. Proc. § 594, is merely erroneous, and is not in excess of the court's jurisdiction.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by John H. Uplinger against Henry H. Yonkin. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

James R. Jaffray, of Los Angeles, for respondent.

CONREY, P. J. Action to recover judgment for money due upon a judgment entered against the defendant in the Circuit Court of De Kalb County, Ill. Judgment was entered herein against the defendant, who now appeals therefrom. Appellant presents three points, on which he claims that this judgment should be reversed.

[1] First point: That the Illinois judgment has not been proved as required by law, in this, that an authenticated copy of the judgment alone was received in evidence, without the judgment roll. This question has been determined adversely to appellant's contention in McHatton v. Rhodes, 143 Cal. 275, 76 Pac. 1036, 101 Am. St. Rep. 125. An issue presented in that case depended upon the validity of a judgment of a circuit court, a court of general jurisdiction in the state of Missouri. An authenticated copy of the Missouri judgment was admitted in evidence, without the judgment roll. The judgment of the superior court was affirmed, notwithstanding that the decision therein contained was clearly wrong unless supported by the evidence of the foreign judgment.

[2] Second point: That the judgment sued on is invalid as the basis of a recovery thereon in California, inasmuch as the judgment itself does not show that personal service of the summons in said action was had upon the defendant in the state of Illinois and within the jurisdiction of the court rendering said judgment, and there is not any other proof, by way of record or otherwise, offered in support of such jurisdiction. The judgment, as shown by the copy thereof, duly certified under seal of court and authenticated, states that—

"It appearing to the court that due personal service of process of summons issued in said cause has been had on the defendant for at least 10 days before the first day of this term, and he, being now here three times solemnly called in open court, comes not, nor does any person for him, but herein he makes default, which is on motion of plaintiff's attorney ordered to be taken, and the same is hereby entered of record."

Thereupon, it is stated, evidence was received, the damages were assessed, and recovery had in the sum specified. The certificate recites that said court is a court of record, having a seal. This is sufficient to establish, prima facie, that it is a court of general jurisdiction. In McHatton v. Rhodes, supra, the Missouri judgment was a judgment determining adversely to one Hattie Meagher her claim of title to certain real property. The recitals contained in the judgment were to the effect that she had been duly notified by publication. The Supreme Court of California held that in that case, "the court being of general jurisdiction, all presumptions are that it had jurisdiction, and that the effect of the recital in the judgment is that the notice or summons was properly published. It is declared in the Constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state." The court referred to section 1963, subd. 16, Code Civ. Proc., and after some further discussion, said:

"In all cases where a judgment is collaterally attacked we must presume, in the absence of anything appearing to the contrary, that they were properly brought in. The presumption is the same where service has been made by publication as where personal service has been had."

[3-5] Third point: That the record does not show that any notice of the time of the hearing of said action was ever served upon or had by the defendant, or served upon or had by any attorney for defendant, and no evidence other than the so-called judgment was offered in that regard. This contention is based upon the provisions of section 594, Code of Civil Procedure of California, and the presumption (in the absence of other evidence) that the law of Illinois as to the requirement of notice of the time of trial, is the same as the law of California. But the notice provided for need not be given to a defaulting defendant. And even where the requirements of the section are applicable, a trial and judgment given without such notice is merely erroneous, and is not in excess of the court's jurisdiction; such, at least, is our inference from the only decision which seems to have touched the question. For in that decision (Estate of Dean, 149 Cal. 492, 87 Pac. 13) the court very carefully limited to cases of direct appeal its declaration that a judgment rendered in disregard of that section is erroneous and should be reversed.

We are of the opinion that the court did not err in receiving the evidence to which reference has been made, or in rendering

judgment against appellant on the facts as thus proved.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 395

RAMISH v. REICHENBACH et al.
(Civ. 3361.)

(District Court of Appeal, First District, Division 2, California. May 7, 1920.)

Appeal and error ⊂=1011(1)—Finding on conflicting evidence conclusive.

Finding of fact on conflicting substantial evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Adolph Ramish against Max Reichenbach and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Edward F. Wehrle, of Los Angeles, for appellants.

Alfred H. McAdoo and David E. Bergman, both of Los Angeles, for respondent.

NOURSE, J. Defendants appeal from a judgment rendered against them as involuntary trustees on plaintiff's complaint for rent of premises occupied by defendants in the double capacity as trustees for creditors and assignees of the insolvent under an assignment made for the benefit of all creditors of the insolvent other than plaintiff. The controversy arises through the fact that after the defendants were appointed trustees for the creditors a written agreement was made between them and plaintiff whereby plaintiff agreed to permit defendants to continue the occupation of the premises theretofore leased to the insolvent, and the defendants promised to pay to plaintiff the back rentals then due out of the first profits of the business. By the pleadings it is admitted that defendants also agreed to pay the expenses of conducting or operating the business, including the payment of the monthly rental and water charges for the premises occupied, before distributing or paying to the other creditors anything upon the indebtedness due them. During the course of their conduct of the business the defendants paid certain sums to an agent of one of the creditors and other sums to the attorney for the creditors, leaving in their possession insufficient moneys to meet the payment for the current rental admitted to be due to plaintiff. Upon the trial it was contended on the part of plaintiff that the moneys so paid out were for services rendered to the creditors, and defendants claimed that such payments were necessary and proper expenses of conducting and operating the business by the trustees. Plaintiff also asked for an accounting upon the theory that, though he was not a party to the original assignment for the benefit of creditors, the defendants by their special agreement with him became involuntary trustees for his benefit. The trial court found that the defendants during their conduct of the business received sufficient moneys to have enabled them under the terms of their agreement with plaintiff to pay him the amount claimed to be due as rental for the premises, but that the defendants used and disposed of such moneys, not in payment of the necessary expenses of conducting and operating the business, to an extent and in an amount sufficient to have paid plaintiff the amount due him.

The whole argument of appellants on this appeal resolves itself into an attack upon this finding as not supported by the evidence. There was substantial evidence tending to prove that one Brown, to whom payments were made for services rendered in checking up the cash and doing certain clerical work, was engaged by one of the creditors, and not by the trustees; also that such services were for the benefit of the creditors charged and were not necessary for the operation of the business under the trustees. There was also evidence that the attorney to whom other payments were made was employed by the creditors to prepare the original trust agreement and assignment, that he was not employed by either of the trustees, and that he rendered little, if any, legal services to them directly. The evidence on the part of appellants tending to show that some of these services were rendered for and at the request of the trustees merely presents a conflict upon which the trial court was required to find. The finding so made, being based upon conflicting evidence, is conclusive upon this appeal, and for these reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

47 Cal. App. 404

BOLAND v. SMITH. (Civ. 3095.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

1. Evidence ⟸442(6)—As to time of delivery of automobile sold not inadmissible as varying contract.

In buyer's action to rescind purchase of automobile, testimony as to subsequent conversations between parties as to when car would be delivered *held* competent to explain conditions, no date of delivery having been fixed in the written contract, and nothing shown therein as to whether first shipment had been ordered or would be made.

2. Sales ⟸81(1)—Contract for sale of automobile called for delivery in reasonable time.

Under a contract for sale of an automobile, delivery to be made "on or about out of first shipment of" the model, the obligation of the sellers was to have delivery made within a reasonable time, depending on conditions within knowledge of the sellers.

3. Sales ⟸130(3)—Evidence held to justify conclusion delay in delivery unreasonable.

In action to rescind purchase of automobile, evidence *held* to justify conclusion that delay in delivery was unreasonable.

4. Appeal and error ⟸907(2)—Presumption ruling of trial court supported by evidence.

Where the appellate court can surmise that such a showing has been made as would have justified a ruling as expressed by the trial court, and the evidence is not before the appellate court, it must presume that the condition of the case in its evidence was such as to support the ruling.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by William P. Boland against Stanley W. Smith, individually and as executor of C. F. Smith, deceased. From judgment for plaintiff rescinding contract for purchase of an automobile, defendant appeals. Affirmed.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to enforce rescission of a contract for the purchase of an automobile. Judgment was awarded in accordance with the prayer of the complaint, and defendants appeal. (After judgment there was a substitution of parties plaintiff by reason of an assignment made by plaintiff Carlin G. Smith to Boland.)

On June 12, 1912, plaintiff negotiated with defendant, Stanley W. Smith, and C. F. Smith, since deceased, for the purchase of an automobile, and on that date paid a deposit of $500. A written contract in the form of a memorandum order was drawn up and signed by the purchaser and the vendors. The automobile was not at the time in the hands of the vendors ready for delivery, but was to be shipped from the factory at an Eastern point, and the written contract provided that the delivery was to be made "on or about out of first shipment of this model." The signature of the plaintiff first appeared attached to the order, and over the signature of the vendors was the following clause:

"We agree to fulfill all the terms and conditions of this order, subject to delay resulting from fires, strikes, action of elements, and other circumstances beyond our control."

No delivery of the car having been made, on the 25th of November, 1912, the plaintiff served a written notice of rescission upon the vendors and demanded the return to him of the $500 deposited. The court, in its findings of fact, recited that defendants had represented to plaintiff that they had several shipments of models of the kind of car desired coming, and that the first shipment would reach Los Angeles on or about the 1st day of July; that the defendants failed to make delivery of the car on July 1st, but stated to plaintiff that shipment had been delayed and that the car would be shortly delivered, and at various times between July 1 and October 17, 1912, the vendors represented and stated that shipment of said car would shortly be made; that on the 17th day of October the vendors specifically promised and agreed to make delivery of the car not later than three weeks from that date, to wit, not later than November 17, 1912; that the vendors received a shipment of the model of the car contracted to be delivered on or about the 25th day of December, and on the 26th of that month notified the plaintiff of the receipt of the car and offered to make delivery thereof. The court further found:

"That defendants have wholly refused and failed to make delivery of any car under the terms of their contract with the plaintiff within a reasonable time, and have failed and refused to return to plaintiff the sum of $500."

One of the contentions of the appellants here is that the court erred in admitting the oral testimony of the plaintiff touching the time that it was understood the automobile would be delivered; the claim being that the effect of such testimony was to vary the terms of the written contract. The testimony referred to was given by the plaintiff, and, as set forth in the bill of exceptions, is as follows:

"I had a conversation at the time the contract was made regarding the time of delivery. Mr. Smith said he would deliver the car between the 1st and 15th of July, that year. I had a further conversation with Mr. Smith, of Smith Bros., in August of 1912. I called on Mr Smith and asked him when I was to get my car; and he said, 'We expect it any day.' I went

in his place every once in a while to find out when he was to make delivery. On August 17th he called at my office to collect a bill for repairs. I said, 'When am I going to get my car?' He said, 'You will get your car within two weeks.' I called in two men, Mr. Sadler, who was in my office, and Mr. Rending, and asked them to listen to the conversation. I said, 'Clarence, you promised me delivery within two weeks.' He said, 'You will get your car within two weeks.' I said, 'I will give you three weeks; if I don't get my car within three weeks, I want my money.' He said, 'You will have the car or your money,' and he left and walked out. I made a memoranda of that conversation on the contract that he had signed and given to me. The car was not delivered on November 7th. I signed a notice of rescission, which was served on Mr. Smith."

Section 1860, Code of Civil Procedure, provides:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[1-3] We think that the testimony was competent to explain the conditions, in view of the fact that no date of delivery was fixed in the written contract and nothing therein was shown as to whether the shipment of automobiles had already been ordered or as to when such shipment would be made. In our opinion, under the terms of the contract, it should be said that the obligation of the vendors was to have delivery made of the car within a reasonable time. What would amount to a reasonable time for shipment from the East and receipt in Los Angeles would depend upon conditions within the knowledge of the vendors, and for that reason we think it was proper for the court to receive testimony touching the representations and statements made by the vendors on the subject of delivery. While in the plaintiff's testimony conversations were shown between the plaintiff and one of the vendors, which conversations occurred subsequent to the making of the contract, those conversations were not relied upon by the trial judge as fixing a new and definite date upon which the automobile was agreed to be delivered, but only as showing the continuing conditions as to the nondelivery and the explanations made by the vendors in attempted excuse of the same, all of which was competent as going to the question as to whether at the time the plaintiff gave notice of rescission there had been an unreasonable delay on the part of the vendors in the delivery of the automobile. The court directly determined that the delay was unreasonable, and, upon the evidence shown, we think that that conclusion was justified.

A second contention of the appellants relates to the matter of another transaction had between the parties prior to the making of the particular contract here involved. In a cross-complaint defendants alleged facts concerning the prior transaction under which it seems the plaintiff had first bargained for a different automobile, which he received, and that he later returned the automobile, with the consent of the defendants, and forfeited some money which he had paid thereon. In the findings of the trial court it is determined that the transaction last referred to was distinct and separate from that sued upon by the plaintiff, and that the rescission of the former contract was not, as defendant asserted, a part of the consideration for the making of the contract to enforce rescission of which this action was brought. Appellants contend that the court refused to admit testimony offered by them in support of matters contained in the cross-complaint. We are unable to determine from the bill of exceptions as to what testimony was offered to that point. The bill of exceptions does not purport to contain all of the testimony heard at the trial. As to the offered testimony we find in the record, among the specifications, this statement:

"In reply to defendants' offer to prove the facts of the prior transaction as pleaded in the cross-complaint the court said: 'I just want the records to show that you started to prove other considerations for this contract not stated therein relative to the matter pleaded in the cross-complaint, and the court refused to hear it on the ground that as the evidence stands at this time you are not entitled to introduce any evidence whatever regarding the former transaction between these parties; in other words, that the court confines you to mutual obligations created by the written contract pleaded by you on the ordering of this car.'"

[4] As to how the evidence stood, as the court phrased it, at the time the judge made that statement, we are not enlightened. We can surmise that such a showing had been made as would have justified the ruling as expressed by the judge, and, that being true, we must presume that the condition of the case in its evidence was such as to support the ruling.

No other points are presented which require consideration or discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 438

CREDIT GUIDE CO. v. FIDELITY STORAGE & MOVING CO. (Civ. 2806.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

Limitation of actions ⟸66(8)—Action against bailee for property accrues on demand.

Where property came into possession of defendant warehouseman in 1912, and was demanded during the two next following years, action to recover it, commenced in 1917, was barred by Code Civ. Proc. § 338, subd. 3, the three-year statute.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Action by the Credit Guide Company against the Fidelity Storage & Moving Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frederick A. Preston, of Los Angeles, for appellant.

D. Joseph Coyne, of Los Angeles, for respondent.

CONREY, P. J. Action to recover possession of certain described personal property or the value thereof. Judgment entered in favor of the plaintiff, from which the defendant appeals.

In the answer it was alleged that the action is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure, under which an action of this character must be commenced within three years from the time when the cause of action accrued. The property in question belonged to plaintiff's assignor, Sarah B. Clark, and came into the possession of the defendant in December, 1912, or January, 1913. Mrs. Clark testified as follows:

"I have requested and demanded the return of the goods which were missing on a number of occasions, as follows: At Los Angeles, one or two times at defendant's place of business, the loss of the box having been discovered in April 1913. I demanded the same several months later. I was at that time advised that they could not locate the box or the contents, but that they said that they would continue their efforts. Several times after the occasion mentioned I took up the matter with the company, and was again advised that they were still searching for the chest containing the articles mentioned, but had not yet been successful."

In connection with the testimony of Mrs. Clark, it appears that her demand had been made and was being insisted upon by her as early as January, 1914. On the 8th of that month defendant sent her a letter, stating that defendant was endeavoring to find the chest in which said goods were said to be contained, and asked her for a description of the chest and contents. On the 29th of the same month they sent her a second leter, acknowledging receipt of a letter from her, of date January 19th, giving the contents of the chest, and stating that they were moving the contents of their old warehouse into their new one, "we are in hopes to find your chest in this way; if we do not, we will endeavor to make a settlement with you." This is practically all of the evidence bearing upon the time when the demand was made and when the claimant's right of action accrued. The action was not commenced until April 24, 1917. On these facts it seems to be established without any doubt that the evidence is insufficient to sustain the court's finding that the cause of action is not barred by the provisions of the third subdivision of section 338 of the Code of Civil Procedure.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 457

DARTER v. SCHUYLER. (Civ. 2150.)

(District Court of Appeal, Third District, California. May 12, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. Vendor and purchaser ⟸185 — Inexcusable failure to make payment under contract terminates it.

When in a contract for the sale of land time is made of the essence, an inexcusable failure on the part of holder of option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option, and makes it impossible for him to enforce the same in the absence of a waiver on the part of the other party.

2. Quieting title ⟸30(3)—Former owner of land held not necessary party.

Where an owner of land gave a third party an option to purchase it upon making certain payments, and such third person failed to make the payment at the time stipulated, whereupon the owner declared a forfeiture of the contract, and subsequently sold the land to plaintiff, in a suit by plaintiff to quiet title brought against the third party, the former owner was not a necessary party.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Suit by R. L. Darter against Mary R. Schuyler to quiet title. Judgment for plaintiff, and defendant appeals. Affirmed.

G. W. Langan and True Van Sickle, both of Oakland, for appellant.

C. W. Miller, of Stockton, for respondent.

NICOL, Presiding Judge pro tem. This action was commenced by plaintiff to quiet his title to a certain tract of land in the county

of San Joaquin, which land he purchased from one J. A. Coley on the 27th day of June, 1917.

On May 13, 1914, an agreement was entered into between the said J. A. Coley and defendant, Mary R. Schuyler, by which Coley agreed to sell and the defendant agreed to buy the said land for the purchase price of $53,000. The agreement acknowledges the receipt of $18,000, being the value placed on certain lots in Oakland, and the balance of the purchase price, amounting to $35,000, to be paid before July 1, 1919, together with interest at the rate of 6 per cent. per annum on all deferred payments, interest to be paid annually. The agreement provides that, in consideration of the defendant being given possession of the premises, she agrees to pay all taxes which may be levied or assessed on the premises, that by the terms of the contract it was expressly provided that time was of the essence thereof, and that in the event of the failure of said Mary R. Schuyler to make any payment at the time the same became due, or within 30 days thereafter, the contract should become null and void, and the said Mary R. Schuyler should forfeit all right thereto and to all moneys theretofore paid on account of the said agreement.

The defendant failed to make the payments as provided by the contract, and as to her failure in this regard the court found:

"That subsequent to the execution of said contract said defendant, Mary R. Schuyler, made certain payments thereunder aggregating the sum of $1,927.46 and no more, and all of such sum was paid before the 1st day of January, 1916; * * * that said Mary R. Schuyler failed, neglected, and refused to pay the interest on the purchase price mentioned in said contract or any part thereof as the same became due or otherwise, and also failed, neglected, and refused to pay the taxes levied upon said premises subsequent to the first installment of taxes for the year 1915; that said J. A. Coley made frequent demands upon said Mary R. Schuyler for the payment of the interest and taxes due from her under said contract prior to August 16, 1916; that on the date last mentioned said J. A. Coley notified said Mary R. Schuyler in writing that she was in default and had been in default for more than 30 days in the payments then due and payable under the terms of said contract, and that if she should fail for 10 days thereafter to perform said contract and make the payments then due thereunder that she would forfeit her rights under said contract; that said Mary R. Schuyler continued to fail and neglect to make payment of the interest and taxes then due and payable from her under said contract, and has never made nor tendered any amount whatever to apply on said contract since the 16th day of August, 1916."

[1] The law is settled in this state that, when in a contract for the sale of land time is made of the essence of the contract, an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the terms of the contract terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party (Champion G. Min. Co. v. Champion Mines, 164 Cal. 205, 128 Pac. 315; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17), and no notice is required to terminate the defendant's rights under the contract (Northern Assurance Co. v. Stout, 16 Cal. App. 548, 554, 117 Pac. 617; Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 553, 161 Pac. 14; Commercial Bank v. Weldon, 148 Cal. 601, 84 Pac. 171). In the case of Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 Pac. 420, the plaintiff sued to quiet title to certain land, and the defendants answered, setting up certain contracts for the purchase and sale of the property upon which they were in default. The court, in passing upon the case, says:

"We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief. * * * Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' (Slye and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in Glock v. Howard & Wilson Colony Co., 123 Cal. 1–16 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713): 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach and no affirmative act upon the part of the vendor was necessary to bring about this result.'"

[2] The defendant claims that J. A. Coley was a necessary party to the action, and in the absence of said Coley as a party the contract was a sufficient and complete answer to plaintiff's complaint. We think the cases above cited are a sufficient answer to this contention. The default of defendant in making the payments as called for by the said contract operated ipso facto as a forfeiture of the same and of the rights of the vendee thereunder. Northern Assurance Co. v. Stout, 16 Cal. App. 548, 117 Pac. 617; Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 161 Pac. 14. The contract by reason of the said default of defendant had been forfeited and had ceased to exist at the time Coley conveyed the property to the plaintiff, and under these circumstances we do not consider that said Coley was a necessary, or even a proper, party to the action.

It is argued that there was a waiver of the strict performance of the terms of the contract by Coley as to the payments of interest and taxes. This contention of the defendant cannot be sustained. The trial court, upon conflicting evidence, found that the defendant was not excused from making the said payments as the same became due by any act or conduct on the part of said J. A. Coley, and that no act or conduct on his part justified her in failing to perform her part of the contract.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 397

DUNNING BROS. CO. v. JOHNSON. (Civ. 2164.)

(District Court of Appeal, Third District, California. May 7, 1920.)

Judgment ⊂⊃423—Equity may correct mutual mistake in description of property in pleadings and judgment.

Where, in a suit to quiet title as against a tax deed, the land involved has been both in the pleadings and the judgment erroneously through mutual mistake described as being in range "J," instead of range "I," a court of equity has power to correct the mistake.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Suit by the Dunning Brothers Company against Waldo S. Johnson to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Ebert and W. E. Davies, both of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal from a judgment of the superior court of Yuba county quieting title of plaintiff to three lots in the city of Marysville and correcting a mistake in the description of the said lots as contained in a judgment entered in the case of John Martin v. Chester A. Smith et al.

On December 4, 1914, the defendant Waldo S. Johnson purchased, at a tax sale made by the tax collector of the said city of Marysville, the three lots in question, and received a certificate of sale for the same. Thereafter in December, 1915, Johnson demanded a deed for the lots in accordance with the certificate of sale, and John Martin, then the owner of the lots, brought suit to quiet his title to the same and also to cancel the said certificate of sale. Judgment was entered in favor of Martin from which Johnson appealed to the Supreme Court and the judgment was affirmed on September 5, 1918. Martin v. Smith et al., 178 Cal. 812, 175 Pac. 16.

On September 12, 1917, Martin and his wife deeded the lots in question to Dunning Brothers Company, the plaintiff in the present action. At the time of the making of this deed it was discovered for the first time that there was a mistake in the description of the lots as contained in the pleadings and judgment in the said case of Martin v. Smith et al., in this, that throughout all the proceedings in said case as well as in the judgment the lots were described as lots 2, 3, and 4 of block 1, in range letter "J," instead of in range letter "I," as the lots, blocks, and ranges are laid down, numbered, and designated upon the record map of said city of Marysville. The present suit was subsequently commenced to quiet plaintiff's title to the lots and for a decree correcting the mistake contained in the said judgment.

Upon the question of mistake the court upon ample and sufficient evidence found as follows:

"That, however, by inadvertence throughout all the pleadings in said action tried as aforesaid, and in said judgment, said lots of land above mentioned were described as being in range letter 'J,' instead of the true range, namely range letter 'I,' in said city. Said mistake was mutual between all the parties to said action and the cause was commenced, tried and determined upon the theory, and upon the belief upon the part of all the parties to said action and on the part of the court determining the same, that said lots were in said pleadings correctly described. While in truth and in fact the description thereof was incorrect, locating said lots in range letter 'J,' instead of the true range, namely, range letter 'I' in said city."

That a court of equity has the power to correct a mistake like the one here in question is too plain to admit of doubt. In Quivey v. Baker, 37 Cal. 465, a mortgage by mistake described a different lot from the one intended by the parties to be mortgaged. In fact, there was no such lot as the one erroneously described. Suit was afterwards commenced to foreclose the mortgage, the complaint describing the property by the same erroneous description contained in the mortgage. In the decree of foreclosure and in the sheriff's deed was the same mistake in description. It was held that an action would lie to correct all the mistakes and that equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties. See, also, Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081; Donald v. Beals, 57 Cal. 399. In Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, it was held that—

"The power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends

also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud, and not the result of the negligence of the injured party."

In Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643, there was a judgment ordered by the district court in favor of plaintiff, in an action on a note, and the clerk was directed to assess the amount due, that by mistake the clerk assessed the amount due at $223.36, instead of $370, and judgment was entered accordingly, defendants appealed to the Supreme Court and the judgment was affirmed, an execution was issued on the judgment and the amount thereof collected; thereafter, and more than one year after the rendition of the judgment, the mistake was discovered. The court said:

"The fact that the judgment of the district court had been affirmed in this court did not deprive that court of jurisdiction of this case. The judgment, as entered in the district court, was appealed from and affirmed, but that affirmance does not operate to prevent the correction of the judgment by the district court in respect to a matter that was not passed upon by this court. The petition shows that the affirmance of the judgment in the amount as rendered by the district court was also a mistake, and it cannot be doubted that such mistake may likewise by proper proceeding be corrected."

The demurrer interposed by the defendant to the complaint was properly overruled by the court and we find no error in the record.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 448

STONE v. PORTER-BURNHAM CO.
(Civ. 2848.)

(District Court of Appeal, Second District, California, Division 1. May 11, 1920.)

Sales ⟸89—Evidence held to support finding that agreement sued on had not been modified.

In an action to recover a balance of purchase price of potatoes sold, wherein defendant sought to prove a new agreement, rescinding the one sued on, and reducing the price of the potatoes, evidence *held* to support a finding that such new agreement had not been made.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. H. Stone against the Porter-Burnham Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Morris, of San Francisco, for appellant.

W. A. McGinn and Wm. B. Bealzley, both of Bakersfield, for respondent.

CONREY, P. J. Pursuant to the terms of a written contract the plaintiff delivered to the defendant a crop of potatoes for which the defendant agreed to pay at the rate of 2 cents per pound. This action was brought to recover the unpaid balance of money due for the merchandise so delivered. Judgment was entered in favor of the plaintiff for the amount demanded, and the defendant appeals from that judgment.

The answer of the defendant alleged that prior to the delivery of any of the potatoes it was learned that the potatoes were not of the quality specified in the written contract; that thereupon a new agreement was entered into whereby the first contract was rescinded and a new agreement of sale was made at the reduced price of $1.75 per hundred pounds; that pursuant to said new agreement the defendant received the potatoes thereafter delivered to it.

The court found against the defendant on the affirmative defense thus presented. The only question presented on this appeal arises upon the contention of appellant that this finding of the court was not sustained by the evidence. The writing alleged to constitute the new agreement was received in evidence in connection with the testimony of the defendant's agent, who testified that it was signed by the plaintiff in the presence of said agent, and that he delivered to the plaintiff a copy thereof. This was a receipt for money paid, with data indicating the $1.75 rate. The plaintiff would not admit that the signature to such paper was his signature, but did admit that it looked like his signature. On the other hand, he testified that the only paper which he did sign was merely a receipt for money, which did not contain the same figures contained in the document presented in evidence by the defendant; particularly that it did not contain any reference to the $1.75 price to be paid, and that he did not receive any copy of the paper signed by him. Defendant's agent testified to the facts alleged in the affirmative defense to the effect that the plaintiff had agreed with him for a rescission of the original written contract and for a new sale at the reduced rate of $1.75 per hundred pounds. The plaintiff denied that such conversation ever occurred, and denied that he had signed any writing providing for such reduced rate. The testimony of the plaintiff as to these matters was corroborated by the testimony of disinterested persons, who testified that defendant's agent had told them on the same day as the date found on said alleged new agreement that defendant was paying the plaintiff for his crop of potatoes at the rate of 2 cents per pound, and that now he would not pay more than $1.75 for the potatoes of said witnesses because the market price had gone down. Without further outlining the evidence, enough has

been said to show that the evidence is sufficient to support the finding of fact as made by the court.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 450

BENNETT v. FIRST NAT. BANK OF HOLLYWOOD. (Civ. 3253.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1920.)

1. Banks and banking ⟸148(2)—Bank liable for money paid out on forged indorsement.

A bank had no right to charge a depositor's account with money paid out upon a check, where the indorsement of the payee was forged.

2. Banks and banking ⟸148(2)—Bank not entitled to credit on money paid on forged indorsement by reason of money paid by forger to drawer.

Where T. forged note and mortgage and obtained a loan thereon in the name of the person whose name was forged, and received a check for one half of the loan payable to order of the third person, and forged the indorsement and received the money from a bank, and a check for the other half was later given to T., who cashed the same, and thereafter T. repaid one-half of the loan to the drawer of the check, the fact of such payment by the forger to the drawer did not entitle the bank to any credit on the amount paid out on the check with the forged indorsement.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by George Bennett against the First National Bank of Hollywood. Judgment for plaintiff, and defendant appeals. Affirmed.

Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondent.

SHAW, J. This action was brought by plaintiff against the First National Bank of Hollywood to recover the sum of $1,000, which the bank charged to his account because of the payment of a check drawn by him thereon and upon which the name of the payee was forged. Judgment went for plaintiff, from which the defendant appeals upon the judgment roll.

As appears from the findings, the facts are as follows: In August, 1917, one S. W. Thomas, then a man of good repute and president of the Garvanza Investment Company, falsely represented to plaintiff that he was the agent of Abbie Gilbert (who was in fact a real person), and that she desired a loan of $2,000, to be secured by mortgage upon certain real estate owned by her. Plaintiff agreed to make the loan, and some days thereafter Thomas delivered to him a note and mortgage purporting to be executed by Gilbert, both of which documents were in fact forged instruments. Thereupon plaintiff delivered to Thomas a check for $1,000, drawn upon defendant bank and payable to the order of Abbie Gilbert whose name Thomas, without her consent or knowledge, indorsed thereon and deposited it in the First National Bank of Glendale to the credit of the Garvanza Investment Company, the account of which he used for his own purposes, and which check, upon being presented to defendant, was paid in due course on August 22, 1917. Thereafter, to wit, on August 27, 1917, in advancing the balance due upon said purported loan, plaintiff gave his check upon defendant bank for $1,000 payable to the order of S. W. Thomas, who duly indorsed the same, which defendant paid to the account of said Garvanza Investment Company upon presentation, likewise charging the same to plaintiff's account. Prior to the time when the Garvanza Investment Company received the proceeds of the Thomas check, all the money represented by the Gilbert check was by it checked out and paid to persons not here concerned. While Thomas, between September 4, 1917, and April 5, 1918, paid plaintiff in installments the sum of $1,000, which sums were credited generally upon the forged note of Abbie Gilbert, no part thereof was from the proceeds of the Gilbert check. Neither Abbie Gilbert nor the parties hereto learned of the fraudulent nature of the transactions until September, 1918, at which time plaintiff demanded payment from defendant of his $1,000 so paid out on the Gilbert check. The court further found that plaintiff was not guilty of any negligence which contributed to the action of defendant in making said payment, and that the payment of $1,000 made by Thomas on said purported note of Gilbert "was not made at the expense of or to the injury of defendant, and that plaintiff was not (thereby) benefited beyond his total loss."

Upon these findings appellant attacks the court's conclusion of law based thereon:

"That plaintiff had a right to apply the whole sum of $1,000 paid by S. W. Thomas to plaintiff on account of the said note and mortgage in liquidation of the said check of $1,000 made and delivered by plaintiff to said S. W. Thomas on the 27th day of August, 1917, and to apply no part of the same on the said check of $1,000 payable to said Abbie Gilbert."

Defendant's unauthorized act in paying the Gilbert check upon which the indorsement was forged is conceded by appellant (Reding-

ton v. Woods, 45 Cal. 406, 13 Am. Rep. 190), who, however, insists that defendant should have the benefit of the $1,000 paid by Thomas in liquidation of any damage sustained by plaintiff on account of such unauthorized action on its part.

[1] That defendant had no right to charge plaintiff's account with the $1,000 so paid out upon the forged indorsement of the Gilbert check is not open to controversy, but in fact conceded by appellant, which, however, insists that equitably it is entitled to have the $1,000 paid plaintiff by Thomas applied in liquidation of its liability, and hence, if so applied, defendant has been reimbursed for the loss sustained by its unwarranted act. Its argument in support of this contention is predicated chiefly upon the claim that the loss was due to plaintiff's negligence, which, in the absence of the evidence, is fully answered by the finding of the court that defendant's action was not due to any negligence on the part of plaintiff.

[2] The action is not based upon the fraud practiced by Thomas upon plaintiff. That is no concern of defendant. It is true that plaintiff, for some reason not appearing, delivered to Thomas a check payable to his order for $1,000, which Thomas in due course cashed; but such act (whatever plaintiff's intention, since the Gilbert note was a nullity) created a personal liability on the part of Thomas, who was the only person answerable therefor, and if not paid an action for recovery would lie against him alone. The payment of any judgment obtained thereon could not be deemed the liquidation of defendant's liability to plaintiff in paying the Gilbert check. If this argument is sound, it follows that the situation is not changed by the fact that Thomas, without a judgment therefor, and from funds other than the proceeds of the Gilbert check (Andrews v. Northwestern National Bank, 107 Minn. 196, 117 N. W. 621, 780, 122 N. W. 499, 25 L. R. A. [N. S.] 996; Shipman v. Bank of State, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821), paid to plaintiff the sum so received by him, and for which he alone was liable. As found by the trial court, the payment was not made at the expense or to the injury of the defendant. The payment was not made out of any fund belonging to it, nor, as to the loss due to defendant's action, was plaintiff benefited by the payment. No equitable reason occurs to us why the sum paid by Thomas should be applied in liquidation of defendant's liability to plaintiff, from which it follows that defendant still has $1,000 of plaintiff's money.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 416

HINCKSMAN v. DELACOUR et al.

(Civ. 3242.)

(District Court of Appeal, First District, Division 1, California. May 10, 1920.)

1. Vendor and purchaser ⊂⊃296—Purchaser in default cannot maintain equitable defense against seller's ejectment.

Buyers of land in possession under contract of purchase, not having performed their contract, and in default with payments, cannot maintain equitable defense to the seller's action of ejectment by setting up his misrepresentations that the property was unincumbered, etc.

2. Vendor and purchaser ⊂⊃296—Purchasers must either perform or rescind.

Purchasers of land in default must either pay the purchase price according to contract and receive whatever title seller is able to give, if they choose to retain possession, or may rescind, seller having misrepresented his title, and restore possession to him and recover price paid, with expenses, less rental value, and, having adopted neither course, but retained possession while in default in payments, are liable to the seller in ejectment wherein judgment restoring him to possession without decreeing return of the price to the purchasers is not erroneous.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Ada Hincksman against Ernest Walter Smith Delacour and Kathleen Fielding Delacour. From judgment for plaintiff, defendants appeal. Affirmed.

Clarence S. Preston and E. H. Lamme, both of San Diego, for appellants.

Fred O'Farrell, of San Diego, for respondent.

WASTE, P. J. This is an action brought by plaintiff, as vendor in a contract for the sale of real estate, against the defendants, who were vendees in possession, to recover possession of the land, and damages for the retention thereof, after alleged breach of the contract in failing to make payments, and for a judgment declaring the contract to have been broken, quieting plaintiff's title to the land, and for general equitable relief.

The defendants in their amended answer to the complaint denied a willingness on the part of the plaintiff to carry out the terms of the contract, and pleaded an affirmative equitable defense, based upon the ground of false and fraudulent representations, made to induce them to purchase the land. The same affirmative matter was set up in an amended cross-complaint, with a prayer for a rescission of the contract, and for an accounting of moneys paid to the plaintiff, and a finding as to the amount cross-complainants had expended in the necessary and proper care and maintenance of the property,

and for judgment therefor. Plaintiff demurred to the amended answer, and amended cross-complaint, and moved to strike out all the affirmative matter contained therein. The demurrer to the amended cross-complaint was sustained without leave to amend, and the court struck from the answer all of the affirmative matter pleaded as a defense.

By the judgment of the lower court plaintiff was awarded the immediate possession of the land, the contract of sale was canceled, and the plaintiff was given nominal damages for the detention. Defendants appeal on the judgment roll, claiming error on the part of the lower court in sustaining the demurrer to the amended cross-complaint, and in striking from the answer the matter alleged by way of an equitable defense. They also contend that the judgment was erroneous in giving the plaintiff possession of the land without a return of the purchase price.

Under the contract of sale entered into by the parties on February 8, 1912, the defendants agreed to pay the plaintiff the sum of $18,000 for the land, $6,000 of which sum was paid when the contract was executed, the balance to be paid in semiannual installments of $500 each until the entire purchase price was paid, the first payment to be made on August 8, 1912. The defendants took immediate possession of the land, and have continued in possession thereof ever since. They made the payment of $500, due August 8, 1912, a payment of $250 on February 10, 1913, and a payment of $250 on August 8, 1913, since which time they have paid nothing on the contract. On December 27, 1916, the plaintiff, in writing, notified the defendants that they were in default, and that she insisted upon full compliance with the contract, and payment within 10 days, of all unpaid installments and interest. No payments being made by the defendants, the plaintiff made demand, in writing, for the possession of the premises, which being refused, she brought this action in ejectment, and for damages.

By way of their attempted equitable defense, the defendants alleged that at the time of the making of the contract the plaintiff stated that the title to the property was unincumbered, whereas it was subject to certain easements for pipe lines; misrepresented the amount of the annual income from the place; represented the amount of land to be 32.63 acres, whereas a highway dedicated to public use required and occupied 2 acres; and misrepresented the real purpose for which she desired to sell the property. Defendants further averred that upon discovering the alleged falsity of these representations they demanded of the plaintiff a rescission of the contract, and that they would make no more payments thereon, but would continue to demand an immediate rescission of the contract and repayment of all sums of money paid thereunder, at the same time offering to surrender the possession of the property, together with everything received by the defendants from the plaintiff, under the terms of the agreement. This demand of rescission, and offer in connection therewith, was rejected by the plaintiff. Defendants further allege that they have at all times offered, and do now offer, and are ready and willing, upon the repayment to them of the amount paid to plaintiff under the contract, and any other sums that the court may find to be legally due for money expended on the property, to return to plaintiff the possession of all of said property, together with all things received from her, the said plaintiff, by these defendants under said contract. They have not done so, however, and no other reason is given for withholding possession of the land from the plaintiff.

[1] From the situation thus presented by the pleadings, it is at once seen that the defendants, vendees in possession, under a contract of purchase, not having performed their contract, and being in default with their payments, are attempting to maintain an equitable defense to an action of ejectment by the vendor. Such a defense may not be maintained. The case is very similar in its essentials to Garvey v. Lashells, 151 Cal. 526, wherein, at page 530, 91 Pac. 498, at page 500, the court said:

"So far as the defense made by the answer is concerned, the case is simply that of a vendee who has received possession of the property from the vendors under a contract of sale, attempting to retain possession against the vendors without fulfilling his covenants as to payment."

As was said in another decision:

"It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor." Gervaise v. Brookins, 156 Cal. 103, 106, 103 Pac. 329, 331; Hoffman v. Remnant, 72 Cal. 1, 4, 12 Pac. 804.

The action of the trial court in sustaining the demurrer to the amended cross-complaint, and in striking the affirmative matter from the answer, was therefore correct.

[2] Appellants urged that the judgment of the trial court, restoring plaintiff to the possession of the land, without decreeing the return of the purchase price to the defendants, was erroneous. There is no merit in this contention. As before stated, the defendants received possession of the land from the plaintiff under the contract, and can retain possession only by fulfilling their covenants which they therein made. It was not necessary for the purposes of this case, an action in ejectment, to determine whether or not

the respondent had a good and sufficient title, or whether or not defendants had been led to enter into the contract by false representations. If they desired to retain the possession acquired under the contract, they should have complied with their part of it. If they concluded not to comply, because the title was not satisfactory to them, or for any other reason, they were bound to restore possession to the plaintiff. Whatever cause of action they may have for the purchase money which they paid and for money expended in the preservation and maintenance of the property is another matter. It constitutes no defense to the present action. Either they must pay the purchase price, according to the contract, and receive such title as the vendor is able to give, if they choose to retain possession of the land, or they may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the other expenditures, after deducting therefrom the fair rental value of the premises. Having refused to adopt either course, they are liable to an action of ejectment by the vendor. Haile v. Smith, 128 Cal. 415, 419, 60 Pac. 1032. The law required them to surrender possession of the property or prove an eviction therefrom, before permitting the defense of failure of consideration, or a suit to recover the purchase price, or damages. Rhorer v. Vila, 83 Cal. 51, 55, 23 Pac. 274; Hannan v. McNickle, 82 Cal. 122, 126, 23 Pac. 271.

The judgment is affirmed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

47 Cal. App. 390

KINNEY et ux. v. KING. (Civ. 3309.)

(District Court of Appeal, First District, Division 1, California. May 7, 1920.)

1. Appeal and error ⟸856(5)—Scope of review of order granting new trial limited by form of court's order.

Where court granted defendant a new trial "solely on ground that, conceding the evidence given by the plaintiffs to be true, plaintiffs were not as a matter of law entitled to recover," defendant, on appeal by plaintiff from such order, cannot show that there were other errors occurring at the trial which entitled him to a new trial.

2. Municipal corporations ⟸705(10)—Automobilist, colliding with one having right of way, held guilty of contributory negligence.

An automobilist, traveling at about 12 miles per hour when approaching a crossing, was guilty of contributory negligence as a matter of law, where he continued to cross the intersection and collided with defendant's automobile, which had the right of way under a city ordinance, the automobiles approaching the intersection simultaneously, and could not recover, though defendant was driving at an unlawful and excessive rate of speed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. E. Kinney and wife against Joseph M. King. From an order granting a new trial, after verdict for plaintiffs, they appeal. Affirmed.

E. E. Morris and W. I. Gilbert, both of Los Angeles, for appellants.

Duke Stone, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order granting a new trial in an action for damages resulting from an automobile collision. The plaintiffs, upon the trial of the action before a jury, were awarded a verdict in the sum of $5,000 damages. The defendant moved for a new trial upon several statutory grounds. The court granted said motion by an order which read as follows:

"Defendant's motion for a new trial is granted solely upon the ground that, conceding the evidence given by the plaintiffs to be true, plaintiffs were not as a matter of law entitled to recover."

[1] The plaintiffs have appealed from this order, and upon such appeal urge the single point that the trial court was in error in holding that the plaintiffs were guilty of contributory negligence, which, as a matter of law, would bar their recovery in this action. The respondent maintains that the trial court was right in so holding, and also undertakes to contend that there were certain other errors occurring at the trial which entitled him to a new trial, and devotes much space to a discussion of these alleged errors. We are of the opinion, however, that these matters are not proper subjects of discussion upon this appeal, in view of the limited form of the court's order in granting the motion for a new trial. We shall therefore confine ourselves to the single point urged by the appellants as a ground of reversal upon this appeal.

The facts of the case, as testified to by the plaintiffs, were these:

On the 9th day of January, 1916, the plaintiffs were proceeding in their Ford roadster automobile easterly on West Ninth street in the city of Los Angeles, approaching the intersection of said street with Lake street. West Ninth street is 50 feet wide between the curbs. Lake street is 44 feet wide between the curbs. At the same time the defendant was proceeding in a Cadillac car northerly on Lake street approaching its intersection with West Ninth street. There was a retaining wall on the southwest corner of these two streets which would ob-

struct the view of persons driving easterly on West Ninth street or northerly on Lake street, until each was within a few feet of the respective lines of intersection. The plaintiffs were familiar with the conditions at that particular intersection, since they lived but a few blocks westerly and passed there frequently. The plaintiff F. E. Kinney was driving his car, and as he came to the point of intersection was traveling at the rate of 10 or 12 miles an hour. As he came into view of Lake street he saw the defendant traveling northerly on Lake street somewhere between 30 and 50 feet from the line of intersection and going at a rate of from 30 to 35 miles an hour. The said plaintiff proceeded across Lake street, swinging to the left in an attempt to avoid a collision, but failing in this effort, since his car collided with that of the defendant at a point east and north of the center of the intersecting square of the two streets, from which collision the injuries resulted which give rise to this action.

The traffic ordinances of the city of Los Angeles, which it was stipulated were applicable to this intersection of these two streets and to the parties to this action, read as follows:

"Any person who shall ride, drive or propel, or who shall cause or permit to be ridden, driven or propelled, any vehicle at a rate of speed greater than 20 miles per hour * * * along or upon any street in the city of Los Angeles [outside of certain business districts] * * * shall be guilty of a misdemeanor."

"The driver of every vehicle * * * shall drive such vehicle * * * in a careful manner with due regard to the safety and convenience of pedestrians and of vehicles and cars upon the streets upon which such vehicle or car is driven or operated."

"The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersections."

[2] Under these terms of said ordinances it may be taken as established by the plaintiffs' evidence in the case that the defendant, in approaching the intersection of the two streets in question at a rate of speed exceeding 30 miles per hour, was guilty of negligence per se; but, conceding this to be true, it must also be admitted, in view of the plaintiffs' own evidence, that when the plaintiff, F. E. Kinney, driving his automobile, approached the westerly line of intersection of these two streets, he saw the defendant's automobile traveling at such rate of speed and at such a point on Lake street as would bring the defendant's car in collision with his own, if each proceeded along his respective line of approach at his respective rate of speed across such intersecting streets. This being so, the plaintiffs and the defendant must be held to have been "approaching simultaneously such intersection," within the meaning and intent of the provision of the ordinance above set forth. It was therefore the plaintiff's plain duty under such ordinance to give to the defendant the right of way across such intersection, and this duty would be rather intensified than diminished by the fact that the defendant was seen by the plaintiffs traveling at an excessive and illegal rate of speed in making his approach to the point of intersection of these two streets, since the ordinance expressly requires drivers in the plaintiffs' position to "look out for" such vehicles as were entitled to the right of way. Clearly the plaintiffs, in attempting to proceed on their way across Lake street, were, under the circumstances as detailed by themselves, acting in direct violation of the terms of said ordinance, when, before entering upon such intersection, they saw the defendant approaching simultaneously such intersection on Lake street at an excessive rate of speed and having the right of way. The same doctrine which renders the defendant's breach of this ordinance through exceeding the speed limit negligence per se renders also the plaintiffs guilty of negligence per se in essaying to cross Lake street in front of the defendant and in disregard of his right of way. The plaintiffs offer as an excuse for their attempt to cross Lake street in front of the defendant's car that, after seeing him, they would be unable to stop their car in time to avoid a collision; but this excuse is not adequate, since the plaintiffs were bound to so operate their car in making their approach to an intersection, across which others had the right of way, as to be able to stop within such distance as would permit said right to be exercised by those entitled to it and approaching simultaneously the intersection.

The case of Bullis v. Ball, 98 Wash. 342, 167 Pac. 942, deals aptly with the precise question involved in this case in construing a similar ordinance. It says:

"The purpose of the ordinance giving to vehicles moving in a northerly or southerly direction the right of way at street intersections was to prevent collisions, to obviate the very exigency which here arose. It was foreseen that at some time vehicles approaching street intersections would very probably meet and collide. To prevent this the ordinance above referred to was enacted. Its purpose demands no explanation. It is quite clear. The rights and duties which it creates are equally clear. The driver on the street running north and south must exercise that degree of care which is ordinarily commensurate with the safety and welfare of others with whom he may come in contact at street intersections. But, while it is true that he must exercise ordinary care, the superior right to passage over the intersection is his. It is a right expressly conferred upon him by authoritative enactment, a right which must be observed and respected by others using streets at the points of intersection. This priority of right naturally and necessarily creates a cor-

responding duty on the part of the traveler using the street running east and west, a duty which consists in the exercise of a degree of care commensurate with the superior right of the person traveling the street running north and south. The duty necessarily implies that the driver of a vehicle on a street running east and west shall slacken speed for the purpose of observing vehicles approaching the intersection on the street running north and south, and, should such vehicle be within a reasonable distance of the intersection, to wait until they have passed before attempting to continue across the intersection. The greater duty and the higher degree of care to be observed in such a situation is upon the person using the easterly and westerly street, if the ordinance in question is to be given any meaning, and any violation of this duty by the person injured which contributes in an appreciable degree to causing the collision in which his injuries are sustained will operate as a bar to his recovery."

Adopting these views, we are constrained to hold that the trial court was correct in ruling that the plaintiffs, in failing to yield to defendant the right of way under the circumstances of the instant case, were to be held guilty of negligence as a matter of law directly contributing to their injury, and hence were not entitled to recover in this action. The case of Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679, relied upon by the appellants, does not present a state of affairs similar to that in the case at bar, since in that case there was evidence showing that the plaintiff, who was injured, had already entered upon and was nearly across the intersecting street at the time when the defendant approached it at an illegal rate of speed. It was not, therefore, a case of simultaneous approach.

The case of Lawrence v. Goodwill, 186 Pac. 781, also presents a dissimilar situation from that disclosed in the case at bar, and does not involve the right of the trial court to determine upon the uncontradicted testimony proffered by the plaintiffs whether their failure to yield to defendant, approaching simultaneously the intersection in question, the right of way across the same, was negligence per se sufficient to prevent a recovery.

Order affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

47 Cal. App. 549

HYNES v. WHITE. (Civ. 3355.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920. Hearing Denied by Supreme Court July 17, 1920.)

1. Gifts ⟹49(6)—Evidence held to establish gift of bonds.

Evidence of defendant, if true, *held* sufficient to establish a gift inter vivos of bonds, even though it showed that donor was immediately given absolute possession of them.

2. Evidence ⟹588—Court may not disregard unimpeached evidence.

A court may not arbitrarily disregard the unimpeached evidence of a single witness.

3. Gifts ⟹4—Intention, delivery, and acceptance are essential.

The three requisites of a valid gift are donor's intention to make it, delivery of thing given to donee, and donee's acceptance thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

4. Evidence ⟹313—Declarations held to show donor's intention to make an unconditional gift.

Donor's declarations, both before and after the gift, held to tend to show an intention on his part to make an absolute and unconditional gift.

5. Gifts ⟹41—Mere possession by donor after completed gift does not revest title.

Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that donor immediately thereafter comes into physical possession and control of the property without any retransfer of the ownership by the donee.

6. Gifts ⟹28(2)—Donor's retention of key to deposit box held not inconsistent with gift.

Donor's retention of key to deposit box, in which donee kept the gift bonds, donee having made donor her deputy to visit the box, *held* not inconsistent with the idea of a gift, since donee had the possession, power, and right to take away the subject-matter of the gift, as well as the physical power and opportunity.

7. Gifts ⟹34—Donor's arrangement to repossess if donee died first held not inconsistent with gift.

Where donee of bonds gave donor, as her deputy, a key to her deposit box containing them, his intention to take them in case she died first, to prevent their going to her aunt, was not inconsistent with a gift to her, since a gift upon condition of reversion if donee died before donor would be valid, and also since the arrangement to repossess in such case was made after the gift had been completed.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by W. J. Hynes as administrator of the estate of Alexander Hay, deceased, against Peggy White, also known as Mrs. Douglas White. Judgment for plaintiff for part of items claimed, new trial denied, and defendant appeals. Reversed.

David E. Bergman, of Los Angeles, for appellant.

Cullinan & Hickey, of San Francisco, for respondent.

BRITTAIN, J. The respondent, as the administrator of the estate of Alexander Hay, deceased, sued the appellant to recover certain bonds, or their value. In a second count the plaintiff sought to recover $500 with interest claimed to have been loaned by Hay to the defendant. The defendant denied the allegations of ownership of the bonds by the estate, and alleged affirmatively that Hay had canceled the note given by her to evidence the $500 loan. The case was tried without a jury. The trial court found that the defendant was not entitled to certain of the bonds claimed to have been given her May 31, 1913, because it was further found that they were intrusted to her without the intent on the part of Hay to make a gift. It was found that other securities claimed to have been given to the defendant in January, 1914, were given her, and also that Hay forgave her the $500 debt. It further found that the bonds found to belong to the estate had been sold by the defendant, and that their value was $5,874.50, for which amount judgment was rendered against her. A motion for new trial was denied, and it is claimed that the court erred therein, as also in certain proceedings during the trial concerning the tender of the oral evidence of the defendant to explain her evidence given on her deposition, on which alone the plaintiff rested his case. It is claimed the evidence does not support the findings, and because this court has reached that conclusion, it is unnecessary to consider the new trial ruling or the tender of the defendant's oral testimony.

The only evidence introduced on behalf of the plaintiff was the deposition of the defendant taken at the instance of the plaintiff. On the part of the defendant there was evidence introduced, strongly tending to support the evidence given by her at the taking of the deposition. Reduced to narrative form, the evidence concerning the claimed gift was that Alexander Hay at the time of the gift was about 70 years old. He was divorced many years before. His former wife had remarried twice, and at the time of the gift was living with her sister. After the divorce Hay took up his home with another sister, who was not living at the time of the gift, and the defendant and her brother were the children of that sister of the divorced wife. Hay was fond of the children, particularly of the defendant, and frequently assured her mother that in the event of her death, he would take care of his niece. She grew to young womanhood and married Douglas White, who at the time of the trial was general industrial agent of the Salt Lake Railroad. His business required him to travel a great deal, and apparently his wife at times traveled with him. There was no intimacy between the defendant and her two aunts. After the marriage of the defendant, who lived in Southern California with her husband, Hay visited their home on one or two occasions, and when they were in San Francisco, they visited him. He was an employé of the Custom Service in San Francisco, earning from $125 to $150 a month. He had no one dependent upon him and no near relatives. In 1913 Douglas White, who was in San Francisco, met Hay, who requested him to telegraph for his wife to come to San Francisco. On White telling him he was returning to Los Angeles that evening, and would send her up, Hay said, "Well, send her up just as quick as you can, because I wish to make arrangement regarding what little property I have."

In response to this request of Hay Mrs. White came to San Francisco, where she met Hay, and according to her evidence he asked her to go with him to the safe deposit vaults of the Union Trust Company, saying he had something to give her. Prior to that time he had kept a box in these vaults for his own use. Before the visit of Mrs. White he had rented a second box, which he took in her name, but for which she paid the rental. On receiving the box, he directed her to take it into one of the customer's rooms to which he also took his own deposit box. Taking from it the bonds found by the court not to have been given her, he said, "I want you to have these." She was asked if he did not say, "'You are to have these bonds after my death,' or something like that?" To this she responded: "He said, 'I give them to you now—they are yours. They belong to you.'" She was asked if he did not say, "I will use the income of these bonds and stocks during my lifetime, and you can have them after my death?" to which she responded, "No; but in the conversation he said, 'I am going to take you over to-morrow to see Mr. ———, of Sutro's, a brokerage firm, and introduce you, so he will know you and you will know him, and you can collect the money on the coupons.'" She put the securities in her box and they went to the desk, where she signed an order, making Hay her deputy to visit her box, and gave to him one of the two keys delivered to her. This arrangement was made pursuant to a conversation, which she stated was after the gift of the securities and manual delivery of them. She testified that he remarked, "You and Douglas are traveling around so much—suppose you get in a wreck or something—then this box would be closed to me, and, of course, I don't intend to give this to your heirs. I am giving it to you." The understanding of both parties at the time was that the reference to her heirs was to her two aunts, one of whom was Hay's former wife. The evidence introduced on behalf of the defendant was that of a number of people who knew Hay, and to whom he had stated after this transaction that he had given his property to Mrs. White. Mrs. White also testi-

fied that she had borrowed $500 from Hay, and had given her note for it; also that he had redelivered the note to her and told her she need not repay that $500, and directed her to cancel the note. Some time in 1914, she testified, she met Hay, and they again went to the safe deposit vaults, when he gave her another bond which she placed with those given her first. The day following the first transaction at the safe deposit vaults, Hay did introduce her to a young man in the banking house of Sutro & Co., and a day or two later he took her back to the safe deposit vaults to assure himself that she knew how to open the box. Prior to his death she cut the coupons from the bonds, giving them to Hay to collect, and, she testified, he paid her the interest collected.

[1, 2] From this evidence the trial court made the finding that Hay had no intention of giving the first bonds to the defendant because of the arrangement by which he was appointed her deputy to go into the box for the avowed purpose of preventing the bonds being taken by her two aunts in the event her death should occur before his own. The same conditions surrounded the gift of the bond in 1914, and he had the same right of access to it as he had to the first bonds, yet the trial court believed the evidence of Mrs. White in regard to that gift, as he believed her evidence in regard to the gift of the $500 note. To reach this conclusion, he must have rejected her positive statement that the conversation which led to her appointing Hay her deputy took place after the gift, although in close connection with it. The only evidence bearing on the intention of Hay to make the first gift was that of Mrs. White. A court may not arbitrarily disregard the unimpeached evidence of a single witness. If her statement was true, all the elements of a gift inter vivos were present, and if the gift was made, even though the donor was immediately given absolute possession of the property, it did not militate against the gift.

[3] The cases are uniform regarding the three requisites of a valid gift: First. An intention on the part of the donor to make it. Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Beaumont v. Beaumont, 152 Fed. 55, 81 C. C. A. 251; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Stewart v. Whittemore, 3 Cal. App. 213, 84 Pac. 841. Second. A delivery to the donee of the thing given. Civ. Code, § 1147; Beaumont v. Beaumont, supra; Beebe v. Coffin, 153 Cal. 174, 94 Pac. 766; Knight v. Tripp, supra; Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. Third. Acceptance by the donee of the thing given. Beaumont v. Beaumont, supra; Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Beaver v. Beaver, supra; Frazier v. Perkins, 62 N. H. 69.

[4] The declarations of the donor both before and after the gift tended to show an intention on his part to make an absolute and unconditional gift. Estate of Hall, 154 Cal. 527, 98 Pac. 269; Ruiz v. Dow, supra; Stewart v. Whittemore, supra; Thornton on Gifts and Advancements, § 222 et seq.; Garrison v. Union Trust Co., 164 Mich. 345, 129 N. W. 691, 32 L. R. A. (N. S.) 219; Waite v. Grubbe, 43 Or. 406, 73 Pac. 206, 99 Am. St. Rep. 764; Reese v. Phila. Trust, etc., 218 Pa. 150, 67 Atl. 124, 120 Am. St. Rep. 880.

[5] Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes in physical possession and control of the property without any retransfer of the ownership by the donee. Beaumont v. Beaumont, 152 Fed. 55, 81 C. C. A. 251.

[6] In this case, as in that, it is contended that the retention of the key of the safe deposit box by the donor with the right to resort to it, in that case for the purpose of getting the coupons, was such a retention of control and possession as would enable him to carry the bonds away, and was therefore inconsistent with the idea of a gift of the same. But the donee had the same possession and the same power of taking away the subject-matter of the gift, and not only so, but she had the rightful power to do so as well as the physical opportunity. The cases are practically uniform in support of this rule of law. Reese v. Phila. Trust, etc., supra; Calkins v. Equitable, etc., 126 Cal. 531, 59 Pac. 30; Stewart v. Whittemore, supra; Pink v. Church, 14 N. Y. Supp. 337;[1] Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Garrison v. Union Trust (Mich.), supra; Gilkinson v. Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792; Waite v. Grubbe, supra; Marston, Adm'r, v. Marston, 64 N. H. 146, 5 Atl. 713; Blanchard v. Sheldon, 43 Vt. 512; Riegel v. Wooley, 81 Pa. 227.

[7] On the part of the respondent it is argued that the intention to enable the donor to repossess himself of the bonds upon the death of the donee was inconsistent with a gift to her. The court cannot accept this view of the case for two reasons: In the first place, the gift would have been a valid one if coupled with a condition that upon the death of the donee the property should revert to him; and, secondly, in this case the trial court was bound, as is this court, by the positive and uncontradicted evidence of the only witness to the matter that the arrangements for the donor to repossess himself of the property in the event of the death

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 580.

of the donee before his own was made after the gift had been completed. Neither this court, nor the trial court, could reach a determination that the first gift was invalid because, if the donee had died first, the donor might not have been able to establish his right to the bonds. The only evidence in the case fails to support the finding of the trial court against the existence of an intent on the part of the donor to make the gift.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 426

HEATH v. JUDSON FREIGHT FORWARDING CO. (Civ. 2661.)

(District Court of Appeal, Second District, Division 2, California. May 10, 1920.)

1. Carriers ⊂=72—Telegram sufficient notice to withhold shipment.

A telegram to a forwarding company, "Hold shipment further instructions if not shipped wire my expense whether shipped or not," was sufficient notice to charge the forwarding company with the duty of withholding the goods from shipment.

2. Carriers ⊂=4—Forwarding company when a carrier.

If goods are deposited with a forwarding agent merely as the initiatory step towards starting them in itinere, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in no wise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier; but where the forwarding agent undertakes to transport the property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, and a carload is billed to a distributing agent of the forwarding agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier.

3. Carriers ⊂=72 — Forwarding agent must withhold goods from shipment on owners' orders.

A forwarding agent, whether treated as a forwarder or as a common carrier, must obey any reasonable order to withhold the goods from shipment, and a forwarding agent, that for hire undertakes the carriage of goods of another in a car of its own selection and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to its place of destination as contracted for against the owner's consent.

4. Carriers ⊂=72—A forwarding company must unload goods on order to withhold.

A forwarding company, given an order to withhold shipment of goods which had been loaded with other goods in a car of which it still had control, was liable to the owner of the goods, where it failed to unload and withhold the same, where, although expense of unloading would be $20, an expense not out of proportion to the value of the goods.

5. Carriers ⊂=188 — Entitled to reasonable charge for unloading on order to withhold shipment.

Where a forwarding company, whether considered as a forwarder or a carrier, unloads a car on the order of the owner of the goods to withhold same from shipment, there is an implied agreement on the part of the owner to pay a reasonable charge for the unloading, to secure which the forwarder has a lien on the goods, under Civ. Code, §§ 1856, 2144.

6. Carriers ⊂=157—Limitation for filing claim with forwarder inapplicable to claims arising from forwarder's own dereliction.

A clause in a receipt given by a forwarding company, "Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination," etc., referred to claims for loss or damage while the goods were in transit due to some fault of the railroad company, and was not intended to cover a claim for damages due to the forwarder's failing to withhold the goods from shipment on shipper's order.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Frank Heath against the Judson Freight Forwarding Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. A. Alderson, of Los Angeles, for appellant.

E. T. Sherer and Bicksler, Smith & Parke, all of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant, a New York corporation, is engaged in the business of shipping and forwarding freight of all kinds, especially household furniture, from New York City to all points in the United States. For this purpose, defendant, at its loading station in Newark, N. J., assembles goods of various ownership that are to be shipped to a common destination. This is done for the purpose of making up a carload, that thereby a through rate may be obtained that is less than the published rates of the railroad company for broken lots. The accumulated carload, so assembled for any given destination, is billed to defendant's distributing agent at the point of destination, and such distributing agent distributes the goods to the various owners at that place.

In the month of December, 1916, plaintiff, who then resided in New York, desiring to ship his household furniture to Los Angeles, which city he contemplated making his home, entered into a contract at New York with defendant, whereby defendant agreed to pre-

pare plaintiff's household furniture for shipment and ship it from New York to Los Angeles. Plaintiff left the city of New York and arrived in Los Angeles about December 11, 1916. On December 18, 1916, defendant wrote a letter to plaintiff, addressed to the latter at Los Angeles, wherein defendant informed plaintiff that, owing to a freight congestion, plaintiff's household goods had not, as yet, arrived at the defendant's loading station at Newark.

On December 29, 1911, at Los Angeles, plaintiff, having decided to return to New York, sent to defendant, addressed to it at its New York office, a telegram reading as follows:

"Hold shipment further instructions if not shipped wire my expense whether shipped or not."

This telegram was received by defendant at its New York office on December 30, 1916, at 9:30 o'clock a. m. At that time plaintiff's household furniture had been loaded on a car at Newark, but, as yet, the car had not started on its journey to California. When the car was finally loaded, the carload consisted of 124 packages, 43 of which contained plaintiff's household furniture, the remaining packages containing goods belonging to other persons. Plaintiff's 43 packages were the first to be loaded on the car. So that, to unload plaintiff's household furniture, it would have been necessary to unload the entire car. This would have involved an expense of about $20.

At 9:45 a. m. on December 30, 1916, which was a Saturday, defendant telegraphed from New York to plaintiff at Los Angeles as follows:

"Your shipment loaded today do you authorize unloading cost about twenty dollars must have reply one o'clock New York time."

It is claimed by plaintiff that this telegram was not actually received by him at Los Angeles until 11:55 a. m. of December 30th, which would be 2:55 p. m. at New York.

As we have said, December 30, 1916, was a Saturday. The regular time for closing defendant's office on Saturdays is 1 o'clock p. m. On this occasion, however, an employé of defendant remained at its office on December 30th until 6 o'clock to receive any telegram that plaintiff might send in reply to that sent by defendant to plaintiff at 9:45 a. m. of that day. Plaintiff did send a telegram to defendant in reply to that which, he says, was delivered to him at 11:55 a. m. That telegram, filed at Los Angeles at 11:58 a. m. of December 30th, reads:

"Please unload goods and put in storage."

For some reason this telegram was not delivered to defendant on December 30th. Because the next day was Sunday, and the following day, January 1st, a holiday, plaintiff's telegram of December 30th was not received by defendant until Tuesday, January 2, 1917. Upon its receipt defendant sent plaintiff a telegram as follows:

"Unfortunately your goods forwarded Saturday evening your wire not received until this morning through error or negligence of telegraph company no reply to wire Saturday afternoon. Compelled to forward car."

We infer from the facts disclosed by the record that the car, loaded with plaintiff's household furniture and other shipments destined for Los Angeles, left Newark at about 6 o'clock p. m. of Saturday, December 30, 1916. On January 4, 1917, defendant wrote to plaintiff, addressed to him at Los Angeles, a letter which reads:

"We beg to advise that your shipment of household goods was forwarded on Dec. 30, 1916, in a through car from Newark, N. J. consigned to our distributing agent, Los Angeles Warehouse Co., 316 Commercial St. Los Angeles, Calif. The charges on this shipment amount to $270.66 which you should pay to the distributing agent above named, and with whom you should make arrangements for taking possession of your goods as soon as car arrives. The distributing agent will gladly answer any inquiries which you may wish to make relative to the matter. Usual storage charges will be assessed on goods which are not removed from freight house within forty-eight hours after arrival."

Upon these facts the trial court found that defendant had not disregarded plaintiff's instructions, and gave judgment for defendant. From that judgment plaintiff appeals.

[1, 2] Respondent contends that the first telegram received by it from appellant, that filed by appellant at Los Angeles on December 29th and received by respondent on the morning of December 30th, was so uncertain that respondent was not obliged to withhold the goods from shipment. With this contention we cannot agree. We think that, regardless of any delay in the receipt by respondent of appellant's telegram of December 30th, replying to that sent to appellant by respondent at 9:45 o'clock a. m. of that day, appellant's first telegram—that filed in Los Angeles on December 29th and received by respondent at New York on December 30th at 9:30 a. m.—was alone sufficient to charge respondent with the duty of withholding appellant's goods from shipment, and that because respondent did not do so it is liable for all damages proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

It seems that respondent undertook as a forwarder to transport appellant's goods from New York to Los Angeles as part of a carload consigned to respondent's distributing agent at Los Angeles; the shipment being handled in that way in order that respondent might obtain the benefit of the re-

duced rate which is made where goods are shipped in a carload lot instead of less than carload lots. We are inclined to the view that respondent's liability is that of a common carrier. If goods are deposited with a forwarding agent merely as the initiatory step towards starting them in itinere, the forwarding agent having undertaken to do no more than to safely keep the goods and forward them when the opportunity offers itself, and being in no wise interested in their carriage after delivery to the carrier, such agent cannot be regarded as a common carrier; but where, as here, the forwarding agent undertakes to transport the property from its location in one city to another city, for through rates less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its distributing agent at the point of destination, such forwarding agent assumes, while holding the property for accumulation, the liability of a common carrier. Judson Freight Forwarding Co. v. Delaware, L. & W. R. Co., 163 Ill. App. 22; Ingram v. Am. Forwarding Co., 162 Ill. App. 476; Bare v. Am. Forwarding Co., 146 Ill. App. 388, affirmed in 242 Ill. 298, 89 N. E. 1021; Kettenhofen v. Globe Transfer & S. Co., 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902, and note, Ann. Cas. 1914B, 776.

[3] However, whether respondent be treated as a forwarder or as a common carrier, we think the law is clear that it was its duty to obey any reasonable order to withhold the goods from shipment that it might receive from appellant, the owner of the property. We also are of the opinion that appellant's first telegram to defendant—filed in Los Angeles on December 29th and received by respondent at New York the next morning at 9:30 o'clock—was sufficient as a definite instruction to hold the shipment.

Irrespective of whether its relation to the owner of the shipment be that of a common carrier or a mere forwarder, we are satisfied that a forwarding company that for hire undertakes the carriage of goods of another in a car of its own selection, and delivery to the owner at the place of destination through its own distributing agent, cannot carry the goods on to the place of destination, as contracted for, against the owner's consent. In this regard the obligation of the forwarder is not different from that of a common carrier; and what is said by the courts in cases against railroads and other indubitable common carriers is, we think, equally applicable to the situation presented here, whether respondent be regarded as a common carrier or as a forwarder only. Though we have found no case involving the duty of a forwarding agent to obey the owner's instructions not to ship, we think the case is controlled by the rule announced in an almost unbroken line of authorities, some of which are cited infra, that the true owner of goods to be transported by a common carrier retains some right of control, and, at any reasonable time before transportation has commenced, may order his goods to be withheld from shipment.

The owner does not renounce his right of all control over his goods by their delivery to a common carrier or to a forwarder. The latter stands in the relation of one employed as a bailee of goods for the purpose of obeying instructions of the true owner regarding them. The owner's right to control the shipment is an incident of his title. The title of the carrier or forwarder, whichever it may be, is subordinate to that of the owner. Aside from its lien for lawful charges, a forwarding company cannot be allowed to defeat the owner's right to control the shipment. Subject to the payment of a reasonable charge for the services necessitated by his order, the owner has the right either to stop the goods in transit or to stop their shipment before actual transportation has commenced. Scothorn v. South Staffordshire R. Co., 8 Exch. 341; Lewis v. Galena, etc., R. Co., 40 Ill. 281; Cincinnati, etc., R. Co. v. Steele, 140 Ky. 383, 131 S. W. 22, 140 Am. St. Rep. 388; Wente v. C., B. & Q. R. Co., 79 Neb. 179, 115 N. W. 859, 15 L. R. A. (N. S.) 756, and extended note; Virginia & Southwestern R. Co. v. Sutherland, 138 Tenn. 266, 197 S. W. 863, L. R. A. 1918B, 77, and note. In Scothorn v. South Staffordshire R. Co., supra, goods intended for shipment were marked originally, "East India Docks, London, by Melbourne Ship to Australia." Later the shipper notified the carrier to deliver the goods at Bell Wharf, Radcliffe, London. There was a failure to comply with the request, and the goods were forwarded to Melbourne and lost. In allowing the plaintiff to recover, the court said:

"It is argued that that is a contract. It is no contract in one sense; it is a person taking goods to be disposed of according to the directions of another, and is it to be contended that if, an hour afterwards, the owner has come back and said he wanted the goods again, the company could have said, 'No; you have made a contract for them; they shall go to the ship'? The contract with a carrier is that he is a bailee of the owner's goods to obey his directions respecting them; and I have no hesitation in saying that generally at any period of the transit he may have them back; and the saying that a railroad company could carry a man's goods on against his consent is a proposition not supported either by law or common sense. It may be different when the subsequent direction to the bailee is an unreasonable one. I can conceive a case where a man may have authorized goods being put in a place where it would be very inconvenient to take them out; but, generally speaking, it is otherwise. Suppose a man travels with luggage in a railway

train and becomes dissatisfied with his journey, and says, 'I wish to go out of the train;' he has a right to do so, and take his luggage with him; but, if Mr. Gray is right, the company would be justified in saying, 'You have delivered your luggage to us, and we will take it on.' I apprehend the real circumstances of such cases as these are that, when a man delivers his goods to a carrier, he employs him as a bailee for reward; the man may be entitled to the reward, but the owner is entitled to have the goods back if he pleases."

[4, 5] It doubtless is true that, if the owner's goods have been put in a place where it would be very inconvenient to take them out, as, for example, if a trunk has been placed deep in the hold of a ship, under other cargo, and the ship is about to sail, so that taking the trunk out would delay the vessel's sailing, and thus involve an expense out of all proportion to the value of the trunk and its contents, the owner would not have the right to redelivery of his trunk at the port of departure. But here appellant's goods, without any very great inconvenience, could have been taken from the car at an expense not to exceed $20—an expense not out of proportion to the value of the articles. For its services in taking his property from the carload, in obedience to appellant's instructions, respondent would not be allowed to charge more than a reasonable sum to compensate it for its trouble. Had it obeyed appellant's instructions, the law would have implied an agreement on the latter's part to pay a reasonable charge for the unloading. Carr v. Penn. Ry. Co., 92 N. Y. Supp. 799. To secure such charge, respondent would have had a lien on the goods. Civ. Code, §§ 1856, 2144.

The telegram upon which appellant must rest his case, the telegram filed in Los Angeles on December 29th and received by respondent on the morning of December 30th, was not punctuated. We quote it again:

"Hold shipment further instructions if not shipped wire my expense whether shipped or not."

Respondent says that this telegram, by different punctuations can be interpreted in at least four different ways. This may be so. But, regardless of how punctuated, or how interpreted, the telegram always contains the definite instruction, "Hold shipment." It may be that the telegram should be read as directing respondent to hold appellant's shipment until further instructions were received or to hold the shipment if the goods had not already been shipped. The goods had not been shipped, and, under any interpretation, respondent is definitely directed to "hold shipment." This it did not do. Having received a definite instruction to "hold shipment," respondent could not justify its course merely because it did not receive, until January 2, 1917, a reply to its telegram of December 30th, asking appellant if he "authorized unloading," and notifying him that the unloading would cost about $20.

It is claimed that respondent could not be required to unload appellant's household furniture in order to "hold shipment," unless appellant entered into a new contract with respondent to pay the latter for unloading the car, which, according to respondent's telegram of December 30th, would amount to about $20. This insistence overlooks the fact that the owner's right to control the goods, and, if he pleases, to stop the shipment and direct and receive a redelivery of the goods, is, by law, implied in the shipment contract itself as a part thereof (Virginia & Southwestern R. Co. v. Sutherland, supra), and further, that the law implies an agreement by the owner to pay a reasonable charge for any extra services that may be necessitated by his exercise of the right thus to control the shipment.

There is no merit in the contention that appellant himself could have stopped the goods before their arrival at Los Angeles. It appears from respondent's letter of January 4, 1917, that the goods were consigned by respondent, as consignor, to itself, or to its distributing agent at Los Angeles, as consignee. Appellant, therefore, could have done nothing save through respondent.

[6] Finally, it is contended that appellant cannot recover because he did not present a claim for his damages within 30 days. This contention is based upon a clause in the receipt that respondent gave the warehouseman from whom it received appellant's goods. That clause reads:

"* * * Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination. All particulars and proof of loss or damage required by railroad companies or other transportation agency to be furnished by the claimant. If goods are placed in storage, claim, if any, must be made before storing."

The "claim" referred to in this clause of the receipt is a claim for loss or damage, while the goods are in transit, due to some fault of the railroad company. The clause was not intended to cover a claim for damages due to respondent's own dereliction.

The judgment is reversed.

We concur: THOMAS, J.; WELLER, J.

47 Cal. App. 454

McCONNELL v. GAUT'S ESTATE et al.
(Civ. No. 3200.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. **Husband and wife ⟸138(9)—Wife signing undelivered mortgage on husband's property and note not ratifying his previous acts as agent.**

A wife, who merely signed her name to a note and mortgage on real property standing in her husband's name, as a dutiful wife, to facilitate his business, did not thereby ratify previous acts of her husband in his own behalf as having been done as her agent; the note and mortgage not being delivered.

2. **Husband and wife ⟸138(1)—Previous signing of notes by wife did not make husband agent.**

The fact that on previous occasions husband had procured his wife's signatures to notes, and that she had thereby become personally obligated thereon, did not of itself operate to constitute him her agent for all time.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Emmet McConnell against Helen Lukens Gaut, individually and as administrator of the estate of Jas. H. Gaut, deceased. From a judgment against the administratrix for the amount prayed for, but denying relief as against her individually, the plaintiff appeals. Affirmed.

Simpson & Simpson, of Pasadena, for appellant.

J. H. Merriam, of Pasadena, for respondents.

WELLER, J. This action was brought to recover judgment against Helen Lukens Gaut, as administratrix of the estate of Jas. H. Gaut, deceased, and in her individual capacity, in the sum of $6,700, on account of certain moneys alleged to have been loaned by plaintiff to the decedent and his wife, the said Helen Lukens Gaut. The court below rendered judgment against the administratrix for the amount prayed, but denied relief as against her individually. From the latter portion of the judgment plaintiff appeals.

The following facts are shown by the findings: On December 15, 1913, the decedent, Jas. H. Gaut, was the owner of certain real property in Riverside county, subject to five incumbrances, aggregating $15,300, one, a mortgage in the sum of $6,000, signed by Gaut and wife, being held by plaintiff. On or about that date plaintiff and Jas. H. Gaut entered into a contract whereby they agreed that the property should be cleared of the incumbrances, that plaintiff would loan Gaut $6,700, that the latter should execute to plaintiff two promissory notes, each for $6,350, secure their payment by a mortgage upon the above-mentioned property, and procure his wife, the defendant, Helen Lukens Gaut, to sign the notes and mortgage. Prior to this, Gaut had borrowed the sum of $1,200 from plaintiff, and had given him a note signed by himself and wife, securing the payment thereof by a grant deed to the property, plaintiff, in turn, giving a receipt which, after stating that the deed was held as collateral security for the payment of the note, reads:

"I have accepted this deed with the understanding in event said James H. Gaut should fail to pay said note then I am at liberty to record said deed and take possession of said property. In event, however, said note is paid, I agree to return said deed to James H. Gaut or assigns. [Signed] E. McConnell."

Subsequently, plaintiff gave checks to Jas. H. Gaut, amounting to some $5,500, which, together with the $6,000 mortgage and the $1,200 note, made up the sum of $12,700, for which the notes and mortgage mentioned in the agreement were to be executed. Plaintiff then deposited releases of the mortgages held by him with the Title Insurance & Trust Company, with instructions to record them on delivery of the $12,700 note and mortgage. These instructions were approved by Jas. H. Gaut, who also agreed to pay to the depositary the sum of $2,500 for the purpose of satisfying other liens and clearing title to the property. Before the deal was consummated, Jas. H. Gaut died, and the $12,700 note and mortgage were never delivered to plaintiff.

The court found that Helen Lukens Gaut, respondent, received no part of the consideration for the $1,200 note, but that she signed it at the request of Jas. H. Gaut, as his wife, and not otherwise, and that she received no part of the moneys borrowed by Jas. H. Gaut, which made up the $12,700 in notes.

The complaint, as originally framed, prayed for a decree requiring the defendant, individually and as administratrix, to execute and deliver the $12,700 note and mortgage, or, in case this could not be done, that plaintiff have judgment in the sum of $6,700. While the action was pending, the prayer for specific performance was abandoned by stipulation and the case proceeded for the recovery of a personal judgment.

Appellant attacks the portion of the judgment which exonerates the respondent from personal liability, claiming that she is bound by the acts of her husband as her agent.

[1, 2] Plaintiff testified to several transactions had with Jas. H. Gaut, covering a period of some months, and in each case speaks of dealing with Jas. H. Gaut only. All checks were payable to Gaut, and all memoranda were made in his name alone. The receipt above quoted is an instance. It will

be noted that no mention of Mrs. Gaut is made therein. Her only connection with the dealings between plaintiff and her husband was the signing of the $1,200 note—in which plaintiff apparently did not consider her interested, as he ignored her entirely in his receipt, and also when, at her husband's request, she signed the undelivered note and mortgage. Nowhere does it appear that Gaut assumed to act for his wife as her agent, or that he attempted to bind her in any way. Whatever obligation attached to her individually was the result of her own actions. She merely signed her name to the documents affecting the title to real property standing in her husband's name, as a dutiful wife, to facilitate his business. To hold that such actions on her part constituted ratification by her of all previous acts of her husband in his own behalf, as having been done as her agent, would transcend the limits of precedent and reason. The fact that on previous occasions Gaut had procured his wife's signature to notes, and that she had thereby become personally obligated thereon, could not of itself operate to constitute him her agent for all time and for all purposes; and the record discloses no other act or omission on her part that could be construed either as precedent authorization or subsequent ratification. If the notes and mortgage for $12,700 had been delivered, she no doubt would have been liable for any deficiency after a sale of the mortgaged property under decree of foreclosure. But that was the extent of her obligation. There being no delivery of the notes and mortgage, she did not become obligated to pay anything on the notes.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 408

BARR LUMBER CO. v. JOY CONST. CO. et al. (Civ. 2816.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

1. Appeal and error ⇐1011(1)—Finding on conflicting evidence not reviewable.

A finding by the trial court based on conflicting evidence cannot be reviewed.

2. Municipal corporations ⇐373(3)—Wetting curb held done under contract so as to extend time for lien notices.

Where a contract for a concrete curb required wetting down the curb for 7 days, and that the work be done to satisfaction of street superintendent, and the latter required wetting down for 10 days, which the contractor did under his protest that work for the last 3 days was nevertheless done under the contract, so that the time for filing lien notices dates from its completion.

3. Municipal corporations ⇐373(3)—Verification of lien claim of corporation for materials furnished contractor held sufficient.

Where a lien claim for materials furnished contractor by a corporation was signed with the corporation named by the president and verified by the individual who signed as president, who swore that he was president and knew that the facts stated were true, the affidavit sufficiently showed that the verification was made on behalf of the corporation.

4. Municipal corporations ⇐373(3)—Statement of nonpayment in claims held sufficient.

Statement in lien claim for materials furnished contractor that the amounts claimed were due and unpaid, that the contractor had agreed to pay for the materials, but that no part had been paid except a stated sum, *held* sufficient statement of nonpayment.

5. Municipal corporations ⇐373(3)—Unnecessary statement in claim held not to defeat lien for material furnished contractor.

A statement in lien claim for material furnished contractor that it was a lien on any moneys, warrants, or bonds on account of material furnished for a public improvement, even though not required in the notice, could not have misled or prejudiced the sureties on the contractor's bond, and do not defeat the lien.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Barr Lumber Company against the Joy Construction Company and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Newmire & Watkins, of Los Angeles, for appellants.

Behymer & Craig, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendants W. R. Hefley and Charles C. Hayes from a judgment entered against them as sureties on a bond given by a contractor under the street improvement law known as the Vrooman Act (Deering's Gen. Laws, Ed. of 1915; Act 3930, p. 1714). The plaintiff sued on a claim for materials furnished by it, and on two assigned claims of a similar nature, all being for materials used by the contractor in performance of the work. After the work had been actually completed, verified statements were filed with the street superintendent of the city of Whittier, with whom the contractor had made his contract, as follows: On May 24, 1916, by the plaintiff; on May 25, 1916, by plaintiff's assignor A. H. Gregg; and on May 24, 1916, by plaintiff's assignor C. Forsyth & Son. It is claimed by plaintiff that these notices were filed in conformity with the requirements of section 6½ of said statute. The street superintendent accepted the work constituting said improvement on the 23d day of June, 1916. Additional notices of claim were filed with the street

superintendent by the plaintiff and by Gregg on July 21, 1916, and by C. Forsyth & Son on July 28, 1916. As to these July notices, their sufficiency need not be discussed, if the earlier notices were filed within time and in due form.

Appellants claim that all of the notices were filed more than 30 days from the time the improvement was completed, and that therefore, under the terms of said section 6½, they were all filed too late, and that for that reason any right of action on said claims was lost. In the case of Pacific Sewer Pipe Co. v. United States Fidelity & Guaranty Co., in which the decision of this court has this day been filed, it is held that the 30 days, not later than the end of which the claimant was required to file his statement with the board of public works (street superintendent, in the instant case) begins to run from the date of the actual completion of the work, and not from the date of the acceptance of the work by the board of public works or street superintendent. [1]

[1] The principal question then is whether or not the notices filed with the street superintendent on May 24th and May 25th were filed within 30 days from the time the improvement was completed. The finding of the court is that the construction work under the contract was completed on the 25th of April, 1916, and not earlier than that date. Appellants claim that this finding is not supported by the evidence and that, as shown by the evidence, the work was completed not later than April 21, 1916. There is positive testimony that the work of construction, exclusive of what is known as the wetting down process, which follows the laying of the cement, was completed on April 15th. It was stipulated by plaintiff's counsel that the specifications called for the wetting down of the curbing for a period of 7 days, and that the work was to be done in a good and workmanlike manner, and to the satisfaction of the street superintendent of the city of Whittier. At about the time when the work was ready for the wetting down process to begin, a conversation occurred between Wilson, the contractor's foreman, and Stevens, the street superintendent, in which conversation the superintendent insisted that the specifications required that the cement be wet down for 10 days, whereas the foreman contended that they called for 7 days. The testimony of the foreman is that he acquiesced in the superintendent's demand to wet it for 10 days, and did so, and that he finished the wetting of the curb on April 24th. The street superintendent testified that this work was done up to and including April 25th.

[2] On this conflicting evidence we must accept the court's finding that the work was completed on and not before April 25th, unless we accept appellant's contention that the last 3 days of the wetting down process are not to be considered as a part of the completion of the contract, and that therefore the work must be held to have been completed at least as early as April 22d. But with this contention we do not agree. Since the work was to be done to the satisfaction of the street superintendent, and since there was a controversy between the parties as to what would constitute a sufficient wetting down process to make the work satisfactory, and since that controversy was actually settled by continuance of the work for the period required by the street superintendent in order to make the work satisfactory to him, it is our opinion that the work should not be deemed to have been completed until the 25th day of April. This being so, the notices of May 24th and May 25th were filed with the street superintendent within due time.

Finally it is contended that the first set of notices and claims filed did not comply with the requirements of section 6½ of the statute, because the form of verification in each of the claims was defective, in that the verified statements did not contain an allegation that the plaintiff's claim, or some part thereof, has not been paid, and did not show when the various items of materials were furnished.

[3] It is also claimed that the Barr Lumber Company's claim was defective, in that the affidavit of verification does not show that the verification was made by O. H. Barr on behalf of the corporation; also that the claims do not purport to hold the bondsmen responsible. The Barr Lumber Company's claim was signed, "Barr Lumber Company, by O. H. Barr, President." The affidavit of verification is signed "O. H. Barr," and the said O. H. Barr, "being first duly sworn, deposes and says that he is the president of the Barr Lumber Company, the corporation claimant above named, that he has read the foregoing claim, and that the facts therein stated are true." In each of the other claims the affiant, who was one of the claimants, stated in his affidavit of verification that he had read the foregoing claim, "and that the facts therein stated are true."

[4] In each of the claims a statement of the demand was made, and that the amount so claimed "is now due, owing and unpaid." The plaintiff's claim further stated that of the total amount which the contractor had agreed to pay for the materials furnished, "no part of the same has been paid," except a stated sum. The other claims filed specifically stated "that no part of the same has been paid." We think that these statements of the verified claims were sufficient to comply with the requirements of the statute.

[5] We further hold, contrary to the contention of appellants, that these claims as filed were not rendered insufficient by the statement made in each of them "that the

[1] For opinion in Supreme Court, see 197 Pac. 332.

said undersigned claims a lien upon any moneys, warrants, or bonds for the said sum as aforesaid on account of said material so furnished for said improvement." Conceding that the last-quoted words were not required to be in the notice, we cannot see that appellants, sureties on the contractor's bond, could have been in any manner misled or otherwise prejudiced thereby.

The judgment is affirmed.

I concur: JAMES, J.
I concur in the judgment: SHAW, J.

47 Cal. App. 440

SCHMIDT v. PURSELL et al. (Civ. 3362.)

(District Court of Appeal, First District, Division 2, California. May 11, 1920. Hearing Denied by Supreme Court July 8, 1920.)

1. Evidence ⊂=46—Judicial notice not taken of order of Industrial Accident Commission.

Court cannot take judicial notice of a general order of the Industrial Accident Commission.

2. Master and servant ⊂=352—Noncompliance with safety order not "gross negligence" within Compensation Act.

Failure of master to comply with general safety order of the Industrial Accident Commission of which he had no notice would not of itself constitute "gross negligence" within the meaning of Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

3. Master and servant ⊂=352—Safety order of Industrial Accident Commission not conclusively presumed reasonable in action for damages.

In an action by a servant for damages for gross negligence under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, general safety orders of the Industrial Accident Commission are not conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety, under section 66 of the act.

4. Master and servant ⊂=352—General Safety orders of Industrial Accident Commission must be served upon employer under Compensation and Safety Act.

Safety orders of the Industrial Accident Commission do not become effective until served upon the employer, under Workmen's Compensation, Insurance, and Safety Act, § 59.

5. Master and servant ⊂=352—Essentials for recovery for gross negligence under Compensation Act stated; "willfully disregard."

It is incumbent upon a servant suing for personal injuries caused by gross negligence, under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, to prove that injury resulted both from gross negligence and from willful disregard of life, limb, or bodily safety; the term "to willfully disregard" meaning to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Frederick A. Schmidt against Henry Pursell and Arthur Pursell, doing business under the name and style of Pursell Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Warren L. Williams, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondents.

NOURSE, J. Plaintiff appeals from a judgment in favor of defendants in an action for damages for personal injuries sustained by plaintiff while in the employ of the defendants. Plaintiff chose to avail himself of section 12 (b) of the Workmen's Compensation, Insurance, and Safety Act, as amended in 1915 (Stats. 1915, p. 1081, § 2), and effective at the time of the injury, and waived compensation under the act. Section 12 then provided that, when conditions of compensation existed, the right to recover pursuant to the provisions of the act should be the exclusive remedy against the employer, "except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury * * * indicated a willful disregard of the life, limb, or bodily safety of employés, any such injured employé may, at his option, either claim compensation under this act or maintain an action at law for damages." The complaint alleged that the accident was the result of the gross negligence of the defendants in failing to properly equip a jointer machine upon which plaintiff was employed with the necessary safety appliances, and also that it was the result of the willful disregard of the life, limb, and bodily safety of the plaintiff on the part of said defendants in refusing and neglecting to equip said machine with such safety appliances. It was also alleged that the cylinder head and guard was a necessary equipment and part of said machine to prevent the operator thereof from coming in contact with the knife and mangle. These allegations were all denied by the answer, and the court found that the defendants were not guilty of gross negligence nor of a willful disregard of the life, limb, or bodily safety of the plaintiff in refusing to equip said machine with such

safety appliances, and also that such safety appliances were not at the time a necessary equipment to prevent the operator thereof from coming in contact with the knife or mangle of the machine. It was also found, in accordance with the allegations of the answer, that plaintiff was thoroughly familiar with the workings and the danger incident to the use of the machine. The appeal is confined solely to an attack upon that portion of the findings which negative gross negligence on the part of the defendants.

The facts material to the opinion are that plaintiff had been in the employ of defendants for some five months prior to the accident and had become thoroughly familiar with the machine upon which he received the injury. He was an experienced operator and had worked for many years on machines of this nature, some of which had guards or safety devices; others had not. On July 20, 1917, five days prior to the date of the injury, an employé of the Industrial Accident Commission notified defendants that the machine should be equipped with a safety device, and, acting upon such notice, the defendants placed an order for such equipment, which, however, had not been received at the time of the injury. In this connection one of the defendants testified that they had not been notified prior to the 20th of July to equip the machine with a safety device, and that it was impossible to obtain one within the five days.

[1] The theory of appellant is that the failure of respondents to comply with the general order of the Industrial Accident Commission relating to the equipment of similar machines with safety devices, after having been personally instructed so to do in this instance by one of the employés of the commission, constitutes gross negligence entitling appellant to recover in this case. The argument in this connection is based upon a misunderstanding of the record, in that the record fails to disclose that any general order of the Industrial Accident Commission was offered or received in evidence. In the briefs it is argued that a certain general order of the commission required the equipment of similar machines with cylindrical cutter heads, but this order was not offered in evidence, and, though it may have been referred to in argument before the trial judge, it is not such a matter as can be given judicial notice. Thus the argument of appellant resolves itself into this, that the failure of defendants to equip the machine with safety devices immediately upon the direction of the employé of the Industrial Accident Commission constitutes gross negligence on their part. In his opening brief it is said:

"We would not be understood as insinuating that violation of the statute in itself constituted 'gross negligence.' That is not our position here."

[2-4] If the violation of a statute in itself does not constitute gross negligence (and there is respectable authority to that effect, though in reserving decision upon that point in an order denying a hearing after judgment in the District Court of Appeal of the Second District in Helme v. Great Western Milling Co., 185 Pac. 510, our Supreme Court has cast some doubt upon the extent of the rule in this state), surely the failure to comply with some general safety order of the Industrial Accident Commission of which the employer may have had no notice would not constitute gross negligence. Section 66 of the act (St. 1913, p. 309), as in effect at the time of the injury, provided that every order of the commission should be admissible as evidence in any prosecution for the violation of certain provisions of the act, and that in every such prosecution they should be conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety. But by this section the orders are conclusively presumed to be reasonable only in prosecutions for violations of the act. The presumption does not apply to an action for damages instituted by an employé under section 12 (b). Furthermore these orders do not become effective until served upon the employer. Section 59. The record discloses that no service was made of any order upon defendants other than the oral instruction given to them by an employé of the Industrial Accident Commission on July 20th. As to this instruction it does not appear what time was given the employers to comply, and the reasonableness of the order having been directly put in issue by the allegations of the complaint of the necessity of equipping the machine with a certain safety device, and the court having found that such was not necessary, it must follow that the finding of the court upon the issue of gross negligence and willful disregard of the safety of the employé was proper, and that any other finding under the circumstances would have had no support in the evidence.

[5] Furthermore, appellant having waived his right to compensation afforded him by the Workmen's Compensation, Insurance, and Safety Act, and chosen to proceed in this action at law for damages, it was incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of respondents and from the willful disregard of the life, limb, or bodily safety of appellant. The willful disregard of the safety of an employé means something more than mere negligence or carelessness. To willfully disregard the safety of an employé is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge. The trial court found that respondents did not know

that the machine was dangerous to operate without a safety device, and this finding is not attacked. Such being the case, the willful disregard of life, limb, or bodily safety, which is a necessary element to recovery in an action of this nature, was not shown.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 494

RAISCH et al. v. HELFRICH et al.
(Civ. 3337.)

(District Court of Appeal, First District, Division 1, California. May 14, 1920. Hearing Denied by Supreme Court July 12, 1920.)

1. Mechanics' liens ⊜75(4) — "Constructive notice" of work sufficient to bind owner.

The knowledge on the part of an owner which will subject land to lien for improvements, is not alone actual knowledge; constructive notice—i. e., notice of circumstances which would put a prudent man on inquiry—being sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Notice.]

2. Mechanics' liens ⊜78—Statute relating to estoppel against owner applies to street work.

Code Civ. Proc. § 1192, requiring owner to file notice of nonresponsibility to avoid a lien on land, applies to street work liens under section 1191.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. G. Raisch and Thomas A. Clark, copartners doing business under the firm name and style of Raisch & Clark, against George Helfrich and the American Land & Trust Company. Judgment for plaintiffs, and last-named defendant appeals. Affirmed.

W. H. Barrows, of San Francisco, for appellant.

J. E. Manning, of San Francisco, for respondents.

KOFORD, Judge pro tem. This is an appeal from a judgment and decree of the superior court foreclosing a lien for street work done under private contract. Plaintiffs, the contractors, secured the signature of defendant Helfrich to a written contract for the street work. Defendant Helfrich, or at least his wife, was at the time in possession under a written installment contract of purchase, under which the appellant company was selling the lot in question. After obtaining the signature of Helfrich to the street work contract, plaintiffs, at the suggestion of Helfrich, called upon the president and general manager of the appellant company, informing him of the contract with Helfrich and other property owners on the street, and of the nature and kind of the intended street work. The president and manager did not sign the contract, but expressed himself as pleased, and said "it was a fine thing to do, to have the street paved with asphalt, and to go ahead and do the work."

The street work was thereafter done according to the contract, was accepted, and in due time a notice of claim of lien was duly filed of record. Before this action was tried, the purchaser of the lot, Helfrich, defaulted in his payments, and the appellant retook the lot and became the owner thereof.

The action resulted in a judgment against appellant on the theory of the estoppel created by Code of Civil Procedure, § 1192, namely, on account of the owner's failure to file a notice of nonresponsibility.

[1] Appellant attacks the judgment on two grounds: First, that there was no evidence that it had knowledge that said work was being done at any time, but that the evidence only established that it knew the work was going to be done. The finding on this point is that appellant "had knowledge before, at, and during the course of the performance of the contract." We think the evidence sufficient. As was said in Harmon Lumber Co. v. Brown, 165 Cal. at page 197, 131 Pac. 368, at page 369:

> "The knowledge which will subject the owner to this burden is not alone actual knowledge. Constructive knowledge, i. e., notice of circumstances which would put a prudent man on inquiry as to the fact in question (Civ. Code, § 19), is equally potent to bind the owner"—citing cases.

We think the evidence measures up well to this test.

[2] Appellant next contends that Code of Civil Procedure, § 1192, does not relate to street work. This section, as amended in 1911, reads:

> "Every building or other improvement or work mentioned in any of the preceding sections of this chapter constructed, altered or repaired upon any land with the knowledge of the owner," etc.

Appellant draws attention with emphasis to the words "upon any land," and says that street work is not done on the land. He also cites Santa Cruz Rock Pavement Co. v. Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174. This case was decided before Code of Civil Procedure, § 1192, was amended in 1911, and at that time it read:

"Every building or other improvement mentioned in section 1183 of this Code, constructed

upon any lands with the knowledge of the owner," etc.

It is quite obvious that the Legislature by the amendment of 1911, by striking out "mentioned in section 1183 of this Code," and inserting "mentioned in any of the preceding sections of this chapter," intended to extend the operation of this statutory estoppel to street work liens under section 1191 of the Code of Civil Procedure. The construction contended for by appellant would violate the express language of the section as amended.

The judgment appealed from is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 387

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3251.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1920.)

1. Master and servant ⟸371—Accident "arising out of employment" within Compensation Act defined.

Accidents "arising out of the employment" within the Workmen's Compensation Act are those in which it is possible to trace the injury to the nature of the employé's work, or to the risks to which the employer's business exposes the employé, and they must result from a risk reasonably incident to the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant ⟸371—Accident during vacation held not one "arising out of employment" within Compensation Act.

Where a sales' manager while spending his vacation at a ranch went by horseback to a post office to answer a military questionnaire, and was thrown from his horse and injured while riding over a trail in returning after writing and mailing a reply to a business letter from his employer received at the ranch, the injury was not the result of an accident arising out of his employment within the Workmen's Compensation Act.

Proceedings by Grey M. Skidmore under the Workmen's Compensation Act (St. 1917, p. 831) to obtain compensation for personal injuries, opposed by the Golden State Portland Cement Company, the employer, and the Continental Casualty Company, insurer. There was an award of compensation by the Industrial Accident Commission and the Casualty Company brings certiorari. Award annulled.

Joe Crider, Jr., of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. In this proceeding upon writ of review we are asked to annul an award of compensation made by the Industrial Accident Commission to Grey M. Skidmore for injuries alleged to have been sustained while employed as sales manager by the Golden State Portland Cement Company, of which company petitioner was the insurer.

Petitioner attacks the award upon the ground that the evidence is insufficient to sustain the finding of the commission that the injury to Skidmore as such employé arose out of and in the course of his employment.

In September, 1918, Skidmore, accompanied by his family, went from his home in Los Angeles county to a mountain ranch of a relative in Northern California, located some five miles from a railway station and post office, known as Island Mountain, to spend a week or more in hunting, horseback riding, and like diversion, as a vacation. He arrived at the ranch on September 25th, and on the two following days, free from any duties to his employer, engaged with marked success in hunting deer and other game abounding in the vicinity. On September 26th he received a letter from his employer, dated September 23d, pertaining to a request made by a customer for an adjustment of freight upon a bill of goods sold him, and which it was claimed Skidmore had agreed to grant, as to which Skidmore made reply the same day; but, having learned that some mail, among which was his questionnaire, awaited him at Island Mountain, he held this letter unsealed, and on the morning of September 27th, took his rifle, and, by horseback, following a trail representing a shorter route to the station and along which game was plentiful, went to Island Mountain, to which place his wife, accompanied by his uncle, proceeded in a vehicle over the road. Upon arriving at the station he received another letter from his employer, dated September 26th, containing information of general interest as to the progress of the business, but nothing calling for answer, though at the station, in finishing his letter in reply to that of September 23d, he made such comments and suggestions as might be expected from a sales manager on his vacation, referred to his success in hunting, and ended his letter by saying "am riding down to the station horseback 5 miles to fix up my questionnaire." After answering the questionnaire, he assisted his uncle in loading some grain and then went to his horse, which he mounted to return to the

ranch, when he was thrown therefrom and his leg broken.

[1, 2] It thus appears that the accident occurred at a time when Skidmore was relieved from duty as an employé of the Golden State Portland Cement Company and while he was engaged in the diversions incidental to the vacation granted him, among which was horseback riding and hunting. His time was his own, to use as he pleased. His purpose in going to the station, as stated by him in his letter, was to answer his questionnaire. For his own diversion he went horseback, and, since deer were plentiful along the trail, he took his rifle. The mailing of the letter to his employer was a mere incident of the trip; but, conceding the writing and mailing of the letter was within the scope of his employment, he was not injured while engaged in such act, but afterwards, and when, upon his own time, free from any duties to his employer, he had engaged in the diversions of his vacation. Gernhardt et al. v. Industrial Accident Commission of California, 185 Pac. 307. He is no more entitled under the law to claim compensation from his employer for the injury which happened to him in thus returning to the ranch than he would have been had it occurred while he was traveling from his home in Los Angeles to the place where his vacation was to be spent. "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé. The accident must be one resulting from a risk reasonably incident to the employment." Coronado Beach Co. v. Pillsbury et al., 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164. There was nothing in the nature of Skidmore's duties to his employer which required him to ride horseback over this trail, carrying a rifle, in traveling from the station back to the ranch; and hence it is impossible to trace the injury to the nature of the employé's work or the risks to which the employer's business exposed the employé as its sales manager. Ward v. Industrial Accident Commission, 175 Cal. 42, 164 Pac. 1123, L. R. A. 1918A, 233. The nature of his employment was not such as to expose him to the dangers incidental to the means adopted for his pleasure while on his vacation, and could not have been contemplated in connection with the employment. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

In our opinion, the injury sustained did not arise out of the employment, which fact must be made to appear in order to entitle an employé to compensation.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 421

LOS ANGELES TRUST & SAVINGS BANK v. BORTENSTEIN et al. (Civ. 3182.)

(District Court of Appeal, Second District, Division 2, California. May 10, 1920.)

1. Conversion ⊂⊃4—Money awarded for land taken for public use deemed the land for purpose of discharging liens.

It is a well-recognized rule of equity based upon the doctrine of equitable conversion that, when land is taken for public use, the money awarded for such land remains, and is to be considered as land in respect to all rights and interests relating thereto, and the money, in such case, will be applied in equity to discharge the legal or equitable rights of creditors or incumbrancers in respect to such land.

2. Eminent domain ⊂⊃154—Damages for destruction of mortgaged property an equitable fund for satisfaction of mortgage.

Money recovered as damages by owner of mortgaged premises for destruction of the buildings thereon *held* a substitute for so much of the land as was destroyed in so far as mortgagee's rights were concerned, entitling mortgagee to recover, in foreclosure action, the difference between the value of the land and the amount of the mortgage; the money awarded being an equitable fund for the satisfaction of mortgage lien notwithstanding that it was awarded to owner.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Los Angeles Trust & Savings Bank, against Herman Bortenstein and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

J. Mack Love, of Los Angeles, for appellant.

William L. Kuehn, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to foreclose a mortgage on real property. Herman Bortenstein and the city of Los Angeles are defendants. Bortenstein alone appeals from the decree of foreclosure. The chief question on the appeal is whether plaintiff has any lien, legal or equitable, upon certain moneys that in another action were adjudged to be due from the city to Bortenstein for injury to the mortgaged property. Bortenstein filed a demurrer to the complaint in the present action. The demurrer was overruled, he was given ten days to answer, and, failing to answer, his default was entered. The city filed an answer admitting all the allegations of the complaint.

It appears from the complaint and recitals in the foreclosure decree that originally the mortgaged property, together with an adjoining strip of land ten feet wide, were

owned by one Clarke and wife. The Clarkes, while the owners of the mortgaged property, mortgaged it to plaintiff to secure the payment of a promissory note for $6,000 executed by them to plaintiff as the payee. Thereafter the Clarkes conveyed the mortgaged property to Bortenstein, subject to the mortgage. At the same time they conveyed to Bortenstein the adjoining ten-foot strip of land. Thereafter the mortgaged property, together with the buildings thereon, and the adjoining ten-foot strip, were greatly damaged by a flood. The buildings on the mortgaged property were carried off by the flood waters, and the surface of the land was washed away. Bortenstein, who had become the owner of the premises under his grant from the mortgagors, claiming that the city was responsible for the destructive effects of the flood, brought an action against the city wherein he recovered a judgment for damages. In that action Bortenstein sued not only for damage to the real property that the Clarkes had previously mortgaged to this plaintiff, but also for damage to the adjoining ten-foot strip and to certain personal property that was on the premises at the time of the flood. The judgment against the city was for the total sum of $12,500. By its judgment in that action the court adjudged that the bare land itself, without the improvements, was damaged in the sum of $1,500, that the buildings and improvements on the mortgaged property were damaged in the sum of $10,000, and that the personal property was damaged in the sum of $1,000. The plaintiff here was not a party to that action. By its decree of foreclosure in the present action the trial court found that the damage to the personal property and to the ten-foot strip is $^{229}/_{2500}$ of the total amount of damage to all the property so owned by Bortenstein and that the damage to the property covered by plaintiff's mortgage is $^{2271}/_{2500}$ of the total damage sustained by all the property. The court, therefore, by its decree in this foreclosure suit, adjudged: (1) That the mortgaged premises be sold by the sheriff in the manner prescribed by law; (2) that the sheriff apply the proceeds of such sale to the payment of his fees, to plaintiff's costs of suit, and to the satisfaction of the mortgage debt; (3) that if, after such payments, there be any surplus, he pay the same to Bortenstein; and (4) that if the proceeds of such sale be insufficient to satisfy the mortgage indebtedness, then, if and when said judgment against the city shall become final, the city pay to plaintiff the amount of such deficiency out of $^{2271}/_{2500}$ of the moneys that it had been adjudged to pay to Bortenstein; and that, if the judgment for damages in the action by Bortenstein against the city should be reversed on appeal, then, out of $^{2271}/_{2500}$ of any damages that might be awarded Bortenstein by any judgment that might thereafter become final in the action by him against the city, the latter pay plaintiff any deficiency there might be after such sheriff's sale of the mortgaged property.

Appellant makes no complaint of that part of the foreclosure decree which directs a sale of the mortgaged property. His attack is against that part of the decree which gives to plaintiff the right to satisfy the mortgage indebtedness out of any moneys recoverable from the city by reason of the partial destruction of the mortgaged property. There is no merit in this contention.

[1] If, by condemnation proceedings, the city had appropriated any part of the mortgaged property, it could not have cut off the lien of the mortgage by paying to Bortenstein, for the latter's sole use and benefit, damages for the part of the premises so appropriated. As a mortgagee, plaintiff could have claimed so much of such damages as might be necessary to satisfy the indebtedness secured by the mortgage, if the part of the mortgaged property not taken or damaged by the city should prove insufficient for that purpose. It is a well-recognized rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such lands remains, and is to be considered as, land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or incumbrancers in respect to such land. Bank of Auburn v. Roberts, 45 Barb. (N. Y.) 407; 19 R. C. L. p. 343; 88 Am. St. Rep. 363; Jones on Mortgages, § 708.

[2] In the instant case, though no part of the mortgaged property was actually appropriated by the city, the property by reason of the city's tortious acts, was partially destroyed or extinguished. The money awarded for this injury is an equitable fund for the satisfaction of plaintiff's lien on the mortgaged property, just as much so as if it had been money paid by the city for land taken or damaged in condemnation proceedings. It is a substitute for the land, or for that part thereof destroyed or damaged by the flood.

The fact that the money was awarded to Bortenstein does not change plaintiff's rights. The sum awarded to Bortenstein in his action against the city for damages arises from or grows out of the land, by reason of the injury that diminished its value. It is a fair inference from the averments of the complaint, the allegations of which are admitted by Bortenstein's default, that the damages awarded by the court in the action against

the city were not limited to Bortenstein's interest, which was that of an owner of land subject to a mortgage, but covered all the damage done by the flood to the freehold. Therefore the money so awarded by the court as damages to the realty must be treated, in equity, as the land itself. It takes the place of the reduced value of the land. The mortgaged land, in its present damaged condition, together with such portion of all the moneys awarded for the total injury as represents the damage to the mortgaged premises, stand now in the place and stead of the original uninjured mortgaged premises. Bank of Auburn v. Roberts, supra; Id., 44 N. Y. 192.

Appellant relies confidently upon the doctrine announced in Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90. There is nothing in that case that militates against the views we have expressed. In the present case the city caused damage to real property that Bortenstein's grantors had mortgaged to plaintiff. When the floods came the buildings on the mortgaged property were a part of the realty. The damage to the buildings, as well as to the land, was damage to the realty. The fact that, in the action against the city for damages, the court awarded Bortenstein $10,000 as and for damage to the buildings and improvements, does not detract from the fact that the damage so awarded was damage for injury to the freehold. In such cases the measure of damages is the value of the improvement as it was in place, as a part of the realty, immediately preceding the time when it was washed away or injured by the flood, not what it would sell for in the open market as personal property after its severance from the land. Rhoda v. Alameda County, 58 Cal. 357. In the Buckout Case the mortgagee was seeking to follow and impress with his mortgage lien the house that, by being served from the land, had become personalty. Here the mortgagee is but seeking to impress with its mortgage lien a fund that has taken the place of so much of the mortgaged realty as was destroyed by the flood.

The foreclosure decree makes no attempt to fasten upon appellant a personal liability for a deficiency judgment. The "deficiency" referred to in the decree is a deficiency that may remain after the sheriff's sale of the partially destroyed mortgaged premises, and that "deficiency," if any there may be, is to be made good out of so much of a fund as, in equity, is deemed to represent that part of the mortgaged property that was destroyed by the flood.

No other points made in the briefs require discussion. We have discussed the points upon which appellant's brief presents any argument. We find no error in the record.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

47 Cal. App. 465

Ex parte JOHNSON. (Cr. 511.)

(District Court of Appeal, Third District, California. May 13, 1920.)

1. Municipal corporations ⇐120—Title of ordinance not conclusive.

The title of an ordinance is not conclusive as to its legal effect, and the court will look to the substantive provisions for determining that question.

2. Licenses ⇐6(3)—Ordinance imposing license tax on attorneys held a revenue measure.

An ordinance imposing a license tax on attorneys, though entitled "An ordinance providing for the licensing, regulating and carrying on of certain professions and trades," etc., *held*, in view of absence of regulatory provisions, a revenue measure, and hence not void as being regulatory and beyond the powers of the municipality.

3. Municipal corporations ⇐112(1)—Title is not an indispensable part of the ordinance.

The title is not an indispensable part of an ordinance, and it may have a defective title.

4. Municipal corporations ⇐111(4)—Failure to pay license fee being misdemeanor under general statute, validity of ordinance immaterial; "law."

An ordinance is deemed a law within Pen. Code, § 435, making failure to take out a license as required by law a misdemeanor, so that it is immaterial whether the provisions in an ordinance imposing license fee that failure shall be a misdemeanor be invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

5. Constitutional law ⇐83(3)—Imprisonment for practicing law without license not "imprisonment for debt."

Where petitioner practiced law without first securing license as required by a municipal ordinance, his imprisonment for the misdemeanor committed was not an imprisonment for debt in violation of Const. art. 1; the imprisonment being deemed a punishment for failure to comply with a public duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imprisonment for Debt.]

6. Licenses ⇐6(3)—Municipality has power to impose a license fee.

While attorneys are licensed by the court, a municipality may impose a license fee on one carrying on the business of attorney and maintaining an office within city limits; for there is no distinction except degree between the protection, etc., necessary for one maintaining a law office and one running a mercantile establishment.

In the matter of the application of Waldo S. Johnson for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Marysville to secure release of petitioner after commitment for failure to pay

license tax. Writ dismissed, and petitioner remanded.

M. T. Brittan, Waldo S. Johnson, and W. E. Davies, all of Marysville, for petitioner.
W. P. Rich, of Marysville, for respondent.

PREWETT, Presiding Judge pro tem. The petitioner was convicted under section 1 of Ordinance No. 188 of the city of Marysville, and he seeks his discharge from the imprisonment which followed such conviction. Section 1 requires that every person carrying on certain specified callings shall, before commencing the same, procure a license therefor, and section 80, so far as pertinent to this inquiry, reads as follows:

"Section 80. Every person engaged in business as a lawyer, maintaining an office in said city, shall pay a license of $2.50 per month."

The petitioner, a lawyer by occupation, maintains an office in said city, and he neglected to take out the license demanded by said section 1. No point is made as to sufficiency of the judgment in mere matters of form.

[1-3] 1. It is contended that the ordinance in question is regulatory in its nature, and therefore beyond the powers of the municipality. It is conceded that the business in question is not one that can be "regulated" under the police powers of cities and counties. Unless, therefore, the ordinance is a revenue measure, it cannot be upheld. The title of the ordinance is cited to the court as an evidence that the municipality, in adopting the ordinance intended it as a regulatory provision. The title reads: "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations." It is true that this title contains the word "regulating," but this is not conclusive. The court will look to the substantive provisions of the ordinance to determine its legal effect. It happens that this title is copied in precise words from that considered by the court in Ex parte Braun, 141 Cal. 204, 74 Pac. 780. The court, in arriving at the conclusion that the ordinance considered in that case was for revenue and not for regulation, uses the following language:

"It is devoid of regulating provisions, being devoted entirely to the imposition of a license tax upon various trades and occupations and the collection thereof. It imposes a license tax upon a great majority of callings and occupations, and in several instances the amount of the tax is based upon the amount of business transacted. It includes numerous callings which are in no degree subject to regulation. * * * Taking into consideration the absence of regulatory provisions, the amounts of the several taxes imposed, and the nature of many of the subjects of taxation named in the ordinance, including the particular business here involved, it is very clear that the license tax upon the business alleged to be conducted by petitioner was imposed solely for the purpose of raising revenue."

The language just quoted is peculiarly applicable to the ordinance now under examination. Although two justices dissented from the opinion in that case, their dissent was based upon other points. The case has been often cited in later reports and, so far as we are informed, its doctrines have never been questioned. A title is not an indispensable part of an ordinance. It may have a defective title. Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; Ex parte Young, 154 Cal. 321, 97 Pac. 822, 22 L. R. A. (N. S.) 330. It clearly appears that the ordinance in question is a revenue measure.

[4] 2. The petitioner insists that the city has no power to provide that a violation of the ordinance shall constitute a misdemeanor. It is immaterial whether or not it has such power or has attempted unsuccessfully to exercise it. An ordinance is deemed to be "a law" in this state. Section 435 of the Penal Code provides that a failure to take out a license when required by a law of this state shall constitute a misdemeanor. This section covers a violation of an ordinance. Ex parte Lawrence, 69 Cal. 608, 11 Pac. 217; Ex parte Christensen, 85 Cal. 211, 24 Pac. 747.

[5] It is further insisted in the brief of petitioner that imprisonment on conviction for nonpayment of a license tax is an imprisonment for debt, and therefore unlawful, though no authorities are cited in support of this claim. It has been so long conceded in this state that imprisonment for failure to pay a license tax is not an imprisonment for debt within the meaning of article 1 of the Constitution that the question can scarcely be deemed to be open for discussion. Failure to procure a license in a case required by law is a neglect of a duty due to the public. For such neglect the offender may be punished by imprisonment. In such case the punishment is penal, and not merely in the nature of a remedy. It is not auxiliary to a civil action. Even after the offender shall have suffered the specified number of days' imprisonment, the money obligation is still unpaid. The penalty imposed is a mere punitive burden exacted as a means of deterring the offender and others from the commission of like delinquencies in the future. In Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864, the court, through its Chief Justice, uses the following language:

"The Legislature of the state has seen fit to make it a crime under the state law for any one to carry on a business for which a license is required by any law or ordinance, without procuring such license, and one who does so not only disobeys the ordinance, but violates the state law, and is guilty of a crime by reason of the express provision of such law."

The petitioner is not charged with a failure to pay his license tax. The charge is that he carried on a certain business without first procuring the necessary license. The section of the Penal Code above cited does not purport to fix a license fee nor does it provide for the issuance of a license. It would be unprofitable to multiply authorities to show that our courts have again and again upheld the power of the Legislature to prescribe a punishment for failure to procure a license before carrying on certain lines of business.

[6] 3. The chief claim of the petitioner is that the city has no power to license the business of a lawyer. It is pointed out that a lawyer is licensed as such by the courts, that his license is in the nature of a vested right, and that any act of the Legislature curtailing this right would impair the obligation of a contract. Without conceding that these claims are well founded, they are, nevertheless, inapplicable to the case. It is true that a license cannot be imposed upon a lawyer, nor can his business be regulated by ordinance. But the petitioner is not charged with practicing law without a license, but with "carrying on a trade, calling, profession, or business" without first procuring a license. Sections 1 and 4 of the ordinance, when read in connection with section 80, above quoted, show clearly that the license is exacted for "carrying on the business of a lawyer at a fixed place of business." The propriety of exacting revenue from one who maintains an office and carries on a business within a city is apparent. Many expenditures by the city are rendered necessary by reason of an office or other place of business within its limits. Petitioner relies with much confidence upon City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674. This case, however, is not in point. The defendant, Curtin, was charged with failure to pay a license tax under an ordinance which provided that "every lawyer shall pay a license of three dollars per quarter." It was held in that case that a license tax cannot be levied upon a person nor upon such of his acts as fall short of carrying on a business. The distinction was sharply drawn by the court between a license upon the business of practicing law and a license upon a person because he is an attorney at law. There appears to be no inherent difference between carrying on the business of practicing law and carrying on any other business or pursuit. It is not questioned that the state may, in the exercise of its sovereign powers, levy license taxes upon merchants and manufacturers who maintain places of business, and this, too, for the sole purpose of raising revenue. A lawyer's office makes certain demands upon the various fire, police, street, and other functions of a city, which differ from above classes only in quantity, and not in quality. If the one should be required to assist in keeping up the revenues of a city, no reason is apparent why the other should not. Whether a license might be enacted for carrying on a law business without maintaining an office is a question that is not before the court. We entertain no doubt that a state license issued to a lawyer authorizing him to practice law is not a bar to the claim of a city to levy a license for maintaining an office in connection with such practice. For many years the state has licensed druggists, but it has not been suggested that a druggist's license is the equivalent of a license to run a drug store. No adequate reason is discovered why the commitment should be disturbed.

Writ dismissed, and petitioner remanded.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 515

BHUMGARA et al. v. GAZVINI. (Civ. 2956.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920. Hearing Denied by Supreme Court July 15, 1920.)

1. Appeal and error ⟹110—Separate appeal does not lie from order denying new trial.

Under Code Civ. Proc. § 963, a separate appeal does not lie from an order denying a new trial.

2. Appeal and error ⟹1041(2) — Defendant held not prejudiced by leave to plaintiffs to amend.

Where defendant did not object to plaintiff's having leave to amend by adding another party plaintiff, and was offered by the court further time to answer, which his counsel refused, he was not prejudiced by plaintiff's permission to amend.

3. Trover and conversion ⟹40(1)—Circumstantial evidence of receipt and conversion admissible.

Circumstantial evidence may be competent to support findings as to receipt and conversion of plaintiff's goods by defendant.

4. Appeal and error ⟹1011(1)—Trial court's findings on conflicting evidence conclusive.

Where the evidence was conflicting, the trial court's determination whether plaintiff produced the preponderance of evidence is final; the decision being as to facts.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by M. J. Bhumgara and another against J. Gazvini. From a judgment for plaintiffs and from an order denying a new trial, the defendant appeals. Appeal from order dismissed, and judgment affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

C. Ibeson Sweet and W. D. Van Nostran, both of Los Angeles, for appellant.

W. R. Law, of Los Angeles, for respondents.

JAMES, J. [1] Plaintiff M. J. Bhumgara sued to recover an amount of money alleged to be the value of certain goods, wares, and merchandise. The property is asserted to have been converted by the defendant to his own use. Judgment was in favor of plaintiff, and defendant appeals therefrom. An appeal was also attempted to be taken from an order denying a motion for new trial, but under the Code provision in force at the time that motion was made and ruled upon no separate appeal was authorized to be taken from the order. Code Civ. Proc. § 963.

[2] At the trial the plaintiff asked and obtained leave to amend his complaint by adding the name of J. S. Bhumgara as party plaintiff. Appellant now claims that the granting of this permission was error. An examination of the record shows that appellant did not object to the amendment at the time. It is shown that the court offered to allow further time to answer, if appellant desired, after the amendment adding the name of the party was made, but that appellant's counsel replied that he did not care for any time, and, at his suggestion, it was stipulated by respondent that, "if the defense is good against either one, it is good against both." We cannot perceive how in the slightest degree the appellant was prejudiced by the amendment.

[3, 4] The only other claim is that the evidence was insufficient to sustain the findings of the court as to the receipt of plaintiffs' goods by defendant and their alleged conversion. We have examined the transcript of the evidence with much care, and, without entering into a detailed statement of the testimony, we consider that the evidence was sufficient to fully sustain the findings. Some of the evidence was circumstantial, but it was none the less competent and material. It was for the trial court to determine whether plaintiffs produced the preponderance of evidence, and its decision, in the presence of a conflict, is final as to the facts.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 413

TULARE COUNTY v. FENN. (Civ. 2937.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1920.)

Bail ⊂=96—Cash bail to answer felony charged forfeited by recorder belongs to county.

A city recorder, in forfeiting a cash bail taken under authority of Pen. Code, §§ 1268, 1295, for the appearance of defendant charged with felony, acts as a magistrate under the power given by Pen. Code, § 808, and Municipal Corporation Act, §§ 882, 883, not as a judge of recorder's court, so that the amount forfeited is not payable to the city under Pen. Code, §§ 1457, 1570, requiring payment of forfeitures in police or justice courts of the city into the city treasury, even though they are for violation of a state law, but such money must be paid to the county under Pen. Code, § 1307.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by County of Tulare against R. W. Fenn. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. W. Braswell, of Lindsay, and Middlecoff & Feemster, of Visalia, for appellant.

Fred C. Scott, Dist. Atty., of Visalia (Frank Lamberson, of Visalia, of counsel), for respondent.

CONREY, P. J. In December, 1917, while the defendant was acting as a magistrate of the county of Tulare under and by virtue of his office as recorder of the city of Lindsay in that county (said city of Lindsay being a city of the sixth class), he received a complaint in writing made to him as such magistrate, charging one Ah Wong with the commission of a felony. Such proceedings were had that said magistrate received from the said Ah Wong the sum of $500 as bail and undertaking that the said Ah Wong would appear, etc., as required. At the time set for the examination of Ah Wong before the defendant upon said charge of felony Ah Wong did not appear. Thereupon the said Fenn, acting as magistrate, entered the fact of such nonappearance upon the minutes of the recorder's court of the city of Lindsay, and did declare said sum of $500 to be forfeited by the said Ah Wong. That forfeiture has become final; nevertheless, the defendant has not paid said sum to the treasurer of the county of Tulare. On these facts, which are pleaded more fully in the complaint, the county of Tulare brought this action to recover judgment against the defendant for said sum of $500. By his answer to the complaint the defendant admitted the allegations of the complaint, except that the defendant denied that there is due, owing, and unpaid from the defendant to the plaintiff the said sum, or any sum whatever. An affirmative defense was also pleaded, under which it was claimed that the money forfeited as aforesaid was forfeited to the city of Lindsay, and not to the county of Tulare, and the money paid over to the said city of Lindsay. On the pleadings above mentioned, the plaintiff moved for a judgment on the pleadings. Said motion having been grant-

ed, judgment was entered accordingly, and the defendant appeals therefrom.

In support of the plaintiff's claim of right to the money in question, we are first required to consider certain sections of the Penal Code in the chapter which relates to the taking of bail. "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail." Pen. Code, § 1268. Section 1295 permits the deposit of money instead of an undertaking in writing. Section 1307 reads as follows:

"If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, at the end of thirty days, unless the court has before that time discharged the forfeiture, pay over the money deposited to the county treasurer."

Notwithstanding the provisions of section 1307 of the Penal Code, appellant contends that the money deposited with him by Ah Wong was rightfully forfeited to the city of Lindsay under and by virtue of the provisions of section 1457 of the Penal Code, which section is a part of the chapter entitled "Proceedings in Justices' and Police Courts," being chapter 1 of title 11 of part 2 of that Code. It is provided in that section "that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers thereof paid by the city, whether prosecuted for a violation of a state law or a city ordinance shall be paid to the city treasurer of the city in which such court is located." See, also, section 1570, Penal Code, to like effect. It is conceded that defendant's salary as recorder was payable by the city of Lindsay.

The money in question here was not payable to the city treasurer of the city of Lindsay, unless as a forfeiture it was collected in the recorder's court in its character as a police court and in connection with an action prosecuted therein. But it was not so collected. The recorder's court in a city of the sixth class has jurisdiction concurrently with justices' courts "of all actions and proceedings, civil and criminal, arising within the corporate limits of such city or town, and which might be tried in such justice's court." The recorder is judge of the recorder's court, and it is provided that he "shall have the powers and perform the duties of a magistrate." Municipal Corporations Act, §§ 882, 883; Deering's Gen. Laws, 1915 Ed., p. 1132. "A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense." Pen. Code, § 807. "The following persons are magistrates: 1. The Justices of the Supreme Court; 2. The judges of the superior court; 3. Justices of the peace; (4) Police magistrates in towns or cities." Pen. Code, § 808.

Since the charge on which Ah Wong was held under arrest was not for a misdemeanor triable in the recorder's court, but was a charge of felony, the defendant Fenn could not act in that matter except as a magistrate. The power of justices of the peace and police judges to hold examinations and commit persons to be held on charges of felony or misdemeanor triable in the superior court is derived from the character of those officers as magistrates, and not as justices of the peace or judges of police courts. This office of magistrate is purely a statutory one, "and the powers and duties of the functionary are solely those given by statute." People v. Cohen, 118 Cal. 74, 78, 50 Pac. 20, 21; People v. Crespi, 115 Cal. 50, 46 Pac. 863. Even a justice of the Supreme Court, or a judge of the superior court, if he sees fit to assume the duties of a committing magistrate, "is not accompanied in the discharge of those functions by any of the general or implied powers * * * which surround him when sitting as a judge of a court of record." People v. Cohen, supra.

In acting as custodian of bail money, and in paying out such money to the public treasury after the forfeiture, the magistrate is an agent of the state, not acting in a judicial capacity. Therefore the decisions referred to by counsel for appellant, to the effect that a judge is not to be held responsible in a civil suit for any judicial determination made by him, are not applicable to this case. The defendant is liable to the county, in an action prosecuted by the district attorney, for money held by defendant which is by law payable into the treasury of the county. It is immaterial to the plaintiff's cause of action that the defendant has mistakenly paid out that money, even in good faith, to some other person or corporation.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

183 Cal. 223

HATFIELD v. JORDAN, Secretary of State.
(S. F. 9504.)

(Supreme Court of California. June 19, 1920.)

States ⇐116—Act providing for bond issue held unconstitutional for failure to make proper provision for payment of principal.

St. 1919, p. 1182, providing for a $10,000,000 bond issue, and for maturity of first lot of bonds on January 2, 1931, but making no provision for the creation of a fund available for the payment of any principal until the 1st day of February, 1931, *held* void, under Const. art. 16, for failure to provide ways and means for payment of the principal, and to create a sinking fund for payment of principal, to commence at a time after the incurring of such debt of not more than a period of one-quarter of the time of maturity of such debt.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Application for writ of mandate by George J. Hatfield against Frank C. Jordan, as Secretary of State, to require him to comply with the provisions of an act for the issuance of bonds in furtherance of the Land Settlement Act. On demurrer to petition. Alternative writ discharged, and proceeding dismissed.

Milton D. Sapiro, of San Francisco, for petitioner.

Gregory & Goodell, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate. An alternative writ was issued, and the matter has been submitted for decision on a demurrer to the petition.

The proceeding involves the question of the validity of an act of the Legislature, entitled "An act to provide for the issuance and sale of state bonds to create a fund to carry out the objects of an act entitled 'An act creating a state land settlement board and defining its powers and duties and making an appropriation in aid of its operations,' approved June 1, 1917, and any and all acts amendatory thereof or supplemental thereto; to create a sinking fund for the payment of said bonds; to define the duties of said officers in relation thereto; to appropriate money for the expense of printing and advertising the sale of said bonds; and to provide for the submission of this act to a vote of the people," approved May 27, 1919. Stats. 1919, p. 1182.

The act is one authorizing a bonded indebtedness of $10,000,000, and therefore, under article 16 of the Constitution, can take effect only in the event that it is submitted to the people at a general election and receives "a majority of all the votes cast for and against it at such election." By the act it is provided that the secretary of state shall publish the act at the expense of the state in at least one newspaper in each county or city and county throughout the state for three months preceding the next general election. Claiming that the act is invalid for want of compliance with certain requirements of article 16 of the Constitution, the secretary of state has refused to make such publication and states that he will not make the same. Hence this proceeding.

Article 16 of the Constitution substantially provides that the Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of $300,000, except in certain instances not material here,

"unless the same shall be authorized by law for some single object or work to be distinctly specified therein, *which law shall provide ways and means, exclusive of loans,* for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within seventy-five years of the time of the contracting thereof." (Italics are ours.)

It further provides that such law shall be irrepealable until the principal and interest shall be paid and discharged, and also that—

"Such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability."

In view of these provisions it is essential to the validity of the proposed law submitted to the people for ratification that it (the proposed law) "shall provide ways and means, exclusive of loans," for the payment of principal and interest as the same falls due, with a limitation of 75 years as the maximum period for which the indebtedness may be created. All this, as we understand it, is conceded by petitioner. Such provision as to the principal may, and perhaps must, be made by providing such a sinking fund as is described in the article, and by this law no other method is attempted. The claim of respondent is that the proposed law does not purport to provide "ways and means" to pay either all of the interest as it falls due, or all of the principal as it falls due. As already suggested, the only provisions therein as to the source of any such payments are those with relation to a sinking fund, thereby provided for, from which all such payments are to be made. It is also claimed that such adequate provision as to a sinking fund for the payment of the principal as is required by article 16 is not made, in that the same is not made to commence at a time after the incurring of the debt "of not more than a period of one-fourth of the time of maturity of such debt or liability." Full consideration of the matter forces us to the conclusion that the objections of respondent are in part, at least, well based, with the result that the proposed law must be held violative of article 16 of the Constitution.

The bonds authorized, aggregating in number 32,000, and in amount $10,000,000, are to bear date January 2, 1921, and to bear interest at the rate of 4½ per cent. per annum, payable semiannually, except that the first payment of interest is to be made on January 2, 1922, on so many of said bonds as are theretofore sold. They are to be sold at auction in such parcels and numbers as directed by the Governor, on request of the land settlement board, the state treasurer detaching from bonds sold all interest coupons which have matured before the day of sale, and the purchaser paying any interest already accrued on any remaining coupon. The first 800 of said bonds, aggregating

$250,000, mature and are payable January 2, 1931; the second $250,000 of said bonds mature and are payable January 2, 1932; the third $250,000 on January 2, 1933; and so on each year to January 2, 1971.

As to the sinking fund the act provides:

"For the payment of the principal and interest of said bonds a sinking fund, to be known and designated as the 'land settlement sinking fund' shall be, and the same is hereby created as follows, to wit: The state treasurer, after the second day of January, *1931* [italics ours], shall, on the first day of each and every month thereafter, after the sale of said bonds, take from the land settlement fund [a fund provided by the Land Settlement Act of June 1, 1917 (Stat. 1917, p. 1566), as amended May 23, 1919 (Stat. 1919, p. 838)] such sum as, multiplied by the time in months, the bonds then sold and outstanding have to run, will equal the principal of the bonds sold and outstanding at the time said treasurer shall so take said sum from said land settlement fund, less the amount theretofore taken therefrom for said purpose, and he shall place the sum in the land settlement sinking fund created by this act." Section 5.

It was further provided:

"And to provide means for the payment of interest on the bonds that may be sold and outstanding, said treasurer shall monthly take from the land settlement fund, and pay into said land settlement [sinking] fund, an amount equal to the monthly interest then due on all bonds then sold, delivered and outstanding."

Payments of interest and principal are to be made from this sinking fund. These are the only provisions in the proposed law relating to the sinking fund, except a provision to the effect that, where a purchaser of a bond pays a sum as accrued interest, the amount shall be paid into the land settlement sinking fund for the purpose, of course, of being paid out again on the interest coupon when it matures and is presented.

It may be conceded that sufficient provision is made by the proposed law for the payment of interest on the bonds sold as it falls due; the treasurer being expressly required to take monthly from the land settlement fund and pay into the land settlement sinking fund an amount equal to the monthly interest then due on all bonds then sold, delivered and outstanding. Although not clearly expressed, this provision may perhaps be construed as requiring such action by the treasurer each month after the sale and delivery of the first bonds disposed of, instead of waiting until January 2, 1931. However, this may be, it seems perfectly clear that the act does not provide ways and means for the payment of the first $250,000 principal of the bonds which mature and are payable January 2, 1931. As we have seen, the only attempted provision is by way of the sinking fund created by the act. There is no provision whatever for the putting into that fund of any money available for the payment of any principal whatever until the 1st day of February, 1931, while the first $250,000 of the bonds mature January 2, 1931. It is not until February 1, 1931, that the treasurer is authorized to begin taking from the land settlement fund on the 1st day of each and every month and placing in the sinking fund money to be kept and used for the payment of the principal. Moreover, the sinking fund must be such as is specified in the constitutional provision, which plainly requires that the same shall "commence at a time after the incurring of the indebtedness of not more than a period of one-fourth of the time of maturity of such debt or liability." This, of course, means that the actual placing of money to the credit of the sinking fund for the payment of principal shall commence at the time stated, and doubtless it also contemplates that the provision so made shall be adequate to the full payment of principal as it falls due. Assuming that the bonds will all be at once sold, as we must in determining the validity of the act, it is obvious that as to all bonds maturing on and before January 2, 1961, the sinking fund does not "commence at a time after the incurring of the indebtedness of not more than a period of one-fourth of the time of maturity of such debt or liability." A simple calculation will show that this means that, as to $7,750,000 of the $10,000,000, the sinking fund does not "commence" at as early a date as is required in view of the constitutional provision. We can see no escape from the conclusion that the act must be held invalid for the reason that it does not measure up to the requirements of article 16 of the Constitution.

It has seemed to us quite possible that the specification of the date of "the second day of January, *1931*," in section 5 of the act, was inadvertently made, and that "the second day of January, *1921*," was really intended. To guard against any possible error in the printed volume of statutes, we obtained from the office of the secretary of state a certified copy of the enrolled bill as approved by the Governor, and find that the act is correctly set forth in the published statutes. It is hardly necessary to say that we have no power to make any change in the provisions of the act, and that we must accept it as truly expressing the intent of the Legislature.

The alternative writ of mandamus heretofore issued is discharged, and the proceeding dismissed.

We concur: SHAW, J.; OLNEY, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

47 Cal. App. 538

STRAUS v. EATON et al. (Civ. 2949.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920.)

1. Frauds, statute of ⊂=115(3)—Paper route lease signed only by lessor's wife held binding on lessee as the party to be charged.

Though a lease of a paper route was void as to the lessor under the statute because his name was signed only by his wife, lessee in a suit on his bond for performance thereof is, as to the contract, "the party to be charged" for newspapers furnished by lessor, and for which in the lease lessee promised to pay, and the contract as signed by lessee is binding on him, and furnishes a sufficient consideration for his bond for performance of the contract, and establishes the liability of both him and his sureties.

2. Husband and wife ⊂=23—Parol authorization to wife to assign claim under lease of newspaper route held valid.

Where the owner of a newspaper route orally authorized his wife to lease it to defendant, telling her that he could not attend to the business of defendant, and that she would have to look after the lease matter and attend to the business, such authority *held* broad enough to empower her to collect the amount due, and incidentally to assign the claim if necessary or convenient, in view of Civ. Code, § 954, providing that a thing in action arising out of an action may be transferred by the owner.

3. Pleading ⊂=218(3)—On demurrer plaintiff should have been required to specify number of articles furnished for which claim was made.

In an action for an amount due by the lessee of a newspaper route to lessor's assignee, where the complaint alleged that lessor furnished papers to lessee under the terms, and during the continuation of their agreement and upon the price therein stated, in a certain sum, when defendants demurred under ground of uncertainty as to the number of papers delivered, plaintiff should have been required to state such number.

4. Contracts ⊂=322(5)—Evidence held insufficient to sustain verdict for balance due under lease of newspaper route.

In an action for a balance due under a lease of a newspaper route, evidence as to the number of papers delivered and for which defendant was liable *held* not to sustain a finding for plaintiff in the amount found by the jury.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by B. A. Straus against J. B. Eaton and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. T. Kendrick, of Los Angeles, for appellants.

B. F. Woodard, of Los Angeles, and A. W. Hare, of Santa Cruz, for respondent.

CONREY, P. J. On the 1st day of August, 1914, one A. V. Dunsmoor was the owner of a newspaper route of the Los Angeles Daily Times, covering certain territory in Glendale, Cal. The complaint alleges that on that day Dunsmoor entered into an agreement with defendant Eaton. By the terms of that agreement, as shown in the complaint, Dunsmoor leased to Eaton the described territory of the city carrier service of the Los Angeles Times, for a period of two years from the date of the writing, August 1, 1914. This writing was signed by the defendant J. B. Eaton, and also was signed, "A. V. Dunsmoor, by Anna A. Dunsmoor," but was not signed by A. V. Dunsmoor. On the same day, defendant Eaton as principal and the other two defendants as sureties executed to A. V. Dunsmoor a bond in the sum of $1,000, conditioned for the performance by Eaton of the terms of said contract. In the alleged contract it was provided that Dunsmoor would furnish papers to Eaton, and that Eaton would pay Dunsmoor therefor at the rate of $1.40 per hundred copies. This action was brought to recover an unpaid balance alleged to be due for papers delivered to Eaton under that contract. Judgment was entered against the defendants in the sum of $924.35. On motion for new trial, the court ordered that the motion be granted, unless the plaintiff consented to a reduction of the amount of the judgment to the sum of $716.89. The plaintiff filed written consent to such reduction. The defendants appeal from the judgment.

[1] The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on account of sundry uncertainties in the complaint, including the point that the complaint did not show the number of copies of the newspaper that were received by Eaton from Dunsmoor for service on the route mentioned in the complaint. These demurrers were overruled. Appellants claim that the purported contract was invalid because it was not signed by A. V. Dunsmoor, nor by any person having written authorization from him. Civ. Code, § 1624, subd. 1, and section 2309. It is true that in the complaint it was not alleged that Anna A. Dunsmoor had received any authority in writing from A. V. Dunsmoor to enter into a contract for him or in his name. And at the trial of the action the only attempt on the part of the plaintiff to establish such agency is found in the testimony of Mrs. Dunsmoor that she is the wife of A. V. Dunsmoor, and that prior to August 1, 1914, he told her that he could not attend to the business with Eaton, and that she would have to look after the lease matter and attend to the business. But it is likewise a fact that the defendant Eaton received from

A. V. Dunsmoor a large number of the newspapers for which, in the written instrument signed by him, he had promised to pay, and that in this action Eaton is, as to the contract, "the party to be charged" thereon. Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. In that decision the court quoted Chitty on Contracts, where it was said that the reason why a party may sue on a contract although it may be void against him for want of his signature under the statute of frauds is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. Under the law as thus defined, we think that the contract, as signed by Eaton, was binding upon him. This being so, it furnished a sufficient consideration for the bond, and thus establishes the liability of the sureties on the bond, as well as that of their principal.

[2] Appellant contends also that the evidence is insufficient to support the finding that the claim was assigned by A. V. Dunsmoor to the plaintiff. Section 954, Civil Code, provides generally that a thing in action arising out of an obligation may be transferred by the owner. It is only in particular instances, as in claims for wages or salary, that the assignment must be in writing. Civ. Code, § 955. So A. V. Dunsmoor could have made an oral assignment of the indebtedness sued on herein. Therefore he could orally authorize an agent to make the assignment in his behalf. We think that the authorization of Mrs. Dunsmoor, as shown by her testimony, was broad enough to give her power to collect the amount due, and incidentally to assign the claim if in the exercise of her discretion as agent she found such assignment to be necessary or convenient.

[3] The complaint did not show the number of copies delivered. It was only alleged that Dunsmoor furnished papers to Eaton "under the terms of said agreement and during the continuance of said agreement, and upon the price therein stated, in the sum of $1,249.45"; that no part of said sum has been paid, except, etc. When the defendants demurred on the ground of uncertainty directed to this point, plaintiff should have been required to state the number of papers delivered. While this might be regarded as an unimportant error if there were no other objections to the judgment, we rule upon this point so that the error may be corrected if the matter shall be again presented in the court below.

[4] On the evidence introduced, and about which there is no dispute, the amount of the judgment is in excess of the amount due. It was stipulated that the items set out in the bill of particulars correctly show the number and character of the papers furnished. The total number shown, including 4,119 Sunday papers, is 55,326, which at the rate specified in the agreement would amount to $774.56. The complaint admits that $325.10 of the amount due for the papers furnished has been paid. It follows that the findings, with respect to the amount due and unpaid, are not sustained by the evidence. For that reason the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 517

Ex parte BAYLES. (Cr. 913.)

(District Court of Appeal, First District, Division 2, California. May 18, 1920.)

Larceny ⊜3(3)—Taking property to enforce lien not "grand larceny," though wrongful.

Where tenant in apartment house agreed that landlord would have a lien on unpaid charges, and also agreed that he would leave the apartment clean on vacating it or pay for cleaning it, action of landlord in seizing articles of tenant because apartment was not left clean could not be grand larceny under Pen. Code, § 484, defining that offense as the felonious stealing, taking, carrying, leading, or driving away the property of another without his consent, as whether it was clean was a disputed question which must be tried in civil action, in view of Civ. Code, §§ 3336, 3379, 3380, and Code Civ. Proc. §§ 509–512, 667, 870.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grand Larceny.]

Application of Hazel Bayles for a writ of habeas corpus to secure his release from Chief of Police of City and County of San Francisco. Petitioner discharged.

C. F. Adams, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Leo R. Friedman, Deputy Dist. Atty., both of San Francisco, for respondent.

LANGDON, P. J. This case comes to us upon a petition for a writ of habeas corpus. The petition alleges that the petitioner is and was at all times mentioned therein the owner and manager of a certain furnished apartment house in San Francisco; that the prosecuting witness, P. Tucker, rented an apartment in said house; that, at the request of said Tucker, petitioner furnished gas and electricity to him from February 16, 1920, to March 31, 1920; that at the time of renting said apartment Tucker signed a receipt, agreeing to the terms and conditions set forth on the back thereof, one of which was that the price of gas and electricity should be charged for in addition to the price agreed

upon as the rental of the apartment. Another one of the terms and conditions contained in said agreement attached to the petition is as follows:

"I, ..., also agree to leave the said apartment, the linen and bedding therein, clean and in good condition, or to pay the charges for cleaning and laundering the same; if said rent or any part thereof, or any charge hereunder, remain unpaid after the same becomes due, according to the terms hereof, or if any obligation hereunder remains unperformed," the owner may remove the personal property of the tenant, and after three months may sell the same at public auction, etc.

It is alleged in the petition that the apartment was vacated by Tucker on March 31, 1920, and was not left clean, and that petitioner was obliged to clean the same; that petitioner charged Tucker $3 for cleaning said apartment; also that a blanket and comforter used by Tucker in said apartment were left soiled, and a charge of $1.50 was made by petitioner for cleaning the same, which charges Tucker refused to pay; that the petitioner on said 31st day of March did take and carry away one sewing machine and one victrola of the value of $225, the property of said Tucker, and refused to permit said Tucker to have the same, and claimed to hold said property for a lien of $9.75, which amount included the charge for gas and electricity, breakage of chinaware, etc., cleaning of linens, blankets, etc., and the charge of $3 for cleaning of the apartment. Upon April 2, 1920, Tucker swore to a complaint in the police court of the city and county of San Francisco, charging petitioner with the crime of grand larceny. A warrant was issued upon said complaint, and on April 5th petitioner was arrested. The hearing came on regularly on April 21, 1920, and upon said hearing the judge of the police court made an order holding the defendant to answer to the superior court upon the charge. Petitioner contends that the testimony before the committing magistrate shows no reasonable, probable or lawful cause for holding her to answer to the superior court for the offense of grand larceny. The precise contention of petitioner is that the transcript of the testimony shows no felonious intent upon her part.

The testimony in the police court shows that Tucker offered to pay the charges for gas and electricity, breakage, etc., and refused to pay only the charges for cleaning the apartment. The first question presented, therefore, is whether or not petitioner had a lien upon the property for this charge. Section 1861a, Civil Code, as added by St. 1917, p. 1662, provides:

"Keepers of furnished apartment houses shall have a lien upon the baggage and other property of value belonging to their tenants or guests, which may be in such furnished apartment house, for the proper charges due from such tenants or guests for their accommodation, rent, services, meals and such extras as are furnished at their request. * * *"

It becomes unnecessary in this instance to decide whether the charge for cleaning the apartment and blankets at the end of the tenancy was a "proper" charge within the meaning of the statute, for the reason that Tucker himself agreed to what should be proper charges against him in his renting agreement. As before stated, in this agreement he undertook to leave the apartment "clean" upon vacating it, or to pay for cleaning the same; and he agreed that the owner should have a lien upon his personal property for all unpaid charges under the agreement between them. Whether or not the apartment was "clean" when it was vacated, was a disputed matter, as shown by the testimony. "Clean" is a difficult word to define absolutely; it is a relative term. Its meaning to its users varies with the standards of such users; and it has a different significance in its relation to different objects. Mr. Tucker contends the apartment was left as "clean" as it was when he received it. Mrs. Bayles contends that her apartments have a reputation for being always "absolutely sanitary and immaculate," and that the apartment was not "clean" according to that standard, but that the services of a man were required for three days to clean the kitchen alone. However, this delicate question of fact does not fall to our lot for determination. If Mrs. Bayles was entitled to hold these articles until she was paid the price of cleaning the apartment, provided said apartment was not sufficiently cleaned before being vacated, then a dispute over the condition of the apartment would not so change the petitioner's legal position as to make her guilty of grand larceny in holding possession of the property under a claim of lien which would exist if she proved her contention about the uncleanliness of the apartment. For, even though the standard of cleanliness exacted by the petitioner should be found by the jury to be an unreasonable standard, and not the standard contemplated by the agreement between the parties, yet we think petitioner would not be guilty of grand larceny. The record discloses no evil or felonious intent upon the part of the petitioner; she was merely seeking to enforce her civil rights as she believed them to exist. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Section 484, Pen. Code. Every taking by one person of the personal property of another without his consent is not larceny. Felonious intent is of the essence of the crime of larceny. People v. Devine, 95 Cal. 227, 30 Pac. 378. If a jury should determine that the apartment was clean according to the standard contemplated by the parties at the time they made their agreement, at the time petitioner

took possession of the goods, and that therefore no money was due petitioner for cleaning the same, Mr. Tucker could be amply compensated in damages for the wrongful detention of his property. Section 667, Code Civ. Proc., and section 3336, Civ. Code. But this question must be tried out in a civil action, and not in a criminal proceeding. Section 3379, Civ. Code; section 3380, Civ. Code; sections 870, 509, 510, 511, and 512, Code Civ. Proc.

The petitioner is discharged.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 568

WILLIAMS v. A. R. G. BUS CO. (Civ. 3439.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920.)

1. Damages ⟸131(4)—$1,500 not excessive for shock and injuries from automobile accident.

$1,500 *held* not excessive damages for one injured by automobile bus overturning, where his back was wrenched and his nervous system shocked and he was unable to resume his work for six weeks.

2. Appeal and error ⟸1004(1)—Grounds for setting award aside as excessive stated.

The power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law or is such as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

3. Appeal and error ⟸295—Excessiveness of damages reviewable only if raised by motion for new trial.

If defendant appellant in personal injury action considered verdict for plaintiff the result of passion or prejudice, its remedy lay first in a motion for new trial addressed to the trial court; it being too late to raise the point for the first time on appeal.

4. Evidence ⟸127(3)—Complaints of pain admissible.

In a personal injury action, testimony by the wife and mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering from his injuries *held* admissible.

Appeal from Superior Court, San Bernardino County; Howard A. Peairs, Judge.

Action by Archie G. Williams against the A. R. G. Bus Company. From judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Ralph E. Swing, of San Bernardino, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it in the sum of $1,500, recovered by plaintiff as damages for personal injuries. The plaintiff was riding as a passenger in an automobile bus owned and operated by the defendant between Ontario and Riverside, Cal., when the automobile overturned.

[1, 2] The first point raised by the defendant is that the damages are excessive. The testimony shows that the plaintiff received a cut about an inch deep in the hip, which required a closure of the wound with stitches; that his back was wrenched and strained; that his leg and arm were bruised, and that his body was rendered stiff and sore, and his nervous system shocked by reason of his experience; that at the time of the trial he was still suffering from this nervous shock which made him constantly apprehensive in the performance of his work of driving an automobile. He spent nine days in a hospital, and was confined to his bed at his home for two weeks additional. He was unable to resume his work for six weeks, and his clothing, including an overcoat and suit, were ruined. He also incurred hospital and doctors' bills. Under such circumstances, we think the verdict of $1,500 is not so grossly excessive as to call for the interference of an appellate tribunal. It has been repeatedly held in this state that the power of an appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Hale v. San Bernardino, etc., Co., 156 Cal. 716, 106 Pac. 83; Wheaton v. North Beach, etc., Co., 36 Cal. 591; Varcoe v. Lee, (Sup.) 181 Pac. 223.

In the case of Bond v. United Railroads, supra, it is said:

"The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. [Citing cases.] Practically, the trial court must bear the whole responsibility in every case."

[3] Furthermore, it appears that the appellant made no motion for a new trial. If it considered the verdict the result of passion or prejudice, or a disregard of the instruc-

tions of the trial court, its remedy lay first in a motion for a new trial addressed to the trial court. It is said in the case of Chiarini v. Rochon, 1 Cal. Unrep. 540, that, if this matter is not brought before the attention of the trial court in a motion for new trial, it is too late to raise the point for the first time on appeal. It is stated in Bond v. United Railroads, supra:

"If a motion for a new trial on this ground is properly and regularly interposed, that court would have power to reduce or set aside the verdict. In the absence of such motion, it should have granted the plaintiff's motion to render judgment for $4,500, unless the amount was so obviously the result of passion, prejudice, or a disregard of the instructions as to justify the court in ordering a new trial of its own motion. As it did not do so, it is to be presumed that there was no cause for such action."

[4] Appellant also complains of the admission of testimony by the wife and mother of plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering. This testimony was properly admitted under a well-recognized rule of evidence. 1 Greenleaf on Evidence (16th Ed.) § 162a et seq., p. 254; Green v. Pac. Lumber Co., 130 Cal. 435, 62 Pac. 747; Evarts v. Santa Barbara, etc., Ry. Co., 3 Cal. App. 712, 86 Pac. 830; Lange v. Schoettler, 115 Cal. 388, 393, 47 Pac. 139.

There are no other assignments of error which require discussion.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 594

PIONEER TRUCK CO. v. HAWLEY.
(Civ. 2784.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

Appeal and error ⊂=931(7)—Assumed on appeal in replevin that defendant's possession was within issues, though not pleaded.

On appeal from a judgment in favor of plaintiff in an action to recover possession of personal property, it must be presumed, where no demurrer was filed in the case and court made findings as to defendant's possession, that the fact of defendant's possession at the commencement of the action was at the trial treated as a fact within the issues and properly determined by the court, although not properly pleaded.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Pioneer Truck Company against H. W. Hawley. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 179 Pac. 447.

Jensen & Jensen, of Los Angeles, for appellant.

Warren E. Libby, of San Diego, for respondent.

CONREY, P. J. The plaintiff brought this action to recover judgment for possession of a certain described auto truck, or the value thereof if a return cannot be had, and for damages. Judgment having been entered in favor of the plaintiff, the defendant appeals therefrom, and the case is brought here upon the judgment roll alone.

Appellant claims that it nowhere appears, either from the complaint or the findings, that appellant ever had possession of the property sought to be recovered, and that for that reason the judgment should be reversed. He relies upon the rule that in an action of this kind the plaintiff cannot recover without alleging and proving that at the time of commencement of the action the property was in possession of the defendant. Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414.

In the case at bar the only allegations touching the defendant are that, at a stated time a few days prior to the commencement of this action, the plaintiff demanded possession of said property from the defendant, and that defendant has failed, refused, and neglected to deliver the same to the plaintiff; "that plaintiff is damaged by the unlawful holding of said property in the sum of $25 for each and every day the same has been withheld since said 17th day of January," etc. The answer of the defendant was equally noncommittal and silent on the subject of defendant's possession of the truck, but denied the allegations above noted. The findings of fact affirm the demand by plaintiff, the failure and refusal of defendant to deliver the property to plaintiff, and declare that the plaintiff is damaged in a stated sum by the detention of said truck. In the "conclusions of law" it was further stated that the defendant "withholds possession thereof unlawfully from said plaintiff."

If the complaint does not wholly fail to touch upon the subject of possession of the property by defendant at the commencement of the action, it must at any rate be admitted that the implication of such possession is very defectively conveyed. Respondent contends, however, that since no demurrer was filed in the case, and since the court made findings as above stated, and it is not made to appear that any question was raised in the court below concerning the sufficiency of the complaint, this court must now assume, in favor of the findings and judg-

ment, that the fact of defendant's possession of the truck at the commencement of the action was at the trial treated as a fact within the issues and properly to be determined by the court. On this ground we think that the judgment should be sustained. In Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 324, et seq., 147 Pac. 90, this subject is fully discussed. There it was conceded that the complaint failed to show a certain fact without which the action would not lie; nevertheless it appeared that the case had been tried and determined upon the theory that the issue was presented in the case. The court held that a defendant should not be permitted to stand by and, without objection, allow an issue to be tried as though properly presented by the pleadings, and on appeal escape the consequences by claiming that the complaint failed to present such issue. The difference between that case and this is that there the facts as to the conduct of the trial and the manner in which the evidence was received were before the Court of Appeal, whereas in the present case we have only the judgment roll. But in Gervaise v. Brookins, 156 Cal. 110, 103 Pac. 332, the Supreme Court, upon a consideration of the pleadings and findings alone, determined that it appeared with reasonable certainty that the case was tried upon the theory that the answer put in issue the value of certain property, although technically that issue had not been properly presented by the pleadings. That being so, the court denied to the appellant the right to have the point considered that there was no such issue. The case of Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60, was cited wherein "the presence in the record of a finding of the fact which it was claimed was not in issue was considered a sufficient showing that the cause was tried upon the theory that the fact was in issue."

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 496

In re CRUICKSHANK. (Cr. 711.)

(District Court of Appeal, Second District, Division 1, California. May 17, 1920.)

1. Attorney and client ⊂=57 — Appellate court in disbarment proceedings concluded by finding on conflicting evidence.

In disbarment proceedings, regardless of the rule that guilt must be shown beyond a reasonable doubt, appellate court cannot disturb finding of trial court based on conflicting evidence that attorney should be disbarred for fraudulent use of money obtained to be used for specified purpose as an offense involving "moral turpitude," which is anything done contrary to justice or honesty and with the purpose of defrauding another regardless of whether such acts rise to dignity of a crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

2. Attorney and client ⊂=53(2)—Code provision as to proof of false pretenses not applicable in disbarment proceedings.

Pen. Code, § 1110, specifying the character of proof required in order to convict one of false pretenses, is not applicable to disbarment proceeding against attorney who obtained money by fraudulent pretenses as to use to which it would be put.

3. Attorney and client ⊂=46 — Attorney may be disbarred for defrauding his partner.

Conceding that partnership existed between attorney and another whom the attorney defrauded by acts constituting moral turpitude, such fact would be no defense to disbarment therefor.

4. Attorney and client ⊂=55—Refusal of new trial not error where affidavits showed omissions to get evidence in.

An order disbarring an attorney cannot be reversed for refusal of new trial on affidavits showing merely that certain things were omitted to be done at trial in securing evidence to exonerate respondent conceding that counsel were inefficient.

5. Attorney and client ⊂=57 — Reasons for disbarment no part of record on appeal.

In disbarment proceedings, reasons for disbarring stated by the judge are no part of judgment and have no place in the record on appeal.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Vernon Cruickshank, an attorney and counselor, was disbarred, and he appeals. Affirmed.

Henry G. Bodkin and Ford & Bodkin, all of Los Angeles, for appellant.

Frank F. Oster, of Los Angeles (Vernon M. Brydolf, of Los Angeles, of counsel), for respondent.

SHAW, J. The trial of defendant, an attorney at law, upon an accusation filed by the Los Angeles Bar Association charging him with the commission of acts involving moral turpitude, resulted in a judgment of disbarment, from which, and an order overruling his motion for a new trial, he appeals.

The gist of the accusation is that appellant obtained from Henry Goetz the sum of $10,000 upon the representation that the same would not be used otherwise than in the construction and equipment of a certain plant and patented process for extracting ore from the black sands of certain lands located near Watsonville, Cal., wherein he and one J. R.

Ghiselin owned a controlling interest; that, instead of using the money for such purpose, he divided the same between himself and Ghiselin, both of whom appropriated the money to their own uses. That such was the theory adopted by the trial court conclusively appears from this statement made in the course of the trial, wherein the judge said:

"The only issue is what this money was going to be used for. All they claim is that they said the money was not used for what Mr. Cruickshank said it was going to be used. * * * That is all I am going to try. * * * The question is whether he (Cruickshank) represented that it would be used for a certain purpose and did not use it for that purpose. That is all there is, and that is all the complaint states."

While the evidence is to some extent conflicting, that of Goetz, which the court accepted as true, tends to show the following facts: That he and appellant had for many years been intimately acquainted and the latter had from time to time acted as his attorney in certain matters. In September, 1917, he, at the request of appellant, called at the latter's office, when appellant told him he had a proposition that was going to make lots of money; that he, with Ghiselin, was interested to the extent of 70 per cent. in a patented process to separate iron ore from black sand upon which they had an option, and needed $10,000 towards putting up the plant. Goetz said he did not want to gamble, but could let him have the money, provided his banker approved, to which Mr. Ghiselin, who was present, replied: "We are not going to give our secrets away." Whereupon Goetz said, "That lets me out," to which a Mrs. Thorkildsen, who was present, replied, "Well, all right, I will put up the money." Thereupon Goetz left the office, followed by appellant, who expressed his friendship for the former and the fact that there were tremendous profits in the proposition, and that, notwithstanding Mrs. Thorkildsen was going to put up $10,000, which he thought sufficient for the purpose, nevertheless they should have the additional money on hand for use as an emergency fund, since other money might be needed to complete the plant, and its equipment; and hence it was desired that they be prepared with money for such purpose, and that, if the money so advanced by Mrs. Thorkildsen was insufficient for the purpose, then and only in such case would his money be used therefor. Meanwhile he was assured the money was to be deposited and kept in bank. Goetz visited the property in company with appellant and Ghiselin, at which time he was cautioned by appellant and Ghiselin not to talk about the business in the presence of others, and by their acts and representations he was favorably impressed with the merits of the proposition. Upon returning to Los Angeles, Goetz was shown certain photographs of the proposed plant, tending to convince him that the plant could be erected for the money obtained from Mrs. Thorkildsen, and on September 21, 1917, when Goetz gave the check, appellant, in his office, said to him:

"Henry, we don't really need your money. I have money in the safe, $10,000, but I will not use that money (represented by the Goetz check) for any other purpose than what it is intended for."

Whereupon Ghiselin got up and pulled out the drawer in the safe and showed him the money. In delivering the check, Goetz said to appellant that he did not want Ghiselin to have anything to do with it, and stated:

"Now, Vernon, here is my check, hoping and trusting that everything you told me is nothing but the truth."

He had full confidence in the appellant and advanced the money to him, believing that it would be kept in the bank at Watsonville and only used in case the money obtained from Mrs. Thorkildsen was insufficient to erect the plant, in which case the money so advanced would be used towards such purpose; otherwise returned to him. Goetz obtained the money by borrowing it from his bank, appellant agreeing to reimburse him for such rate of interest as he was compelled to pay therefor, and voluntarily, it seems, proposed giving him a contract for a 5 per cent. interest in that of appellant and Ghiselin, similar to one which appellant said they were giving to Mrs. Thorkildsen. This receipt recited that Goetz had loaned them $10,000, in consideration of which they conveyed to him a 5 per cent. interest in the option therein described and in certain alleged patent rights in the machine to separate iron and steel from the black sands therein mentioned. No part of the money so advanced went into the construction of any plant or process, but upon receiving it appellant gave one-half thereof to Ghiselin, and the former used a part of his share in a trip to New York, made for the purpose, as claimed by him, of financing the black-sand proposition. There is much other evidence touching the question, but that referred to tends to show that appellant and Ghiselin engaged in a dishonest scheme to obtain the $10,000 from Goetz and did not intend to use it towards the completion of the proposed plant, but did at the time intend to appropriate it to their own use, and thus by deceiving Goetz he was fraudulently induced to advance the money, no part of which, other than $1,600, did he collect.

Appellant insists that a proceeding for disbarment is criminal in character, and therefore the proof, as in the trial of a criminal case, must show the defendant to be guilty as charged beyond a reasonable doubt, and insists that, notwithstanding the testimony of Goetz, it does not, when considered with tes-

timony offered by defendant, establish a case justifying his disbarment, in support of which he cites a number of authorities from other jurisdictions.

[1] What was said by the Supreme Court, in answering a like contention (In re Morton, 179 Cal. 510, 177 Pac. 453), is appropriate here:

"Basing his contention upon the fact that a proceeding for the disbarment of an attorney is in the nature of a criminal proceeding (In re Alameda County Bar Ass'n, 35 Cal. App. 534, 170 Pac. 432), counsel insists that, to warrant disbarment, the evidence, like that required to justify a verdict of guilty in a criminal case, must be clear, positive, and such as to establish both the motive and commission of the act charged beyond a reasonable doubt. In support of this proposition he cites a number of authorities from other jurisdictions, an examination of which, however, shows that none of them involved cases on appeal where the court was called upon to review the sufficiency of the evidence in support of the finding, but what was said therein related to proceedings of disbarment over which the court, in some of the cases having recourse to a referee in the taking of the evidence, assumed original jurisdiction, acting as a trial court, as In re Houghton, 67 Cal. 511, 8 Pac. 52. None of them constituted authority for appellant's claim, when applied to a court charged with the duty of reviewing the testimony, but do announce the rule that in such cases the accused should not be convicted unless the trial court is convinced, by clear and satisfactory evidence, or, as said in some cases, beyond a reasonable doubt, of his guilt. However this may be, this court, in a like case involving a like question (Matter of Danford, 157 Cal. 425, 108 Pac. 322), has, in effect, held that in disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but that such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had."

Hence, since the trial court in the exercise of its function believed the testimony of Goetz, and, though conceding its denial on the part of defendant, we cannot say the evidence was insufficient to justify the implied finding of the court that defendant was guilty of acts constituting moral turpitude, which is anything done contrary to justice or honesty and with the purpose of defrauding another, regardless of whether such acts rise to the dignity of a crime. In re Disbarment of Coffey, 123 Cal. 522, 56 Pac. 448; In re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856. On the contrary we hold appellant's contention in this regard to be without merit.

[2] Neither is there any merit in the contention that section 1110 of the Penal Code, which specifies the character of proof required in order to convict one of false pretenses, is applicable to a case of this character.

[3] Another argument made by appellant is that there existed between appellant, Goetz, and Ghiselin the relationship of copartners. This is based upon the fact that appellant and Ghiselin conveyed to Goetz 5 per cent. interest in their option. We are unable to perceive any merit in the contention. But conceding the existence of the copartnership, such fact would not constitute any defense to a proceeding brought against an attorney for acts constituting moral turpitude in defrauding his partner.

[4] In support of a motion for a new trial made by defendant, he filed an affidavit wherein it is alleged that the court abused its discretion in (a) denying a few minutes continuance of the case to allow appellant to secure the evidence of the president of the Bar Association as to the alleged fact that Goetz had exonerated appellant from any misconduct; (b) that an affidavit by complainant exonerating appellant was in the possession of the secretary of the Bar Association; (c) that after the alleged misconduct of appellant he acted as attorney for Goetz; (d) that prior to the disbarment proceeding Goetz sued appellant and Ghiselin and in his complaint and testimony offered at the trial made statements inconsistent with his testimony given in this proceeding; (e) that the disbarment citation was returnable October 9, 1918, and the case was tried October 15, 1918, over the objection of appellant, during which time appellant's counsel was sick and appellant unskilled in the trial of a lawsuit and therefore unable to present a proper defense. As to all of these, and other like contentions, a sufficient answer thereto is that the record discloses no such applications made during the trial of the case, and no facts are stated in the affidavit showing the discovery of any new evidence which was not known and accessible to defendant at the time of the trial. There is nothing in the record showing that defendant, when the case was set down for trial, made any objection thereto upon the ground that the time was too short for him to prepare his defense, or that he asked for continuance in order to produce the evidence of the president of the Bar Association. On the contrary, the effect of the affidavit is to merely show that defendant omitted the doing of things which he thereafter felt that he should have done in protecting his interest at the trial. It may be, as suggested by appellant, that such omissions were due to the inefficiency of counsel then appearing for him; but the court cannot, in the absence of a duly authenticated record showing error, reverse an order upon such ground.

At the close of the trial the court, in rendering its judgment, said:

"I realize the seriousness of disbarring an attorney, but the accused is not doing a very substantial amount of law practice, according to his own statements, and there would not be much damage done by disbarring him."

[5] It has been repeatedly held that the reasons stated by a judge in deciding a case are no part of the judgment and have no place in the record, and hence present nothing to be considered in reviewing a judgment on appeal therefrom. However, we may say that in arriving at its decision we cannot believe the trial court was in the slightest degree influenced by the limited extent of defendant's law practice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 485

VAUGHN v. FEY. (Civ. 3350.)

(District Court of Appeal, First District, Division 2, California. May 14, 1920. Rehearing Denied June 11, 1920. Hearing Denied by Supreme Court July 12, 1920.)

1. Cancellation of instruments ⊜1—Suit for "rescission" held synonymous with suit for "annulment."

A suit to "rescind" a contract cannot be differentiated from a suit to "annul" the contract; the two words being used interchangeably.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Annul; Rescission.]

2. Contracts ⊜260—Entire contract may be rescinded for partial failure of consideration.

Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under Civ. Code, § 1689, providing that plaintiff offers to restore to defendants everything of value received under the contract in view of section 1691.

3. Contracts ⊜266(1)—Plaintiff held entitled to rescission only upon return of value received.

Where plaintiff has entered into a contract with defendant whereby defendant was to advance money to pay for time and materials for the building of a model of an invention for automatically changing phonograph needles and for a patent thereon, plaintiff *held* not entitled to rescind on the ground of partial breach without returning or offering to return everything of value received by him.

4. Contracts ⊜266(1) — Personal receipt of consideration not essential to duty to return on rescission.

In a suit to rescind a contract for the construction of a model and procurement of patent on a device for changing phonograph needles because of partial breach thereof by defendant, that part of the money paid by defendant had not been paid directly to plaintiff, but to the Patent Office and to vendors of materials, did not excuse plaintiff from his obligation to return consideration paid for his benefit.

Appeal from Superior Court, City and County of San Francisco; J. W. Mahon, Judge.

Suit by J. L. Vaughn against Charles Fey to annul a contract. From a judgment for plaintiff, defendant appeals. Reversed.

Maurice R. Carey, of San Francisco, for appellant.

Devoto, Richardson & Devoto, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment annulling a contract which had been entered into between the parties hereto. J. L. Vaughn, being the inventor of certain improvements on an automatic phonograph, embodying in particular a new invention for automatically changing the steel needle used for producing the sound from the records, desired to perfect and patent this device, and for this purpose entered into a contract, on June 22, 1916, with Charles Fey, by which contract Fey agreed to advance money to pay for all of the materials required for the building of a model and to furnish shoproom for the building of the same, and to pay to Vaughn $20 each week for a period of 90 days from the date of the agreement, to cover the time Vaughn would be engaged in working upon the model, and also to advance a sufficient sum to cover the cost of securing a patent in the United States upon the said invention, to be applied for when the working model was completed and perfected. In consideration of this agreement by Fey, Vaughn agreed to transfer to Fey a one-half interest in any patent which he might obtain in the United States upon his said invention.

This agreement is set out in full in the complaint herein, and it is alleged that the defendant failed and refused to advance the money necessary for the patent. There is no allegation of an offer to restore what the plaintiff received from the defendant under the contract, and the prayer of the complaint is that the contract between the parties be annulled.

The defendant's demurrer was overruled, and he answered, denying a breach of said contract on his part, and pleading full performance thereof. He also set up as an affirmative defense that the plaintiff had not returned nor offered to return the consideration received from the defendant under the contract. This latter allegation was admitted by the plaintiff upon the trial, and no evidence was offered by him to excuse his failure to place the defendant in statu quo. It was further admitted by the plaintiff at the trial that the defendant had supplied the workroom, tools, and equipment for the building of the model, and had expended the sum of $95 for materials, equipment, etc.,

used in the construction of the same; that he had paid to the plaintiff $100 in weekly payments of $20 each during the period plaintiff was engaged upon the work; that he had advanced the sum of $230 for the purpose of paying the expense of securing a patent upon the said invention; that thereafter the Patent Office refused to issue one patent covering all the elements of the invention, but insisted upon a "divisional" patent; and that plaintiff, without consultation with defendant, then directed that the money advanced by the defendant be applied to obtaining a patent upon the main device, which patent was duly issued. Plaintiff then asked the defendant for an additional $85 to cover the cost of a separate patent upon the device for changing the steel needle. Defendant refused to advance this last-mentioned sum, and the controversy arises over this refusal; it being admitted by the plaintiff that in all other particulars the defendant fully kept and performed all of his obligations under the contract.

The defendant and appellant in support of his allegation of full performance urges that the contract calls for only one patent, and that in advancing the money to secure one patent defendant fulfilled his part of the contract. However that may be, the admitted facts show that the defendant has expended the sum of $425, in addition to furnishing shoproom, tools, and equipment for the completion of the model, and the testimony of the defendant is that he expended a larger amount.

Upon these facts, the court decreed an annulment or rescission of the contract, and made no provision in the decree for a return to the defendant of the money which he had parted with under the contract.

[1] The respondent's position is not well taken in seeking to differentiate a suit for the annulment of this contract from a suit for a rescission of a contract. The two words are used interchangeably. Haines v. Stilwell, 5 Cal. Unrep. Cas. 27, 40 Pac. 332; Words and Phases, vol. 7, p. 6139; Bouvier's Law Dictionary; 1 Black on Rescission and Cancellation, p. 1; Webster's New International Dictionary.

[2] We have, then, a suit in equity for the rescission of a contract. Without going into the question of whether or not the plaintiff it entitled under the contract to demand from the defendant money to defray the expenses of obtaining a second patent, and, conceding for the purpose of a decision of this case, that he was so entitled, and that the defendant failed in that particular to fulfill his contract, it is obvious that defendant's breach constituted only a partial failure of consideration. Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under section 1689, Civil Code. Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305. But it is also stated in said last-mentioned case that the pleadings contained an allegation that everything of value received under the contract had been restored by the party rescinding to the other party. Sterling v. Gregory, supra, 149 Cal. at page 118, 85 Pac. 305. It is said in the case of Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 683,[1] that in case of rescission each party to the contract must restore to the other everything of value received and pay for labor performed for him under the contract, no matter at whose instance the rescission is made. The decision cites, upon this point, numerous California cases.

In the case of Bohall v. Diller, 41 Cal. 532, at pages 535 and 536, it is said:

"When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract. * * * The plaintiff has failed to allege a repayment or tender of the amount paid by the defendant, at the execution of the contract. He therefore cannot proceed to recover the possession of the premises on the ground of the rescission of the contract."

The language of these various decisions but declares the law as announced in section 1691, Civil Code, which expressly provides that rescission, when not accomplished by consent, can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules:

"* * * 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

See, also, Hammond v. Wallace, 85 Cal. 522, 531, 532, 24 Pac. 837, 20 Am. St. Rep. 239; Buena Vista Fruit & V. Co. v. Tuohy, 107 Cal. 243, 255, 40 Pac. 386; Hite v. Merc. Trust Co., 156 Cal. 765, 767, 106 Pac. 102; Walsh v. Standart, 174 Cal. 807, 811, 164 Pac. 795; Maginess v. West. Securities Corp., 38 Cal. App. 56, 175 Pac. 277.

[3] It seems plain, therefore, conceding that the defendant has partially breached his contract, and that this breach entitles the plaintiff to rescind the same, that nevertheless plaintiff may only do so upon returning to the defendant everything of value received by plaintiff from the defendant.

[4] It is idle to urge that, because a part of the money was not paid directly to the plaintiff, but to the Patent Office for the patent, and to the vendors of materials for supplies to be used in completing the model, the plaintiff, therefore, has received nothing which he is obligated to return. The money was paid under the contract for the benefit

[1] 34 Pac. 497.

of the plaintiff and to enable him to perfect his invention, and he accepted the benefits thereof in the way of materials to complete his model and letters patent upon his invention. The situation is not different in principle from what it would have been had the money been paid to plaintiff personally.

The judgment is reversed.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 541

IMPERIAL VALLEY AUTO CO. v. TONEY. (Civ. 3099.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920.)

Replevin ⊂⊃103(4)—Judgment for defendant for affirmative relief not sustained by answer.

In action for possession of personalty, in absence of claim in answer for return of property, etc., judgment granting defendant affirmative relief of such return or value cannot be sustained save as a judgment for costs, under Code Civ. Proc. §§ 627, 667.

Appeal from Superior Court, Imperial County; R. Y. Williams, Judge.

Action by the Imperial Valley Auto Company, a copartnership, against Minnie May Toney, administratrix of the estate of C. E. Toney, deceased, substituted for J. C. Harcleroad, doing business as J. M. Harcleroad & Son. From judgment for defendant, plaintiff appeals. Affirmed as modified.

Chas. L. Childers, of El Centro, for appellant.

James W. Glassford, of El Centro, for respondent.

CONREY P. J. Action brought by plaintiff to recover possession of personal property. Judgment for defendant, and the plaintiff appeals therefrom. The judgment roll is the only record before us.

The judgment, in terms, is that the defendant recover from plaintiff the said personal property, or, if delivery thereof cannot be had, then the defendant have judgment in a stated sum (found to be the value of the property, less a certain allowed credit), and for costs.

The answer filed by defendant did not claim a return of the property. Indeed, there is nothing in the pleadings or findings to indicate that the property was delivered to the plaintiff, or was not all the time held in possession of the defendant. Under such circumstances, that part of the judgment which grants to the defendant affirmative relief cannot be sustained, except as a judgment for costs. Code Civ. Proc. §§ 627 and 667; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772.

It is ordered that the judgment be modified by striking therefrom that part thereof which provides that defendant recover the described automobile, or, in case delivery thereof cannot be had, that defendant have and recover the sum of $405.90.

As so modified, the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 620

BORGMEYER v. SOLOMON. (Civ. 2776.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Contracts ⊂⊃175(3) — Evidence held to show unconditional contract with architect.

In an action by an architect for services, evidence *held* sufficient to sustain the trial court's finding in favor of plaintiff of an unconditional contract.

2. Trial ⊂⊃397(1)—Specific findings not necessary as to affirmative evidentiary matters alleged in answer.

In architect's action for service, where defendant's answer did not set up a conditional contract, or make the defense that plaintiff architect had not complied with the conditions required of him, the affirmative matters alleged were merely of an evidentiary nature in connection with defendant's denial that he contracted with plaintiff architect, and as to such matters specific findings were not necessary.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by E. G. Borgmeyer against J. B. Solomon. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 178 Pac. 544.

Haas & Dunnigan, of Los Angeles, for appellant.

Philip Cohen, of Los Angeles (Walter F. McEntire, of Los Angeles, of counsel), for respondent.

CONREY, P. J. This action was brought by the plaintiff to recover fees alleged to be due to him from the defendant on a contract for professional services which were rendered by the plaintiff as an architect. It was found by the court that the defendant employed the plaintiff as such architect to prepare plans and specifications for the erection of a hotel building at a described location in the city of Los Angeles, and agreed to pay therefor the sum of $900, which sum was to cover the cost of superintending the erection and construction of the building; also, that the plaintiff prepared plans and specifica-

tions, as required by the defendant, and has at all times been ready, willing, and able to perform the services of superintending the erection and construction of the said building, but the defendant has refused and still refuses to erect and construct said hotel building in accordance with the plans and specifications prepared by the plaintiff, and has refused to pay, etc. Judgment was rendered in favor of the plaintiff, and the defendant appeals therefrom.

Appellant contends that the findings above mentioned are not sustained by the evidence. In support of his contention that the evidence is not sufficient to establish the contract of employment on the terms stated in the complaint and found by the court, appellant insists that the evidence without conflict shows that the contract of employment was conditioned upon plaintiff procuring a tenant for the contemplated building, acceptable to the defendant. While an examination of the record shows that there was testimony given by the defendant and others tending to prove that the contract of employment was conditional, as above stated, yet such evidence was not without conflict. On the contrary, there is evidence strongly tending to show that the contract was free from such condition. This evidence showed, among other things, that the plaintiff was introduced to the defendant by one Seigel, a contractor, and that the plaintiff told the defendant that, if defendant was willing to take a little less rent than he was proposing to demand, plaintiff was sure he could get him a tenant; that very promptly thereafter the plaintiff, through an agent, obtained the name of a prospective tenant and informed defendant that he had a tenant for the hotel; that this tenant, one Mrs. Verhaar, is the same person who afterwards became the tenant of defendant's building after it had been constructed by the defendant on plans prepared by an architect other than the plaintiff; that, shortly after plaintiff's first conversation with defendant, an interview took place between plaintiff and defendant and Mrs. Verhaar, at which time Mrs. Verhaar stated that she would take the house if the plans suited her, but would not sign the agreement until the plans were completed; that the plaintiff prepared the plans and completed them about four weeks after the time of said interview at which Mrs. Verhaar was present; that during these four weeks the defendant and the contractor were present at the plaintiff's office many times, examining the plans and making suggestions concerning the same; that before the plans were prepared the defendant directed the plaintiff to go ahead with their preparation and promised to pay fees amounting to 3 per cent. of the cost of the proposed building, such cost being estimated at $30,000. The testimony of the witnesses indicates that in their preliminary negotiations the defendant was influenced by the prospect that the plaintiff might aid him in procuring a tenant for the proposed building and that such probable tenant had been found. But this testimony was not compelling upon the court to find that the procuring of such tenant entered into and became a part of the actual employment of the architect to prepare the plans and specifications. After those plans and specifications had been completed, the defendant refused to proceed according to those plans and specifications, or to avail himself further of the services of the plaintiff. No reason or excuse for such refusal appears in the record; although it does appear that the defendant, with the assistance of other architects, erected a hotel building at the proposed location and that Mrs. Verhaar became the tenant thereof.

[1] Being satisfied with the court's finding of an unconditional contract, we need not discuss the second point of appellant, which is that, assuming that plaintiff was bound to procure a tenant, he did not comply with that condition.

[2] Finally, appellant contends that the court "failed to find on the material issue raised by the answer that the contract was a conditional one," and that the judgment should be reversed, for that reason. The affirmative matters stated in the answer and to which this argument is directed are, in fact, not sufficient to present the defense that there was a conditional contract. On the contrary, those matters were pleaded only as a part of the defense that there was no contract of employment whatever. The affirmative matters in question stated that the plaintiff made a proposition to the defendant concerning a lease to be made to a prospective tenant to be produced by the plaintiff and proposed that plaintiff act as architect in making the plans and superintending the construction of such building; and then alleges that no agreement was made with the plaintiff by the defendant for the drafting of plans or specifications of said building, or the supervision of the construction of the same, and that such plans as the plaintiff did prepare were prepared wholly and solely at his own instance, and not on request of defendant or pursuant to any employment by the defendant. It thus appears that the answer did not set up a conditional contract or make the defense that the plaintiff had not complied with the conditions required of him thereby. This being so, the affirmative matters stated were merely of an evidentiary nature in connection with defendant's denial that he made any contract with the plaintiff. As to matters so pleaded in the answer, specific findings were not necessary.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 749

PEOPLE v. RICCOMINI et al. (Cr. 502.)

(District Court of Appeal, Third District, California. May 26, 1920.)

Criminal law ⊂=1130(4)—Appeal ordered submitted on record where no brief filed in time.

Where no brief has been filed within the required time, and where no extension of time has been requested or granted, the case will be ordered submitted upon the record.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Victor Riccomini and another were convicted of having entered a store with intent to commit larceny, and they appeal. Affirmed.

Roy Lewis and B. E. Gaddis, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The clerk's and reporter's transcripts in this case were filed in this court on December 27, 1919. The case was regularly placed on the April, 1920, calendar, and, when called, counsel for appellants requested and were granted 30 days' time in which to file an opening brief. Such time having expired without the filing of a brief, and no extension of time having been requested or granted, the case is now ordered submitted upon the record.

By an information filed in the superior court by the district attorney of Sacramento county, defendants were charged with having, in September, 1919, entered the store of O. Morelli, in the city of Sacramento, with intent to commit the crime of larceny. Defendants were jointly tried, the jury found them guilty, and they were sentenced by the court to imprisonment in the state prison.

We have carefully examined the record, and are satisfied that there was sufficient evidence to justify the verdict of guilty. The law was correctly stated to the jury by the court, and we discover in the record no error prejudicial to the defendants.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.: BURNETT, J.

47 Cal. App. 558

SEABOARD NAT. BANK OF SAN FRANCISCO v. BELDEN et al. (Civ. 3342.)

(District Court of Appeal, First District, Division 1, California. May 19, 1920.)

1. Bills and notes ⊂=140 — Though renewal notes were given, action may be on original obligation.

Though a corporation gave renewal notes in place of the original, yet, where there was nothing to indicate that the original obligation was extinguished, action might be brought thereon instead of the renewal notes.

2. Bills and notes ⊂=296—Indorser for value after maturity cannot set up defenses.

Where a corporation after maturity indorsed notes to plaintiff for value, defenses available to the maker were not available to the corporation, the indorser's warranty (Civ. Code, § 3116), not permitting, and so such defenses were not available in an action to recover on stockholder's liability.

3. Corporations ⊂=215—Stockholder's liability is primary and unaffected by guaranty of the debt.

The liability of stockholders of a corporation is primary, and a stockholder cannot escape because a corporate creditor held a guaranty of the corporation's obligations.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Seaboard National Bank of San Francisco against Leo V. Belden and others. From the judgment for plaintiff, defendant Fred G. Jones appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

KOFORD, Judge pro tem. This is an appeal by the defendant Jones from a judgment in an action brought to recover on a stockholder's liability, as a stockholder of the Luther Burbank Company, a corporation. The indebtedness upon which this judgment against appellant was rendered was evidenced by eight promissory notes, as follows: Five notes executed by the corporation to the plaintiff directly, and three notes executed to the corporation by Joseph H. Clark and subsequently indorsed over to and sold to the plaintiff by the corporation.

Appellant contends: First, that the five corporation notes were paid and extinguished by new notes given in their place; second, that the Clark notes were by the corporation indorsed to the plaintiff after maturity, and were taken by plaintiff subject to defenses; and, third, that plaintiff had received a guaranty of all the liabilities of the corporation, and for that reason cannot enforce the liability of the appellant.

[1] The evidence upon the first point is to the effect that new notes were given in the place of the five original notes. The action was upon the original liability evidenced by these notes. The new notes were renewal notes. There is nothing in the evidence to support the contention that the original obligation, as evidenced by these five notes, was extinguished by the giving and accepting of new notes. The action was properly brought upon the original obligation, even

though the original notes had been surrendered (Bonestell v. Bowie, 128 Cal. 511, 61 Pac. 78; Clark v. Berlin Realty Co., 33 Cal. App. 50, 164 Pac. 333), and there being no express agreement that the renewal notes should constitute payment, and such notes not having been in fact paid (Comptoir d'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28).

[2] It is not apparent how appellant's rights are in any way affected by the Clark notes being indorsed by the corporation to the plaintiff after maturity. Such defenses as might exist would be in favor of the original maker, Clark. If the corporation had any defenses, appellant neither pleaded nor offered to prove them and has not even suggested what they are to this time. But if there were any defenses they would not be available to the corporation as indorser for value. The indorser's warranty would not permit it. Civ. Code, § 3116.

[3] Neither is there any merit in appellant's third point that the guaranty of the liability of the corporation is in any sense a defense available to appellant sued on stockholder's liability. The liability of the stockholders of a corporation is direct and primary, arising coincidentally with the debt of the corporation, and is not changed nor affected by the existence of a guaranty. London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16.

The judgment appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 503

PEOPLE v. BLISS. (Cr. 885.)

(District Court of Appeal, First District, Division 2, California. May 17, 1920. Hearing Denied by Supreme Court July 16, 1920.)

1. Criminal law ⟸970(7)—Indictment and information ⟸154—Objection to information not waived by failure to demur and properly presented by motion in arrest.

The objection that the information did not state facts sufficient to constitute a public offense was not waived by failure to demur and was properly raised by a motion in arrest of judgment, under Pen. Code, §§ 1004, 1012, 1185.

2. False pretenses ⟸26—Information held defective.

Information charging that the defendant made certain false representations as to the value of her property and the amount of her income, and that defendant, knowing such representations to be false, agreed to sell named person, for the sum of $300, a one-third interest in a group of mines, which admittedly was owned by defendant and was worth $100,000, in consideration of such person agreeing to work for defendant, *held* not to state facts constituting offense of obtaining money under false pretenses; there being no causal connection between the false representation and the parting with the money, and no facts showing that the named person was defrauded.

3. False pretenses ⟸9—Pretenses must be a material element in inducing parting with money.

In charging the crime of obtaining money under false pretenses, the false pretenses must be shown to be a material element in inducing the prosecuting witness to part with his money or property.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Florence W. Bliss was convicted of obtaining money under false pretenses, and from judgment of conviction and from order denying her motion for a new trial, she appeals. Reversed.

J. R. Cunnyngham and H. H. McPike, both of San Francisco, and G. L. Jones, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of obtaining money under false pretenses, and also from an order denying defendant's motion in arrest of judgment. There are a number of grounds of appeal enumerated in the notice of appeal, but the appellant urges upon our attention but one of these matters, and, as this objection, in our opinion, is decisive of the case, it will be unnecessary to discuss any of the others.

The objection is that the information fails in two respects to state facts sufficient to constitute a public offense: First, because no causal connection is shown or can be inferred between the representations alleged to be false and the parting with the money; and, second, because the information fails to allege facts showing that the complaining witness, Lansdale, was defrauded.

[1] The objection to the information is a matter of substance, and not of form, and was not waived by a failure to demur, and was properly raised by the motion in arrest of judgment. Pen. Code, §§ 1004, 1012, 1185; People v. Ross, 103 Cal. 425, 428, 37 Pac. 379; People v. Smith, 103 Cal. 563, 566, 37 Pac. 516; People v. McKenna, 81 Cal. 158, 22 Pac. 488.

The information alleges that the defendant made certain representations to W. R. Lansdale with fraudulent intent. The representations are then set out. In the brief filed on behalf of the state these allegations are summarized as follows:

"(1) That defendant was the owner of a valuable mine in the state of Nevada known as the Lucky Girl group of mines.

"(2) That said mines were of the value of $100,000.

"(3) That defendant had on deposit in the Central National Bank of Oakland $4,700.

"(4) That defendant had on deposit in said bank $25,000 to her credit as executrix and sole legatee of the McIntyre estate.

"(5) That defendant was worth over $1,000,000 and was the owner of property in New York of the value of over $1,000,000.

"(6) That defendant was the owner of ten sections of wheat land near Alberta, Canada, worth over $1,000,000.

"(7) That defendant owned two large hotels, seventeen granaries, and a traction engine all situate near Alberta, Canada.

"(8) That defendant had left Canada because that country had gone dry and she was compelled to close the bars of the hotels.

"(9) That defendant received an income of $6,500 payable every 40 days.

"(10) That she had given instructions to the Canadian Bank of Commerce to transfer all money on deposit with said bank, amounting to the sum of $6,500 to the Elko National Bank, Nev., and that said sum would be on deposit to her credit January 1, 1918.

"(11) That she had discharged her attorney, and that he had attached and garnished her money in the sum of $4,700 on deposit in the Central National Bank of Oakland, and that she was thereby prevented from withdrawing any part thereof."

It is then alleged that these representations, with the exception of the first and second, are false and untrue. Then follows an allegation that the defendant knew the representations were untrue, and that Lansdale, believing said representations, and being deceived thereby, was induced by reason thereof to enter into a certain agreement. The terms of the agreement are then specified, and they are that the defendant would hire and employ said Lansdale and his wife and son at specified salaries at the Lucky Girl group of mines, and that the defendant would sell and convey to said Lansdale an undivided one-third interest in said group of mines. In consideration of which agreement, said Lansdale paid the defendant $300. It is alleged that Lansdale, "in pursuance of said promises, representations, and agreements so made by said Florence W. Bliss, and being deceived thereby, did then and there pay over and deliver to the said Florence W. Bliss the sum of $300." There is no direct allegation, nor any allegations from which it might be inferred, that the defendant did not own the Lucky Girl group of mines; that they were not worth $100,000; that Lansdale and his wife and son were not employed by the defendant; and that they did not get a one-third interest in the said mine.

[2, 3] It seems clear, therefore, that there is no causal connection shown between the allegations alleged to be false and the parting with the $300 by Lansdale. It is a well-settled rule that, in charging the crime of obtaining money under false pretenses, the false pretenses must be a material element in inducing the prosecuting witness to part with his money or property. People v. Kahler, 26 Cal. App. 452, 147 Pac. 228; People v. Haas, 28 Cal. App. 182, 151 Pac. 672; People v. Canfield, 28 Cal. App. 792, 154 Pac. 33.

It is contended by the respondent that this case fairly falls within the rule of the case of People v. Griesheimer, 176 Cal. 44, 167 Pac. 521. In that case it is said:

"While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby."

In the present case it not only does not appear by necessary or even possible inference that the money was paid because of the representations which are alleged to have been false, but it is expressly charged in the information that the money was paid for a specific purpose; i. e., in consideration of a promise to give to Lansdale a one-third interest in a valuable gold mine owned by defendant, and in further consideration of the promise by the defendant to employ Lansdale and his family at that mine. It is apparent that, if one is purchasing an interest in a mine and securing employment therein, an inducing representation would be as to the ownership and value of the mine. It is clear that the representations concerning these facts were the inducing cause for the parting with the money, and these representations are not alleged to have been false. The only representations alleged to have been false are representations totally disconnected with the purpose for which Lansdale parted with his money. A similar question is presented in the case of People v. Kahler, supra; indeed, that case seems to present a legal situation closely analogous to the one here. That case is discussed and approved in the case of People v. Canfield, supra.

In the Kahler Case it is said:

"While not alleged, it is no doubt true that Cogan was induced to buy the drums and traps in reliance upon defendant's promise to give his son musical instruction and to secure him employment as soon as he was sufficiently proficient. It was this promise which induced the prosecutor to deal with him, and not the representation of existing facts in reliance upon

the truth of which Cogan believed that defendant would fulfill his promise."

So in the present case it was the promise to convey a one-third interest in the mine and to employ the prosecutor and his family which caused him to enter into the agreement with the defendant and to part with his money, and not the representations of existing facts as to defendant's wealth, which latter may have given the prosecutor additional reason to believe that the defendant would fulfill her agreement, but were not the consideration upon which he parted with his property.

Furthermore, the information fails to allege facts showing that Lansdale was defrauded. There is no allegation that Lansdale did not receive from the defendant just what it is alleged she agreed to give him—a one-third interest in this mine and employment for himself and family. There can be no presumption that Lansdale did not receive these things, in the absence of an allegation to that effect, and, if he received what defendant had agreed to give him, there would be no offense on the part of the defendant. People v. Tufts, 167 Cal. 266, 270, 139 Pac. 78. It is clearly apparent that, if defendant did own the mine, which was of the value claimed, and did give to Lansdale a one-third interest therein, and employment for himself and family, it would be immaterial in a criminal inquiry whether or not she falsely represented that she owned in addition thereto a million dollars worth of real property in Canada and a million dollars worth of real property in New York, or all the wealth of the Aztecs, as Lansdale was not led to believe that he would be entitled to any interest in any property except the mine.

The motion in arrest of judgment should have been granted, as the information was insufficient to charge a public offense.

The judgment is reversed.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 676

PIDGEON v. SAN DIEGO CONSOL. BREWING CO. (Civ. 3311.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920.)

1. Corporations ⟸264—Stockholder's liability on obligation created by law barred in three years; "time when liability was created."

A stockholder's liability to his corporation is an obligation created by law, barred at the expiration of three years from the time when the liability was created, the words referring to the time "when the liability was created," as set forth in Code Civ. Proc. § 359, applying to the time when the corporation made the contract out of which the liability arises, and not to the time of any breach by the corporation.

2. Corporations ⟸264 — Corporation's contract of sale created contingent liability when made and before order placed thereunder.

Under contract for sale of beer by corporation in which defendant held stock, made with plaintiff suing to enforce defendant stockholder's liability, liability of the corporation, within Code Civ. Proc. § 359, barring obligations created by law, was created when the contract was made, and before plaintiff placed an order for beer.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by P. F. Pidgeon against the San Diego Consolidated Brewing Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

W. J. Mossholder, of San Diego, for appellant.

Eugene Daney and Lane D. Webber, both of San Diego, for respondent.

CONREY, P. J. Appeal by the plaintiff from a judgment entered in favor of the defendant in an action to recover from the defendant, on its statutory liability as a stockholder of the Mission Brewing Company, a corporation, a fixed proportion of an alleged indebtedness of the Mission Brewing Company to the plaintiff. The judgment was entered pursuant to an order sustaining the defendant's demurrer to the complaint without leave to amend the complaint. One of the grounds of demurrer was that the action is barred by the provisions of section 359 of the Code of Civil Procedure.

The complaint was filed on the 17th day of September, 1918. The complaint sets forth the terms of a contract entered into on the 11th day of August, 1913, between plaintiff and the Mission Brewing Company under which, at a stated price per barrel, the company agreed to sell and deliver beer to the plaintiff as ordered. The complaint alleged, in effect, that said contract was in force at all times from the making thereof to and including the 6th day of July, 1918, at which time the Mission Brewing Company refused to further perform the contract and notified the plaintiff that it would not thereafter deliver beer to him, except at a stated price per barrel, which was very much higher than the price fixed by the contract. Further allegations show loss and damage to the plaintiff by the refusal of the Mission Brewing Company to comply with the terms of said agreement.

[1] The question presented by this appeal has been fully discussed and should be regarded as having been permanently settled by recent decisions of the Supreme Court.

The rule is thereby established that in cases of this kind a stockholder's liability is an obligation created by law, which is barred at the expiration of three years from the time when the liability was created; that the words referring to the time "when the liability was created," as set forth in section 359 of the Code of Civil Procedure, apply to the time when the corporation made the contract out of which the liability arises, and not to the time of any breach of the contract by the corporation. For a full statement of the law on this subject it is only necessary to refer to such late cases as Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939 and Chambers v. Farnham (Sup.) 187 Pac. 732.

[2] We think there is no merit in appellant's contention that under the contract set out in the complaint no liability was created (within the meaning of the code section above cited) against the Mission Brewing Company "until Pidgeon placed an order for beer. Each time he placed an order for beer a new liability arose." It is now too clear for further argument that, if the Mission Brewing Company was ever liable to the plaintiff by reason of the transactions mentioned in the complaint, that liability must have arisen out of the contract of August 11, 1913. This being so, the statute limiting the time for the commencement of an action against a stockholder for a breach of that contract began to run in favor of the stockholder at the date of the contract.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 490

SMYTH v. FITCH (WILLIAMS et al., Interveners). (Civ. 2143.)

(District Court of Appeal, Third District, California. May 14, 1920.)

1. Insane persons ⇐29—Order restoring grantor to competency sufficient to show capacity.

Order restoring grantor to competency on day of execution of deed *held* sufficient to support finding as to mental capacity to execute deed on such day.

2. Deeds ⇐211(1)—Evidence held to show mental competency of grantor.

Evidence *held* to show that mother was mentally competent at the time of her execution of deed to daughter.

3. Deeds ⇐210 — Evidence held to prove grantee's compliance with condition of deed requiring her to support grantor.

In daughter's action to quiet title to land, conveyed by mother by deed conditioned on daughter's support of mother during her lifetime, evidence *held* to sustain finding that daughter complied with the condition.

Appeal from Superior Court, El Dorado County; Geo. H. Thompson, Judge.

Action by Florence Agnes Smyth against Oscar Fitch, as administrator of the estate of Emily Charles, deceased, in which Major S. Williams and another intervened. Judgment for plaintiff, and interveners appeal. Affirmed.

William F. Bray, of Placerville, for appellants.

J. F. Pullen, of Sacramento, for respondent.

BURNETT, J. The action was in the usual form to quiet title to certain real property in the county of El Dorado. The appellants herein became parties by a complaint in intervention, in which they alleged failure of consideration, fraud, and undue influence on the part of plaintiff in obtaining the deed which she claims; and, upon the issues thus raised, a trial was had, and the findings and judgment were in favor of plaintiff. The appeal was taken under the alternative method, but appellants have not presented in their brief any of the evidence upon which they relied or to which they desired to direct the attention of this court, as required by section 953c of the Code of Civil Procedure. Nevertheless, we have examined the record, and are satisfied that, contrary to the contention of appellants, the findings are amply supported, and that we would not be justified in disturbing the conclusion of the lower court. We may state the salient facts as follows: Emily Charles, a widow, and mother of eight children, among whom were the plaintiff and the interveners herein, was for many years prior to her death in 1916 the owner of a 160-acre farm in said county. On February 24, 1908, she was declared to be mentally incompetent by the superior court of that county, and Manfred J. Williams, a son and one of the appellants herein, was appointed guardian, but never qualified or acted as such. On March 27, 1911, she was restored to competency by said court, Judge Arnot presiding, and a judgment of restoration duly made and entered, from which no appeal has ever been taken. After her restoration and upon the same day she made, executed, and delivered to one of her daughters, Florence Agnes Smyth, respondent herein, a deed of said tract of land, wherein she "granted, bargained and sold, conveyed and confirmed" the same to said daughter in consideration of the sum of $10, and also in further consideration of the performance by the grantee of certain conditions, including the constant personal presence of the grantee upon said farm, and also the furnishing by her to the grantor of food, clothing, medical attendance, nurse's care, and the defraying of the ex-

pense of the last illness, final interment of the grantor after death, said deed providing for reversion in case of a breach. Appellants contend in their brief that the evidence is insufficient to support the finding of the court that the grantor was competent to make such deed, and also that the grantee complied with and carried out the conditions therein prescribed.

[1, 2] As to the first of these contentions, the order restoring the grantor to competency, which was admitted in evidence without objection, would be sufficient to support the finding as to her said capacity. Moreover, this was supplemented by the testimony of various witnesses, who expressed their opinion that the old lady was capable of transacting business and of understanding the nature of the transaction resulting in the execution of said deed. From the evidence which was thus presented we deem it sufficient to quote from the deposition of C. E. Peters, an attorney at law, as follows:

"I saw her on that date [March 11, 1911], in the courtroom of the superior court, El Dorado county, and also at my office. Judge Arnot presided in the superior court. Mrs. Florence Smyth, daughter of Mrs. Charles, Major Williams, son of Mrs. Charles, and possibly Harry Williams and Manfred Williams were present at the session of the superior court, and I was there at that time. After proper proceedings the court made an order restoring Mrs. Charles to mental competency. That was followed by a judgment which was duly entered in the records of the court. After the court proceedings Mrs. Florence Smyth and Mrs. Charles went to my office, and a deed was drawn, conveying certain property to Mrs. Smyth, and, as I remember it, reserving a life interest to Mrs. Charles. I have not seen the deed since it was executed. The deed was acknowledged by Mrs. Charles before Hon. Chas. A. Swisler, notary public. I was also satisfied that Mrs. Charles was fully competent, mentally, to execute the instrument. She was quite old at that time, about 80 years, I believe, and she showed keen alertness and understanding. She was especially practical for a woman of her years; her only hindrance being that she was somewhat deaf. The deed was made by Mrs. Charles without any influence or duress against her of any kind. She did it willingly and voluntarily, stating that she believed it to be the best thing for her to do, considering her circumstances, health, and years."

As to the other point, plaintiff herself testified as follows:

"Q. You promised and agreed and bound yourself to certain conditions expressed in this deed? A. Yes. Q. Among others to support and maintain the party of the first part as long as she lived, and that you should furnish at your expense food, clothing, medical attendance, nurse's care, and the expenses of the last illness —funeral expenses and various other conditions expressed in the deed; you agreed to do that, did you? A. Yes. Q. You did all of that? A. I did. Q. To the best of your ability you complied with all of the conditions of the deed? A. I did. Q. Giving your mother kind attention and care? A. Yes. Q. You have paid for the funeral expenses and erected a monument upon her grave? A. I did. Q. Paid the various expenses of the ranch and taking care of your mother? A. I did."

[3] The foregoing evidence would be sufficient, of course, to support the finding of the court as to the said conditions, but we may add that she was corroborated by the testimony of other witnesses.

We think the appeal is without substantial merit, and the judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

47 Cal. App. 474

LEAVER v. SMITH et al. (Civ. 3307.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

1. Execution ⟸283—After year purchaser may quiet title, although no deed has been issued.

Under Code Civ. Proc. §§ 700, 702, providing that the purchaser at execution sale acquires all the title of the judgment debtor, and that right of redemption is lost in a year, a purchaser, despite sections 703 and 706, relating to possession during period of redemption, is at the end of a year possessed of absolute title, and may quiet the same against the judgment debtor in suit for that purpose, though no deed has been issued.

2. Judgment ⟸585(2)—Previous judgment against plaintiff bar to second action.

As under Code Civ. Proc. § 1963, subd. 18, it is presumed all issues which might have been decided in a previous action between the same parties were disposed of, a previous judgment against a purchaser at execution sale, in an action to quiet title brought against the judgment debtor more than a year after sale, is a conclusive adjudication which will bar a subsequent action, notwithstanding at the time of the first suit to quiet title a deed had not been issued, for under sections 700 and 702 the purchaser had complete title, and on production of evidence thereof was entitled to recover regardless of lack of deed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by P. J. Leaver against Samuel T. Smith and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. T. Kendrick, of Los Angeles, for appellants.

M. I. Grossman, of Los Angeles (Charles M. Ackerman, of Los Angeles, of counsel), for respondent.

JAMES, J. In this action to quiet title plaintiff had judgment and defendant appeals. The complaint was in the usual form

appropriate to the character of the action. In addition to a general denial, the defendant made a special plea in his answer by alleging a former judgment between the parties for the same cause. That portion of the answer is as follows:

"That heretofore, to wit, on the * * * day of March, 1917, an action was commenced by the plaintiff in this court against each of these defendants, wherein it was alleged that the plaintiff was the owner of said property and wherein it was also alleged that the defendants, and each of the defendants, had no right, title, or interest in said property; that the said defendants appeared in said action and the said cause came on regularly for trial before said court on the 11th day of December, 1917, and thereupon said court duly made and gave judgment against the plaintiff and in favor of defendants, thereby adjudging that plaintiff take nothing in said action and that defendants recover their costs."

Samuel T. Smith is the only defendant interested, as the action was dismissed as to Anna May Smith, who was first named in the complaint as Jane Doe. The trial court made particular findings by way of showing the facts upon which the judgment was predicated. From these findings it appears that appellants here, in 1914, became a judgment debtor of one Leaver; that upon execution being levied against the real property herein involved, then belonging to appellants, a sale was made and the property was purchased by the plaintiff, the judgment creditor; that the execution sale was made on the 3d day of February, 1916; that no redemption of the premises having been made in the meantime, deed was delivered to the purchaser on the 11th day of December, 1917. As to the former judgment pleaded by appellants, the court made its findings as follows:

"That it is true that an action was commenced in March, 1917, by plaintiff in this action, and against defendant in this action, for the purpose of quieting title to the premises herein described; that all of the allegations contained in the further and separate answer to plaintiff's complaint, set out in the answer of defendants herein, are true."

Conclusions of law followed, wherein it was determined that the plaintiff should have a decree quieting his title to the property described in the complaint.

[1, 2] It is appellants' contention that the plea of the former judgment adjudicating the same matter between the same parties was sustained by the evidence, and that the court should have held that the plaintiff was estopped from re-asserting claim to the property described. No question is made as to the correctness of the findings of fact in their material parts. From such findings and from the undisputed evidence exhibited in the bill of exceptions we may summarize the occurrences material for consideration as follows: Execution sale of the defendants' property was made and certificate of sale was given and recorded on February 3, 1916; deed to the same was delivered December 11, 1917. Plaintiff's first action to quiet title was commenced (as appears from the court's findings) in March, 1917; trial of that action was had on December 11, 1917, and judgment entered on December 18, 1917. This action, being the same in form as the preceding action, to wit, to quiet title to the same property against the same defendants, was commenced on October 23, 1918, and judgment was rendered on January 21, 1919. While the evidence heard at the trial of the first action is not shown, we can surmise that the plaintiff was refused a decree in the first action because at the time the action was commenced a deed had not been issued to the property; the opinion of the trial judge evidently being—for it is emphasized here in the brief of respondent—that a cause of action to quiet title would not mature upon the execution sale until formal deed was issued; that conclusion being derived from the assumption that the purchaser at an execution sale, and until he secures a deed, obtains only an equitable title which is not sufficient to sustain a cause of action as against the holder of the legal title. Before considering further the question just suggested, attention is called to the fact that, as the execution sale was held and certificate of title issued on February 3, 1916, the full period for redemption had expired prior to the commencement of the first action in March, 1917. In other words, that at the time plaintiff commenced his first action the right of redemption had been lost in the judgment debtor, and the plaintiff was entitled, upon demand, to his deed. Code Civ. Proc. § 702. It is important to the question of the alleged estoppel which the first judgment worked against the plaintiff to inquire as to the character of title which the purchaser at an execution sale is endowed with from the time he receives his certificate of sale. Section 700 of the Code of Civil Procedure provides that—

"Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property. * * *"

The effect of this provision is to confer upon the purchaser full title, except that within the ensuing period of 12 months after sale an equity of redemption is possessed by the judgment debtor. When the full period of 12 months has elapsed there no longer exists any equity in the judgment debtor; hence the purchaser becomes possessed of an absolute title at that time. Such was the case here at the time plaintiff commenced his first action to quiet title to the real property. The issuance of a deed was not essen-

tial to the vesting of title in the plaintiff; nor was such deed necessary and indispensable evidence of the title of the plaintiff. Respondent has cited Knight v. Fair, 9 Cal. 117, which is favorable to his contention that upon the sale of real property under execution an equitable title only is conferred upon the purchaser. That case, however, is considered in Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648, and attention is called to the fact that Knight v. Fair was decided under the Practice Act when the state of the law was different from that which was carried into the Code. The court, in Pollard v. Harlow, supra, said:

"The language of section 700 of the Code of Civil Procedure is, that upon the sale of the property 'the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto,' which is to say unequivocally that he acquires the legal as well as the equitable title. The only qualifications are, that (when not a leasehold of less than two years' unexpired term) the property shall be 'subject to redemption'; that a deed shall be subsequently given (Code Civ. Proc. § 703); and that pending the time for redemption the possession shall remain with the defendant (Code Civ. Proc. § 706). But no one of these qualifications is inconsistent with the vesting of the legal title in the purchaser. With regard to the first, the case is simply the familiar one of a legal title, defeasible upon the happening of a condition subsequent; and as to the second, the deed gives 'to the purchaser no new title to the land purchased by him, but is merely evidence that the title has become absolute.' Robinson v. Thornton, 102 Cal. 680."

As to the binding effect of the former judgment: That judgment was between the same parties as appeared in this suit; the cause of action was stated substantially in the same manner. In the first action plaintiff alleged ownership of the property and sought to quiet title against the claims of the defendants. Plaintiff was called upon there to furnish evidence of any title that he had, or be estopped from further asserting a claim based upon the same evidence.

"If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is pleaded, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case (Phelan v. Gardner, 43 Cal. 306); and the presumption of law is that all such issues were actually heard and decided (subdivision 18, § 1963, Code Civ. Proc.)." Parnell v. Hahn, 61 Cal. 132.

It therefore appears that the plaintiff, at the time he brought his former action, could have made proof of the sale under execution to him of the real property and the receipt of the certificate of sale. As that sale was had and certificate made and recorded on February 3, 1916, it would have appeared that at the time the former action was commenced no equity of redemption was left with the defendant; hence that the plaintiff had become possessed of an absolute title. In other words, it appears that plaintiff in the first action could have introduced precisely the same evidence as he introduced at the second trial to prove his title, with the one exception that at the second trial he offered the additional evidence of the deed issued to him. As we have before stated, we do not consider that the production of the deed was in any wise necessary to the proof of title of the plaintiff derived under the execution sale. His case was complete without the production of such a deed.

The situation, then, is that the first judgment was entered against the plaintiff upon the merits upon the same essential evidence that was received in the second case, and under such circumstances we have no doubt that the first judgment should be held to have adjudicated the rights of the parties to this action; hence the plaintiff is estopped from bringing the defendant a second time into court for the same cause. The first judgment was not appealed from, and at the time of the trial of this action (although not at the commencement of the action) had become final.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 543

HUBBARD et al. v. JURIAN et al.
(Civ. 3329.)

(District Court of Appeal, First District, Division 1, California. May 18, 1920. Hearing Denied by Supreme Court July 16, 1920.)

1. Appeal and error ⇐1097(2)—Opinion on former appeal law of case.

A decision of the appellate court on a former appeal, a petition for hearing in Supreme Court being denied, was the law of the case on a subsequent appeal, even though the Supreme Court departed from the doctrine of the decision after judgment was entered on the remittitur.

2. Mechanics' liens ⇐132(8)—Work done by architect immaterial on question when work on building ceased.

Painting of window panels under direction of architect to protect them from cracking in the sun, by persons other than the contractor, was properly overlooked by court in determining when work on building ceased, especially where such work was trivial.

3. Mechanics' liens ⊂=113(2)—Lien of stop notice subordinate to other liens.

The equitable garnishment occasioned by a stop notice served on owner under Code Civ. Proc. § 1193, attaches only to such sum as might be payable to the contractor after the extinguishment of liens.

4. Costs ⊂=203—Defendants not "adverse parties," so as to require service of cost bill.

Where defendants took separate appeals, and remittitur provided, "Appellants to recover costs," appeals resulting in a modification of the judgment by the reduction thereof as to some defendants, and an increase as to one, the latter was not an "adverse party" to the other defendants, under Code Civ. Proc. § 1033, so as to require service on it of a cost bill.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by A. L. Hubbard and others against A. Jurian, G. W. Odell, and the Maryland Casualty Company. From an adverse judgment, and an order refusing to strike out a cost bill, plaintiffs appeal. Affirmed.

See, also, 35 Cal. App. 757, 170 Pac. 1093.

Ralph C. McComish, of San Jose, for aplants.

F. H. Bloomingdale, of San Jose, and James Walter Scott, of San Francisco (James J. Harrington, of San Francisco, of counsel), for respondents.

KOFORD, Judge pro tem. Two appeals are involved here. Plaintiffs appeal from the portion of the judgment foreclosing the mechanics' liens of some of their assignors, and denying relief for the claim of Hubbard & Carmichael, one of plaintiffs' assignors. Plaintiffs also appeal from the order of the trial court refusing to strike out the cost bill for costs on a former appeal.

The present plaintiffs are the executors of the original plaintiff, now deceased. When this case was originally tried, the judgment in favor of the then plaintiff included the Hubbard & Carmichael lien filed July 2, 1913. The defendants each appealed from the judgment and order denying a new trial. On this appeal the judgment was modified in certain respects, including the disallowance of this particular lien, on account of the claim of lien having been filed too late. Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093. Upon the going down of the remittitur, the trial court entered judgment in accordance with its directions upon the same findings of fact, but containing recitals of the appeal and decision on appeal. Thereupon plaintiffs moved for a new trial, which was denied, and then took this appeal from a portion of the judgment.

Appellants, in seeking a reversal of the judgment, contend (1) that the finding that Odell and Jurian were estopped from claiming that the work had been abandoned prior to March 10, 1913, by reason of having alleged in their answer that the abandonment occurred on or about that date should prevail over the finding that the contractor ceased from all labor on the building on March 1, 1913, which it is argued (2) is not supported by the evidence. Appellant also urges (3) that Hubbard & Carmichael Bros., having filed a stop notice under section 1184, Code of Civil Procedure, were entitled to be paid out of the money in the hands of the owners belonging to the contractor, which was found to be $948; and (4) that a laborer or materialman may recover from the surety of the contractor without having perfected a lien.

[1] The decision on the former appeal of this case disposes of most, if not all, of the points, and therefore is the law of the case with respect to the question decided on that appeal. The doctrine of the decision on the former appeal in this case on the fourth point above urged by appellants has been departed from by the Supreme Court, since the judgment herein was entered on the remittitur, in the later case of General Electric Co. v. American Bonding Co. (Sup.) 182 Pac. 444, notwithstanding that a petition for hearing in the Supreme Court of the former appeal of Hubbard v. Jurian, supra, was denied by that court. But our decision on the former appeal must still be considered to be the law as far as this case is concerned. It is a final judgment as to that point, and for all purposes of this particular case it remains established, whether it may be afterwards thought to be right or wrong. With respect to this point on appeal, appellants recognize that this court is bound by its former decision.

But with respect to the other three points on appeal appellants assert that there is no law of the case. First, they point out that in the first decision the word "estoppel" is not used, and that therefore their first point is still open for decision. We do not agree with this. Although the word "estoppel" is not used, as is claimed, yet the decision fully discusses this point, and decides that the defendants' pleading as a whole is of such a nature that it does not estop them, and that the finding as to the date of abandonment stands. We quote from the decision as follows:

"It is contended upon behalf of the respondent Hubbard that the claim of lien of Hubbard & Carmichael which was filed on July 2, 1913, was within time, because it was filed within 120 days from March 10, 1913, 'on or about' which date the answer alleged work on the building was abandoned. In this behalf it is urged that this date, by reason of the aver-

ments of the answer, was admitted by the defendants to be the date when work ceased upon the building, and that as a consequence the trial court should have accepted that date as the time of cessation of labor despite evidence to the contrary, and that the finding of the trial court that work ceased upon the building on March 1, 1913, was, in so far as the Hubbard & Carmichael claim was concerned, unauthorized, and cannot therefore be permitted to prevail over the admitted fact. In support of this contention we are cited to the familiar rule that an admission made in the pleading is binding on the party making it, that a fact admitted by the pleadings of an opponent need not be proved, and that any evidence introduced contrary to such admission must be disregarded by the trial court when making its finding. In our opinion this rule has no application to the situation presented by the pleadings in the present case. The burden of proof was upon the plaintiff to show that his assignor, Hubbard & Carmichael, had filed their claim of lien within the statutory time after constructive completion of the building. Bloom's Law of Mechanics, Supp. p. 258. The answer of the defendants squarely and sufficiently denied the allegation of the complaint that the building was completed on June 20, 1913. This denial made it incumbent upon the plaintiff to proffer proof showing that the claim of lien had been filed within time. Moreover the phrase 'on or about March 10th,' as used in the answer, is indefinite and uncertain, and might therefore consistently mean several days before or after that date, and, inasmuch as the exact date of the completion of the building or the cessation of work thereon was a material fact to be determined by the court below as a foundation for the allowance or rejection of the claims of lien, it cannot be said that the allegation in question was such a definite admission of fact as would preclude the necessity for the taking of evidence or the making a finding thereon. The finding of the trial court that work on the building ceased on March 1, 1913, and that such cessation continued for more than a period of 30 days, being sufficiently supported by evidence, it follows that the Hubbard & Carmichael lien, which was filed July 2, 1913 (123 days after March 1, 1913), was just 3 days too late, and therefore should not have been allowed."

[2] It is thus stated in the decision that the finding of the date of cessation of labor is sufficiently supported by the evidence. Appellants contend that, as they were respondents on that appeal, they could not attack that finding at that time, but that, being appellants now, they may do so. However this may be, we are still of the opinion that the evidence is sufficient to support the finding that the contractor ceased from all labor upon the contracts on March 1, 1913. The work done on March 4, 1913, was painting window panels under direction of the architect to protect them from cracking in the sun, and was trivial in amount. It was properly overlooked by the trial court, not so much because it was trivial, but because it was not done on the contract, nor by the contractor. This amount of painting should be compared with any steps taken by the owner looking to the protection of his property from deterioration, as distinguished from improving it constructively, by either the contractor, or owner, or going ahead in any manner with the contemplated work.

[3] Appellants contend that the third point, touching the stop notice, was discussed in the former decision only with respect to the premature payment made to the contractor; that this court can now decide that this stop notice should be given effect, operating, not upon the premature payment of $1,315, but on the money remaining in the hands of the owners and due the contractor at the time of the service of the withhold notice. Appellants state that the trial court found this amount to be $948. There is no finding to this effect directly, but it is arrived at by computation. The contract prices were $5,260 and $3,600, which, together with extras, make a total of $9,222. The owners paid installments of $900, $1,315, and a further sum of $1,315, together with the sum of $4,744.59, to complete the work after abandonment, making a total of $8,274.59 cost to the owner without paying liens. The difference between this cost and the contract price, with extras, is $948, ignoring cents.

Is this amount available to plaintiffs under the stop notice, in face of the fact that there are valid liens greatly in excess of this sum? The judgment distributes this sum proportionately among the several valid lien claimants, and also gives them judgment against the sureties on the statutory bond filed by defendant Maryland Casualty Company. Therefore, while the amount of $948 was due the contractor under the terms of his contract in one sense, it is not in another. He will never receive it, and is not entitled to it. Code Civ. Proc. § 1193.

It was said in Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681:

"The contention of appellant that it was entitled to a personal judgment against the owner, growing out of the notice to withhold money, is not tenable. The equitable garnishment, which is said to be occasioned by such notice, attaches only to such sum as might be payable to the contractor after the extinguishment of the liens, for until such liens are extinguished no sum is payable from the owner to the contractor."

Plaintiffs, by reason of the stop notice, therefore, were not entitled to judgment against the owner, nor to be paid out of this fund to the exclusion in whole or in part of the valid lien claimants. This disposes of all the points of the appellants on the appeal from the judgment.

[4] The appeal from the order of the trial court refusing to strike out the cost bill on appeal is based on the fact that the defendants Jurian and Odell did not serve the cost

bill on the defendant Maryland Casualty Company as well as upon plaintiffs. The two defendants were appellants there, having taken separate appeals, and plaintiffs' predecessor was the respondent. The remittitur provided, "The appellants to recover costs on this appeal." It is claimed that, inasmuch as the modification of the judgment resulted in a reduction of the judgment against appellants Odell and Jurian, and an increased judgment against appellant Maryland Casualty Company, said last-named appellant was in fact an "adverse party" to its coappellants Odell and Jurian, as that term is used in Code of Civil Procedure, § 1033. The remittitur did not allow one appellant to recover costs from the other, but only from the respondent (appellants here). The appellants filing the cost bill did not ask for judgment for costs against their coappellant.

We must hold, therefore, that those appellants were not adverse parties to each other, that it was not necessary that the cost bill be served on the Maryland Casualty Company, and that the trial court properly refused to strike it out on that ground.

The judgment and order appealed from are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 252

LAWSON v. TURLOCK UNION HIGH SCHOOL DIST. et al. (Civ. 2179.)

(District Court of Appeal, Third District, California. April 28, 1920. Hearing Denied by Supreme Court June 24, 1920.)

1. Schools and school districts ⊜69—School district trustees may change location of high school in a city.

Under Pol. Code, § 1742, as amended by St. 1919, p. 1086, a board of trustees of a school district may change the location of a high school located in an incorporated city.

2. Constitutional law ⊜48—Statute not declared unconstitutional, except for most cogent reasons.

A strong intendment exists in favor of an act of the Legislature, and a court should declare it unconstitutional only for the most cogent reasons.

3. Statutes ⊜93(6)—Statute permitting trustees to change location of high school in city not invalid.

Pol. Code, § 1742, as amended by St. 1919, p. 1086, is not obnoxious to Const. art. 4, § 25, subd. 28, which provides that the Legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts, in that it permits trustees to change the location of a high school in an incorporated city; the classification being reasonable, and not arbitrary.

Application by E. W. Lawson for certiorari to review action of Jesse Jaderberg and others, as Trustees of Turlock Union High School District. Writ denied in the District Court of Appeal, and hearing denied in the Supreme Court.

Hawkins & Hawkins, of Modesto, for petitioner.

L. J. Maddux, of Modesto, for respondents.

PREWETT, Presiding Judge pro tem. This is an application by petitioner for a writ of certiorari to above-named respondents to review the action of said respondents, as trustees of Turlock Union High School District, in changing the site of the high school from its former position in said city to another about one mile distant. It is contended by petitioner that the trustees exceeded their powers in ordering the change. Although the record in the matter is somewhat voluminous, the actual question to be determined is very narrow.

Turlock is an incorporated city, and prior to October, 1919, said high school district owned and maintained a high school upon certain premises within said city which premises had been regularly selected and designated for that purpose. The union district covers an extensive area of territory outside of the corporate limits of said city and includes said city. In October, 1919, said trustees by a majority vote changed said high school from its former position to a tract of about 23 acres situated in another part of the city. In February, 1920, petitioner herein commenced an action in injunction in the superior court in an effort to restrain said trustees from proceeding with said proposed change. Judgment was rendered against him, and his appeal is now pending therefrom.

[1] 1. Waiving the question whether petitioner has a speedy remedy by appeal, the decisive point against him is that the amendment to section 1742 of the Political Code, enacted in 1919 (St. 1919, p. 1086), justifies the board in its action. The portion of said section relevant to this inquiry now reads as follows:

"With the following exception, no change of location of any high school when once established, shall be made except upon a petition to the superintendent of schools who has jurisdiction of the high school district, * * * and then only upon the affirmative vote of two-thirds of the qualified electors of the high school district voting at an election called by the superintendent of schools, for that purpose. Such election shall be called and held, and the returns thereof made to the superintendent of schools, in the same manner as in the case of the election for the formation of the district: Provided, however, that when any location has been once established in any of said districts,

and said location lies within the corporate limits of any incorporated city or town, any change of location within the corporate limits of said city or town may be made upon any such change of location receiving the vote of a majority of the board of trustees of any such district whenever a new building is to be erected."

The proviso is the portion added by the amendment of 1919. Its terms are clearly broad enough to justify the action taken by the trustees if the act is open to no constitutional objection.

[2, 3] 2. It is claimed, however, that the amendment is obnoxious to that provision of the Constitution which provides that the Legislature shall not pass local or special laws prescribing the powers and duties of officers of school districts. Const. art. 4, § 25, subd. 28. Admittedly the amendment does prescribe the powers and duties of school officers. If the amendment is neither local nor special, it is immaterial whether the term "school districts," as used in the above-cited provision of the Constitution, is broad enough to include high school districts. A strong intendment exists in favor of an act of the Legislature, and a court should declare it unconstitutional only for the most cogent reasons. The amendment in question applies to all high school districts in the state that have a school building within the limits of an incorporated city. This means, potentially, every high school district in the state, for if it has no school building within an incorporated city to-day it may have one to-morrow. Classification that is reasonable, and not arbitrary, does not vitiate a statute. 6 Ruling Cases, 372. The distinction established by the Legislature is not an arbitrary one. There are sufficient differences between a location in a city and one in the country to justify the classification established in the amendment. Conceding that the change of site from one point to another in the same city is a change of location, within the purview of the amendment, the fact that such change could be for only a limited distance, while in the country it might be for many miles, is itself a sufficient difference in conditions to save the amendment. Moreover, the opportunity for securing favorable sites within a city is manifestly less than in the open country. In dealing with many owners of a block within a city, flexibility of power to contract for options, wider discretion, and greater facility for rapidity of action are necessary. In the country, a removal to a new location, miles distant from a former site, might inconvenience large numbers of pupils, while, ordinarily, the greatest possible removal within a city could not greatly inconvenience any one. In the country, serious or dangerous obstacles to travel, even though the removal be for only a short distance, might operate to deny the benefits of the school to many persons, while such a result is scarcely possible in a city.

These distinctions exist. They are sufficient to justify the classification established in the amendment. That they are sufficient, in the opinion of the law-making body, to demand such classification, is answered by the adoption of the amendment.

The writ is denied, and the proceeding dismissed.

We concur: BURNETT, J.; HART, J.

Opinion of Supreme Court in bank denying hearing.

PER CURIAM. The application for a hearing in this court after decision by the district court of appeal of the third appellate district is denied.

We deem it necessary to say, however, that the decision must not be taken as a precedent for the proposition that certiorari will lie to review decisions of a tribunal, board or officer, not made in the exercise of judicial functions (Code Civ. Proc. § 1068), nor for the proposition that the order of the trustees of a union high school district changing the location of a high school building is other than a legislative or executive act. Hopping v. Richmond, 170 Cal. 612, et seq., 150 Pac. 977.

(All concur.)

47 Cal. App. 713

BAR DUE v. COX. (Civ. 3326.)

(District Court of Appeal, First District, Division 1, California. May 24, 1920. Hearing Denied by Supreme Court July 23, 1920.)

1. Appeal and error ⊂⊃761—Assignments of error insufficient.

Objections in a brief to the judgment and actions of the trial court, merely stated without citation of authority or any argument beyond bare statement of point, present nothing for consideration on appeal.

2. Adjoining landowners ⊂⊃10(3) — Evidence showing erection of high fence was malicious.

In an action under St. 1913, p. 342, to have a fence erected on defendant's premises declared a private nuisance, evidence *held* to warrant a finding that the fence was maliciously erected for the purpose of annoying plaintiff.

3. Adjoining landowners ⊂⊃10(3)—Spite fence statute constitutional.

St. 1913, p. 342, providing that any fence or other structure in the nature of a fence, unnecessarily exceeding 10 feet in height, maliciously erected or maintained for the purpose of annoying owner of adjoining property shall be deemed a private nuisance which may be abated, is not unconstitutional.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by N. Bar Due against Sarah Cox. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur E. Nathanson, of San Francisco, for appellant.

J. H. Morris, of San Francisco, for respondent.

WASTE, P. J. The plaintiff brought this action to have a certain fence, wholly erected and maintained upon the premises of the defendant, declared a private nuisance, and removed forthwith, or reduced to a height not exceeding 10 feet. He also prayed that the defendant be enjoined and restrained from preventing or interfering with plaintiff, should plaintiff undertake to abate and remove the fence, or go upon the property of the defendant for that purpose. The action was predicated upon the alleged ground that said fence was maliciously erected and maintained to annoy plaintiff, and any of his tenants who might occupy his flats, and upon the theory that the fence excluded the light and air of plaintiff's tenants, to the annoyance and prejudice of plaintiff, and to the damage of plaintiff's property. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which was denied. Defendant then introduced considerable testimony. On submission of the case judgment was rendered for the plaintiff, and the defendant appeals.

The action is brought by the plaintiff under the provisions of the act of the Legislature of May 28, 1913 (Stats. 1913, p. 342), which provides that any fence or other structure in the nature of a fence, unnecessarily exceeding 10 feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property, shall be deemed a private nuisance, for the abatement of which such owner or occupant may enforce the remedies prescribed in the sections of the Civil Code.

[1] Appellant in his opening brief specifies some eleven points as "questions involved in this action." He presents, however, but two with that particularity which invites our consideration. The remaining objections to the judgment and action of the trial court are merely stated without citation of authority, or any argument beyond the bare statement of the point. As an example we cite appellant's sixth point, "Errors of Law in Denying Defendant's Motion for a Nonsuit." In his brief, under the title "Motion for Nonsuit," he merely quotes verbatim the reporter's transcript of the motion, made in the court below, and the court's ruling, without a single comment. At another point in the brief appellant inserts the heading "Insufficiency of the Evidence to Sustain the Findings of Fact, Conclusions of Law and the Judgment," followed by some 77 pages of extracts from reporter's transcript, without argument, comment, or suggestion as to why this testimony is insufficient. In his closing brief appellant merely asserts that there is "no substantial conflict" in the testimony. We are not called upon to consider points so stated. Gray v. Walker, 157 Cal. 381, 386, 108 Pac. 278; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

In view of the importance of the legal questions involved, however, we have examined the contention that the act of the Legislature, under which the suit was brought, is unconstitutional, and have read much of the evidence in the transcript, to determine for ourselves its sufficiency to sustain the finding of the court, that the fence in question unnecessarily exceeds 10 feet in height, and was maliciously erected, and is so maintained, for the purpose of annoying the plaintiff and his tenants.

[2] The plaintiff and the defendant are adjoining property owners. Some years prior to the commencement of the suit the plaintiff moved an old dwelling to the rear of his lot, so that it practically abuts on defendant's property. The latter, thereafter, erected, wholly within the line of her own property, the fence in question, but so close to the rear of plaintiff's structure that it effectively shut off the view from the lower windows of plaintiff's house and obstructs the light and air thereof. Defendant has grown vines over this tight board fence, which she waters at times, and the testimony is that the water is thrown through the cracks of the fence, and wets the interior of the lower flat of plaintiff's premises. Defendant has constantly prevented workmen engaged in repairing plaintiff's premises from in any way going upon her lot and has exhibited an embittered feeling and a defiant attitude toward the plaintiff and his tenants. From photographs and the evidence of witnesses it is apparent that the fence effectually boards up the lower windows of plaintiff's lower flat. There does not seem to be any necessity for it being maintained at a height in excess of 10 feet. This is evidenced by the fact that the fence on the property line of defendant adjoining another owner is of a different character and not so high. The fact of its peculiar construction, the way it is maintained in front of plaintiff's property, the attitude of defendant as testified to by various witnesses, and the whole circumstances surrounding its erection and maintenance, plainly indicate a malice on the part of defendant toward the plaintiff. This, we think, was the only logical conclusion to be drawn from the evidence, and was the ultimate fact for the trial court to determine, in the light of these circumstances.

[3] In support of her contention that the act is unconstitutional, defendant relies upon two decisions of the Supreme Court of California, construing the act of the Legislature of March 9, 1885, "regulating the height of division fences and partition walls in cities and towns." This act is set out in full in the case of Western Granite & Marble Co. v. Knickerbocker, 103 Cal. at page 114, 37 Pac. 192. The gist of that decision is that the fence there under consideration was a division fence and that it was not competent for the Legislature to vest in the adjoining proprietor the power to prevent his neighbor from building such a structure on his own property, provided it is not a nuisance. The other case is Ingwersen v. Barry, 118 Cal. 342, 50 Pac. 536, which is based upon the Western Granite Case. The act we are now construing was, however, passed after these decisions, and, judging by their context, with the purpose of supplying the very element necessary to render it effective, which was missing from the former statute—the malicious maintenance of a private nuisance. Under the authority of Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510, Rideout v. Knox, 148 Mass. 368, 19 N. E. 391, 2 L. R. A. 81, 12 Am. St. Rep. 560, and Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670, we believe it to be constitutional.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

47 Cal. App. 480

HARRIS v. BURT. (Civ. 3318.)

(District Court of Appeal, Second District, Division 2, California. May 14, 1920.)

1. Appeal and error ⟸371—Stenographic reporter cannot refuse to prepare transcript because fees are not prepaid.

The stenographic reporter cannot refuse to make the transcript provided for by Code Civ. Proc. §§ 953a, 953b, because his fees have not been prepaid.

2. Mandamus ⟸57(1)—Stenographic reporter may be compelled to prepare transcript.

Under Code Civ. Proc. § 1085, providing that a writ of mandate may be issued to compel performance of an act which the law enjoins as a duty from an office, the stenographic reporter may be compelled to prepare the transcript provided for by Code Civ. Proc. §§ 953a, 953b, though his fees have not been prepaid as demanded.

3. Appeal and error ⟸371—Appeal will be dismissed where appellant took no steps to compel reporter to prepare transcript.

Where appellant gave notice of appeal and filed a demand for a transcript in accordance with Code Civ. Proc. § 953a, and gave an undertaking, etc., as well as the undertaking provided for by section 953b, and agreed to pay the clerk the cost of the transcript, but the stenographic reporter refused to prepare the same until prepayment of fees, and appellant took no steps by application for writ of mandate, under section 1085 or otherwise, to compel performance, *held*, though the duty in the first instance was on the clerk, the appeal will be dismissed where the transcript was not filed in time; appellant knowing of the reporter's wrongful demand.

Appeal from Superior Court, Los Angeles County.

Action by M. H. Harris against Bessie M. Burt, a widow. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Appeal dismissed.

R. T. Lightfoot, of Los Angeles, for appellant.

Arthur Wright, of Los Angeles, for respondent.

THOMAS, J. Motion to dismiss appeal. From the record before us it appears that a judgment was entered against the defendant here in the superior court of Los Angeles county on the 21st day of June, 1919, for a total sum of $412.74; that on the 3d day of July, 1919, a notice of appeal to the Supreme Court was filed by the defendant in that court; that at the same time and place defendant also filed a demand for transcript, in accordance with the provisions of section 953a of the Code of Civil Procedure, and gave an undertaking on appeal, with stay of execution, duly approved by the clerk of that court, as well as the undertaking provided for by section 953b, Code of Civil Procedure, in the sum of $100, agreeing to pay to the clerk the cost of preparing such transcript, which undertaking was likewise duly approved by the clerk; and that thereafter the clerk prepared what is usually denominated as the "clerk's transcript," which transcript was regularly filed in the superior court. It also appears that the official reporter who reported the case, Mr. Henry Henderson, received no notice requiring the preparation of a phonographic report of the trial until Saturday, July 26, 1919, and until the receipt of such notice he had no knowledge that defendant intended to appeal the case. On Monday, July 28, 1919, the official reporter wrote, signed, and mailed, with postage prepaid, a letter addressed to defendant's attorney of record, and who appeared before this court in opposition to this motion, which letter was in words and figures as follows:

"Room 560, Court House, Los Angeles, Cal., July 28, 1919. Mr. R. T. Lightfoot, Attorney at Law, 916 Washington Bldg., City—Dear Sir: Saturday noon your notice of appeal and request for transcript in M. H. Harris v. Bessie

M. Burt, No. B71930, was handed to me, being the first notice I had had that you desired a transcript, and now, at my first opportunity, I have looked up the case and made an estimate of the cost thereof. The estimate of my fees for the reporter's transcript on appeal is $53.20. If you desire an office copy, the fee will be one-half more, or $79.80. I notice your notice was filed July 3d, but if you have complied with your part of the statutory requirement, the provision as to time of filing transcript being, as I understand, merely directory, your client's rights would, I assume, not suffer by the delay. Having had no communication from you or any one about it until Saturday, I am not to blame. If you wish me to go ahead with the work, upon prepayment of my fees, I will do so promptly. Respectfully yours, [Signed] Henry Henderson, Official Reporter."

The statements contained in this letter are not denied. They are without conflict. Mr. Henderson, in his affidavit into which the foregoing letter is incorporated, says that he heard nothing further regarding the transcript or the proposed appeal "until just recently, when he was informed by plaintiff's attorney of the circumstances of the present motion to dismiss the appeal." Nothing has ever been done by appellant, or any one else, except as above stated. There has not been filed with the clerk of the Supreme Court, or with the clerk of this court, any transcript, brief, or other papers, except those in connection with the motion now before us.

The motion is based upon two grounds: (1) That the transcript of the record in said action has not been filed; and (2) that no points and authorities have been filed. The motion is based upon the certificate of the clerk of the superior court in which said cause was tried, and the affidavit of respondent's attorney.

It is contended by appellant that, having done all that the law requires in order to be entitled to the benefit of an appeal under the so-called "alternative method," she should not be made to suffer because of the neglect, failure, or refusal of the clerk to perform his duty. In this we quite agree. But such things do sometimes happen in the best regulated offices. When they do, and when this fact is known, as in the instant case, by the appealing party, the latter cannot sit idly by, neglecting, failing, or absolutely refusing to avail himself of any of the several provisions of law to compel the performance by the proper officer of his duty in such case, and by such neglect, failure, or refusal succeed in depriving the opposing litigant of the fruits of a righteous judgment (if such it be), and escape the granting of a motion to dismiss the appeal under such circumstances.

There are on file before us two certificates by the county clerk of Los Angeles county. By one of these it is shown that the judgment attempted to be appealed from was entered on June 9, 1919. By the other the same judgment is shown to have been entered on June 21, 1919. Which certificate is correct, we do not assume to say, but have given appellant the benefit of our doubt, and have accepted the latter as showing the correct date of entry.

[1, 2] Section 953a of the Code of Civil Procedure provides, among other things, that—

"Any person desiring to appeal from any judgment * * * to the Supreme Court or any of the District Courts of Appeal, may * * * file with the clerk of the court from whose judgment * * * said appeal is taken * * * a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony * * * be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment."

With this provision in mind, there being nothing before us to show when, if at all, appellant was served with notice of entry of the judgment from which she attempts to appeal, and the notice of appeal, as we have already seen, having been filed on July 3, 1919, it will be assumed that such notice was filed as by said section provided. From the certificates of the clerk referred to, it appears that no transcript of the phonographic report of the trial has been prepared or filed "in the office of the county clerk, as demanded, and for which bond was given, and the time for settling and approving same has expired."

There is conflict in the evidence as to whether appellant's attorney ever made demand on the court reporter for such transcript, except by filing such notices and undertakings with the clerk as stated. Appellant's attorney says that he did make such demand; while the reporter, on the other hand, says that appellant's attorney "has not communicated with affiant, either verbally or in writing, relative to said transcript." We think, however, that this is immaterial. At any rate, we are certain that for a long time, taking the affidavit of appellant's attorney at its full face value, the latter well knew that such transcript had not been prepared, and that the reason for it was according to his own statement, as set forth in his affidavit:

"That said Henderson *refused at all times* to deliver said stenographic report unless he should have been paid in advance therefor by the defendant and appellant." (Italics ours.)

"Where an appeal is taken under the alternative method provided by sections 953a and 953b of the Code of Civil Procedure, it is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given" and the bond provided for in said sections has been filed, "and to file such transcript with the clerk. He cannot refuse to so file because his fees remain unpaid." Gjurich v. Fieg, 160 Cal. 331, 116 Pac. 745.

Rule 2 of the Supreme Court (176 Pac. vii), provides that—

"The appellant in a civil action shall, within forty days after an appeal is perfected, except as hereinafter stated, serve and file the printed transcript."

Following this is a provision covering the procedure where the appeal is taken by the method adopted in the case at bar. Section 3 of that rule provides that—

"The time above limited may be extended by written stipulation, or by order, based on affidavit, showing good cause therefor."

Section 953a, supra, provides that—

"Upon receiving said notice *it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial.*" (Italics ours.)

Section 1085, Code of Civil Procedure, provides that a writ of mandate—

"may be issued * * * to any * * * person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station. * * *"

Here, then, are indicated various methods which appellant might have pursued, and by so doing avoid her present unfortunate situation, the first of which would have cost nothing but a few moments for the preparation of the necessary papers, and their service upon the stenographer. The second would probably have produced the desired result with but little inconvenience or expense on the part of appellant. For we cannot believe that any stenographer would disregard the order of the judge in whose department he was reporting, particularly upon such judge calling his attention to the case of Gjurich v. Fieg, supra. The latter method —writ of mandate—without doubt would have resulted satisfactorily.

With these facts before us, and considering the same in the light of the case above cited (where the Supreme Court, in intimating what might be considered the proper procedure, said: "In this view of the law it was, of course, within the power of the appellant to have had mandate issued against the stenographic reporter to compel him to file his transcript with the clerk as the law contemplates, and in ordinary cases appellant's failure to do this within a reasonable time might be construed to be such lack of diligence as to justify the dismissal of an appeal")—that case having been decided July 1, 1911, more than eight years ago—we think that a denial of respondent's motion would be a miscarriage of justice, and would transcend the limits of both precedent and reason.

[3] It was not to respondent's interest to take any steps other than those taken here. Appellant cannot in one breath insist that she believes her attempted appeal to be well taken and in the next that it is immaterial to her whether the stenographer ever prepares and files such transcript. If it be contended that appellant had the right to await the pleasure of the stenographer, we answer that in availing herself of such right she must use it in such a way as not to infringe upon the rights of respondent here. There being, as we have seen, legal methods by at least one of which appellant could have compelled the reporter to act, and failing or refusing to avail herself thereof, she cannot now be permitted to take advantage of her own neglect and by so doing defeat this motion. In our opinion the legal maxim, "The law helps the vigilant, before those who sleep on their rights," applies here.

It is therefore held that because of the facts with which we are confronted, and for the reasons herein expressed, the motion presented must be granted.

The appeal is dismissed.

We concur: FINLAYSON, P. J.; WELLER, J.

47 Cal. App. 728

CRAIG v. GOMES et al. (Civ. 3347.)

(District Court of Appeal, First District, Division 1, California. May 25, 1920.)

Limitation of actions ⊂=48(7)—Junior mortgage not prior where senior mortgagee in possession, though mortgage barred by limitations.

Where mortgagors sold mortgaged property and took second mortgage thereon, and where purchasers sold property to holders of first mortgage, who took possession before their first mortgage became due, mortgagor's assignee of second mortgage, on foreclosure thereof, after first mortgage, was barred by limitations, and, while holders thereof were in possession of land, was not entitled to priority over first mortgage because of its being outlawed, since mortgagees in possession could not be ejected nor interfered with in any manner until payment of mortgage debt, even though mortgage was barred by limitations.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by H. S. Craig against L. R. Gomes and others. From judgment rendered, plaintiff appeals. Affirmed.

H. S. Craig, of Oakland, in pro. per.

Sans & Hudson, of Watsonville, for respondents.

KOFORD, Judge pro tem. The appeal is on the judgment roll, and the following statement of facts is taken from the findings:

J. L. Rankin (plaintiff's assignor) and his

wife, on July 12, 1913, executed a $3,000 mortgage due in one year, 1914, to Lillian R. Higman. This mortgage was assigned by the mortgagee and her successors several times, and came at last, on January 5, 1914, to defendants L. R. Gomes and Mary Gomes, his wife. After the making of said mortgage Rankin and wife transferred or sold the mortgaged premises to James Lomas, his wife, and William R. Orr, and the said grantees either coincidently or later (the findings do not show which) executed to said Rankin a second mortgage on the property for $1,500 on May 4, 1914. This is the mortgage which plaintiff, as the assignee of said Rankin and wife, foreclosed in the court below. On September 11, 1916, the Lomases and said Orr, who had purchased from the Rankins as aforesaid, conveyed the property to defendant L. R. Gomes and Mary Gomes. Thereupon Gomes and wife were the owners of the property, and also the mortgagees in the first mortgage, and the mortgage had not then outlawed. Then on September 29, 1916, Mary Gomes transferred to her husband, L. R. Gomes, all her interest, both in the property as a part owner, and in the said $3,000 mortgage, as mortgagee. The defendant L. R. Gomes has been the owner and in possession ever since the last-named date. It is therefore to be seen that the defendant went into possession before his mortgage outlawed.

This suit by plaintiff to foreclose the second mortgage of $1,500 was commenced shortly after the first mortgage had become barred by the statute of limitations. The decree of foreclosure provides that the first mortgage of $3,000, although barred by the statute of limitations, is a first lien and prior to the lien of plaintiff's $1,500 mortgage.

The sole question on appeal raised by plaintiff is that the first mortgage should not have been given a priority over his mortgage on account of its being outlawed.

Plaintiff does not contend that there has been a merger, and merger is not applicable under the facts. See Anglo-California Bank v. Field, 146 Cal. 644, 80 Pac. 1080, and 154 Cal. 513, 98 Pac. 267. He contends for the application of the principle that a junior mortgagee may invoke the aid of the statute of limitations against a prior mortgage, even though the mortgagor of the prior mortgage, as between himself and the mortgagee, may have waived its protection. Wood v. Goodfellow, 43 Cal. 185; California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

The defendant contends for the application of the principle that a mortgagee in possession, even though his mortgage becomes barred, cannot be ejected nor interfered with in any manner by the mortgagor until the mortgage debt is paid. Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Brandt v. Thompson, 91 Cal. 462, 27 Pac. 763; Peshine v. Ord, 119 Cal. 312, 51 Pac. 536, 63 Am. St. Rep. 131; Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209; Cameron v. Ah Quong, 175 Cal. 377, 384, 165 Pac. 961.

We think that this is the correct principle to apply here. Rankin (plaintiff's assignor) is the very man who executed the first mortgage. In morals and equity he should pay it before he is given any judgment which may result in ousting the first mortgagee. The mortgagee in possession went into possession before his mortgage became barred. The second mortgage was executed while the first was a valid subsisting first lien, not barred, and not even due.

The cases relied upon by appellant do not deal with a first mortgagee in possession, and their doctrine cannot be extended to a case of this kind in violation of such plain equitable considerations as exist here. While plaintiff here is the assignee of Rankin, he has no greater rights than his assignor. Furthermore, the doctrine of the cases last cited has been extended to the assignee of the original mortgagor and is not limited to the mortgagor himself. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

47 Cal. App. 508

ENNIS-BROWN CO. v. RICHVALE LAND CO. (Civ. 2053.)

(District Court of Appeal, Third District, California. May 17, 1920.)

Depositaries ⊂=4—Depositary bound to return a "special deposit."

Where purchaser of crop of corn sent an advance payment therefor to crop mortgagee "to apply on purchase" of the corn, and the crop was a short one, so that the advance payment was, in fact an overpayment in part, the crop purchaser was entitled to recover the amount of the overpayment from the crop mortgagee, under Civ. Code, §§ 1814, 1835, as to depositaries; the deposit being not a general deposit but a special deposit, that is, one limited to a specific and definite purpose, and the title not passing to the mortgagee as it would have done if the deposit had been general in its nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Deposit.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Ennis-Brown Company against the Richvale Land Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. O. Goldstein, of Chico, for appellant.

Victor L. Hatfield and W. H. Hatfield, both of Sacramento, for respondent.

BURNETT, J. September 14, 1917, the Ennis-Brown Company entered into a contract with W. B. Linn & Son whereby the former agreed to purchase the Egyptian corn growing upon the land occupied by the latter and owned by them. The agreed price was $50 per ton, "free on board boat," and it was stipulated that an advance payment of $4,500 should be made. At the time the crop was estimated at 320 tons, but it actually yielded 115,013 pounds, amounting at said price to the sum of $2,875.30. Plaintiff having advanced said sum of $4,500 was therefore entitled to the return of $1,624.70. The question in the case is whether the cause of action in favor of plaintiff for this amount is legally against said Linn & Son or defendant Richvale Land Company. On September 27, 1917, defendant wrote plaintiff stating in effect that the former understood that the latter had purchased the corn crop of Linn & Son and that said Richvale Land Company had a crop mortgage on said crop and would expect any advancement of the price to be made to said company. On October 1, 1917, plaintiff, not referring to defendant's letter of September 27, wrote defendant as follows:

"Richvale Land Company, Chico, California—Gentlemen: As per instructions from Mr. Axtell, we herewith inclose you our check of $4,500 to apply on purchase price of Egyptian corn bought from W. B. Linn & Son. Kindly have Mr. Linn indorse check in your favor and this will keep the record straight at your end. Please acknowledge receipt of the check and oblige.

"Very truly, Ennis-Brown Company."

The next day defendant answered the letter, as follows:

"We acknowledge receipt of your check for $4,500 to apply on purchase of Egyptian corn from W. B. Linn & Son. Mr. Linn will begin to thresh the first of next week.

"Very truly, Richvale Land Company."

The foregoing correspondence shows the foundation for plaintiff's claim against defendant for the balance remaining after the purchase price of said corn was paid.

We appreciate all that has been said by appellant as to the essentials of a contract. Of course, the parties must agree upon its terms before it becomes a legal and binding obligation. A proposition made by one party but not assented to by the other is of no avail. These elementary principles need no discussion, but we are entirely satisfied that appellant has made a wrong application of them. We may admit that the parties herein might have adopted more apt language to express their intention; at least, they could have been more definite and explicit, but we must not expect such precision and accuracy as would characterize formal instruments deliberately prepared by a capable attorney. However, by fair intendment and common understanding of the terms employed, the letter and the reply being considered together, the correspondence amounts to this: Plaintiff, having sent to defendant the sum of $4,500, directs that it be applied to a single and definite purpose, namely, the "purchase of Egyptian corn bought from W. B. Linn & Son." There was no uncertainty therein. It was understood what purchase was referred to and what price was to be paid. This direction, of course, excluded the application of the money to any other purpose. This is according to a familiar rule of logic. The direction would not have been changed in effect if the plaintiff had directed that the money be applied "on the purchase of said corn and used for no other purpose." The defendant accepted the money and agreed to use it for that purpose. It is true that there was no express declaration that "we

agree to apply the money to that purpose," but this is necessarily implied in the statement, "We acknowledge receipt of your check for $4,500 to apply on purchase of Egyptian corn from W. B. Linn & Son." Would the case for plaintiff be any stronger if defendant had written: "We acknowledge receipt of your check for $4,500 and we will apply it on the purchase of Egyptian corn from W. B. Linn & Son." The acceptance of the money for a definite purpose carries the implication that it would be used for that purpose. This seems too plain to require argument. The money, therefore, having been accepted for a definite and specific object, and the purpose having been accomplished, what is the obligation of the defendant as to the residue, which was not needed for the purchase of the corn? There can hardly be any difference of opinion as to that question. The residue belonged to plaintiff, and it was the legal and moral duty of defendant to return it to the owner.

We need not quibble as to the proper legal terminology to characterize the relation of the parties. In a general sense, though, it is proper to say that a trust was created by express agreement, and it imposed upon defendant the obligation to pursue the course we have indicated. More specifically stated, the Richvale Land Company became a voluntary depositary within the meaning of section 1814 of the Civil Code, providing:

"A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary."

As to the use to which the deposit may be put, necessarily the will of the depositor controls. However, the Legislature, in section 1835 of the Civil Code, has recognized this limitation in the following language:

"A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor."

Herein the only consent granted by plaintiff to defendant was to apply the money "on the purchase of Egyptian corn bought from W. B. Linn & Son." The depositary, therefore, had authority to use it for no other purpose.

Appellant makes the mistake of supposing that the case involves a general deposit, whereas, we are dealing with a special deposit. It is special because it was limited to a specific and definite purpose. The title did not pass to defendant as it would have done if the deposit had been general in its nature. The deposit constituted a bailment with the title remaining in the bailor, and the bailee acquired no right to make general use of the property. The distinction between the two kinds of deposits is clearly pointed out in Anderson v. Pacific Bank, 112 Cal. 601, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228, and People v. California, etc., Trust Co., 23 Cal. App. 199, 137 Pac. 1111, 1115.

Appellant also claims that the trial court erred in allowing interest from October 31, 1917, instead of January 25, 1918, when the demand was made for the payment of the residue. No doubt the general rule as to interest on deposits is correctly stated in Anderson v. Pacific Bank, supra, and Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572, wherein it is held that interest is allowable from the date of demand. Herein, however, the court found on sufficient evidence that there was an actual conversion of the money on said October 31; and section 3336 of the Civil Code permits the recovery of the interest from that time. Moreover, we are not furnished with a copy of the pleadings upon which the action was tried, and we must assume that no issue was tendered as to this point. Indeed, we might go further in the assumption that it was admitted in the answer that a demand was made on said October 31. It may be added that the reduction of the amount recovered would be inconsiderable if effect were to be given to appellant's contention in this respect.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

47 Cal. App. 461

TENNANT v. CLINE et al. (Civ. 3085.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

Fraudulent conveyances ⇐308(9) — Whether possession of chattels changed to satisfy statute a jury question.

Whether there had been such change of possession of automobile, alleged to have been sold by a husband to plaintiff, suing for conversion the sheriff who seized the car as the husband's, under attachment process issued at the instance of the wife, as satisfied Civ. Code, § 3440, *held* for the jury under the evidence that the husband was living with plaintiff, and that both he and she used the car after the claimed sale.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Myrtle Tennant against John C. Cline and others. From judgment for defendants, plaintiff appeals. Affirmed.

Newmire & Watkins, of Los Angeles, for appellant.

Joseph Musgrove, of Los Angeles, for respondents.

JAMES, J. Appellant brought this action to recover for the alleged conversion of an

automobile which is claimed to have been improperly seized under attachment process by defendant Cline, as sheriff.

Lucy C. Gentry, in a divorce action against Harry V. Gentry, obtained judgment in April, 1916, for a monthly allowance for the support of herself and minor children and for an additional sum of $2,000, which represented her interest in the community property. The judgment remaining unsatisfied in February, 1919, Lucy C. Gentry caused the sheriff to levy on the automobile of which the plaintiff here later claimed to be the owner. From the statement of the testimony, as it is set forth in the bill of exceptions, it appears that the plaintiff had been named as the corespondent in the divorce action brought by Lucy C. Gentry against her husband, and that for a long period of time, up to the date when the automobile was taken under the writ, Gentry and this plaintiff lived in a four-room flat, and that no other person resided therein; that the automobile in question was used by both of them. The plaintiff testified that she was the owner of the automobile, having purchased it from Gentry in April, 1917, paying him $150 for his interest in the machine; that after she received the bill of sale Gentry continued to use the car with her permission, and that both of them drove it; and that Gentry had the same use of the car after the bill of sale was made as he had before, with the permission of the plaintiff. The testimony of the plaintiff and of other witnesses further showed that in all dealings with respect to the purchase of the car and the payment of the installments on account thereof, and the making of a loan which was obtained when a chattel mortgage (executed by Gentry) was given upon the security of the machine, Gentry acted alone, excepting that one bill for repairs amounting to a considerable sum was paid personally by the plaintiff. There was testimony of the daughter of the Gentrys as to a statement (made subsequent to the alleged making of the bill of sale) by plaintiff wherein the plaintiff affirmed that the automobile belonged to Gentry. The deputy sheriff who served the writ at the time the car was taken possession of by the sheriff testified that he went to the flat occupied by plaintiff and Gentry, and that Gentry went with him to the garage in the rear of the flats and backed the automobile out of the garage to the street and turned it over, saying: "You won't keep that car long, because it belongs to my father."

Defendants, in their answer, alleged that the pretended sale of the automobile by Gentry to the plaintiff was fraudulently made without consideration and with intent to prevent Mrs. Gentry from reaching the property or writ of execution under a judgment. The case as presented to the jury, however, seems to have left to be resolved, not the question whether actual fraud was intended to be committed in the regard mentioned, but whether, under section 3440, Civil Code, there had been such a change of possession and control of the automobile as between Gentry and this plaintiff as to transfer title as against Mrs. Gentry, who was a judgment debtor of the transferor. That section requires, in order that an effectual transfer of title of personal property may be had, that there be "an actual and continued change of possession of the things transferred." The trial court instructed the jury generally as to the requirements of the law in the regard noted, and further gave this additional instruction:

"You are further instructed that if you find that H. V. Gentry, prior to the time of delivering to plaintiff, Myrtle Tennant, said bill of sale, dated the 5th day of April, 1917, had the use of said automobile, and that thereafter subsequent to the delivery of said bill of sale he still continued to have the use and control of said automobile in the same manner and to a like extent, that there is no such delivery as the law contemplates as requisite to constitute a valid transfer."

It is contended that the court erred in so instructing the jury, and it is argued that because of the relation and association between Gentry and the plaintiff, this instruction was not applicable and constituted prejudicial error. We are cited to the case of Morgan v. Ball, 81 Cal. 93, 22 Pac. 331, 5 L. R. A. 579, 15 Am. St. Rep. 34. In that case the parties between whom the transfer was alleged to have been made of a mare, colt, and buggy were husband and wife, and the court said that, notwithstanding the husband continued to have the use of the property, the wife could maintain her title. The court, however, stated in the opinion that it had been proclaimed by the husband that the property was that of the wife and had been publicly known and recognized as hers by all who used it, the court saying:

"She did not refuse her husband the use of it, but she did take it into possession at once and continuously keep and use it as hers as to all the world, and it was not in any way used or possessed by her husband, except as subordinate to her dominion, possession, and control."

That decision does, to some extent, bear the intimation, as appellant contends, that where the relationship of husband and wife exists possession by the husband of the property alleged to have been transferred will not preclude the wife from maintaining her title. However, the latter case of Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200, refers to Morgan v. Ball, supra, and contains the following declaration:

"The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should

receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial."

And, moreover, in this case it appears that the parties were not related at all. They occupied the same four-room flat for reasons of their own, and, so far as the evidence shows, did not hold a partnership interest in the particular property alleged to have been converted. It was for the jury to determine from the facts, under the court's instructions, as to whether there had been such transfer and change of possession of the property as would sustain plaintiff in the cause of action asserted.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 704

GUY v. LEECH et al. (Civ. 3376.)

(District Court of Appeal, First District, Division 2. California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Estoppel ⊂=83(3)—Seller of lumber held estopped as against building mortgagee to set up he did not accept trust deed in place of lien.

Seller of lumber to contractor who represented to lender to contractor on mortgage that trust deed to him, the seller of lumber, would be inferior to the building loan mortgage, *held* estopped as to set up against the mortgagee that he did not accept the deed in payment for his lumber and in lieu of any lien therefor.

2. Estoppel ⊂=110—Building mortgagee not required to plead as against material man asserting lien.

Though the general rule is that an estoppel must be pleaded, there is an exception where the party is without knowledge that his claim must ultimately rest upon an estoppel, as in the case of a building mortgagee claiming against one who sold lumber to the contractor, and now claims a lien after representing to the mortgagee that he accepted trust deed in place thereof.

3. Appeal and error ⊂=1122(2) — Appellate court cannot make findings.

The appellate court has no power on appeal to make as a basis for judgment, findings for the trial court.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George P. Guy, doing business under the fictitious name and style of the Pico Heights Lumber Company, against Harry R. Leech and others, and Sarah L. Bond. From judgment decreeing plaintiff's mechanic's lien to be superior to her first mortgage, the last-named defendant appeals. Reversed.

C. L. Kilgore, Jas. W. Miller, and J. E. Carson, all of Los Angeles, for appellant.

G. C. De Garmo and Haas & Dunnigan, all of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from that portion of a judgment which decrees that the mechanic's lien of plaintiff is superior to the first mortgage held by defendant and appellant upon certain real property in the county of Los Angeles. There were three actions involving the same issues, which were consolidated by the trial court and tried at the same time. In one of the actions the plaintiff Haslwanter sought to foreclose a mechanic's lien, and Sarah L. Bond, the appellant here, was made one of the defendants, as she held a first mortgage upon the property. This lien was decreed to be superior to the mortgage, and appellant does not object to this portion of the judgment, but states in her brief that the same has been paid.

In the second suit George P. Guy sought to enforce a mechanic's lien against the property and to have it declared superior to the mortgage. This was resisted by the mortgagee, Bond. Before a determination was had of the questions raised in these suits, the mortgage became due by reason of default in some of its terms, and the mortgagee, Bond, sought to foreclose the same in yet another suit, in which said lien claimants were joined as defendants. It was stipulated that the complaints in the mechanic's lien foreclosures should be considered the answers and cross-complaints of said claimants in the mortgage foreclosure suit of Sarah L. Bond. The actions were consolidated, and the one issue presented in them all was whether or not the mechanic's lien of the respondent was superior to the mortgage. The court found that it was, and from such determination the appellant prosecutes this appeal.

The facts with relation to this question are: Harry R. Leech was a builder, and he borrowed from Sarah L. Bond $3,000 for the purpose of building a house. For this amount he gave her his note, which was secured by a mortgage upon the house, then partially constructed. This mortgage was dated May 9 and recorded May 19, 1917. Leech had previously built houses, which were financed by building loans, and had purchased the lumber therefor from the respondent. In borrowing the money to carry on the work he had given first mortgages, and the respondent had furnished the lumber and had taken deeds of trust subject to the first mortgages upon the property upon

which the work was being done. In this instance Leech and Guy—it is admitted by both of them—undertook to make the same arrangement, and Guy agreed to furnish the lumber and to take a deed of trust in payment therefor, subject to the first mortgage. He did furnish the lumber in accordance with this understanding, and it was used in the construction of the house. This construction work was well under way when Leech applied to Mrs. Bond's agent, Patterson, for the loan of $3,000. Mr. Patterson testified that he called up Mr. Guy on the telephone when Leech applied for the loan; that he told him that he considered the loan of $3,000 "pretty heavy, but Mr. Leech tells me that you are taking a trust deed for your lumber and material which would help the loan." Patterson then told Guy that one of his clients was already "mixed up" in some litigation over a loan, and he did not wish this to happen again, and he asked him expressly whether he was taking a trust deed for the lumber and material subject to the first mortgage, and Guy said "Yes." The respondent Guy, in his own testimony, states that he has heard the testimony of Mr. Patterson, and that Mr. Patterson correctly testified as to the conversations and transactions between them. After these representations Mrs. Bond made the loan on May 19, 1917. In June, 1917, Leech executed a trust deed to Guy for $747, the amount of the lumber bill. He executed his note for said amount and sent it to Guy directly, and sent the trust deed securing the note to be recorded. It was duly recorded on June 4, 1917, and, under the instructions from Leech, was sent by the recorder to Guy. Apparently, so far, everything was satisfactory to all parties, and the transactions were in accordance with the understanding of all persons concerned. It is because of subsequent events, occurring after this trust deed went into effect, that Guy seeks to escape the effect of his action in agreeing to accept the trust deed in payment.

Within a month Leech became involved in financial difficulties and did not complete the house. It appears from the record that the plumbing and a portion of the painting, and other minor matters, were left uncompleted, and that it would cost about $200 to finish the house. Leech ceased work upon the house, and the cement contractor, Halswanter, who had not been paid, filed his notice of lien for $230, which lien was adjudged in these consolidated actions to be superior to the mortgage, and is not disputed by the appellant.

In October, 1917, Leech being in default in the payment of interest upon the first mortgage, Mr. Patterson, the representative of the mortgagee, telephoned to Guy, who had the trust deed, and Guy said that he would pay the interest as soon as he could get a deed from Mr. Leech conveying the property to him. He later paid the interest and said he had received a deed from Leech. Guy had called upon Leech in October and had asked what was to be done about completing the house, and Leech had told him that he was trying very hard to dispose of the house, and Guy had suggested that Leech deed the property to him to avoid the expense and trouble of a foreclosure of his deed of trust. Leech asked for more time, which was granted, and later, upon another request from Guy, he executed a quitclaim deed to Guy.

In November, 1917, Guy filed his notice of lien and returned to Leech the trust deed and note and the quitclaim deed. He made no reconveyance of the property, but merely returned to Leech the evidences of the transfer of interest to himself. So far as the record shows, the trust deed is still on record unreleased and affects the title to this property. Guy now seeks to enforce his mechanic's lien. He takes the position that he accepted the trust deed in payment for his lumber upon the understanding that it was to be subject only to the first mortgage, and upon the understanding that the house would be completed by Leech, and that, as an intervening lien has accrued and the house is not completed, he does not wish to rely on his trust deed, but wishes to enforce his mechanic's lien. His explanation of his return of the quitclaim deed to the property, given to him in October by Guy, is that it was not a grant deed and was not signed by the wife of Leech, and that therefore it was not a deed satisfactory to him, and he had consequently returned the instrument to Leech.

We may eliminate the question of the sufficiency of the second deed and of Guy's acceptance thereof; for it appears to us that the facts regarding the trust deed are decisive of this case. Respondent agreed, as appears by his own testimony, to accept the trust deed in payment of his debt, which trust deed was to be inferior to the building money mortgage given to Mrs. Bond. He represented to Mrs. Bond that this would be done after he had been told that she would consider the loan a heavy one unless he agreed to do this; in other words, he, by his representations, caused her to believe in the security of the loan and to advance the money. The advancement of this money by her for the building was an advantage to him, as he was selling the lumber, and had sold lumber under such conditions to Leech for several other houses. He acted in accordance with his representations and took the trust deed. His later disappointment in regard to the action of Leech in not paying the cement bill and in not completing the house cannot affect the rights of Mrs. Bond. This is a matter between Guy and Leech. The arguments of respondent that Leech has not fulfilled his part of the contract, and

therefore Guy is not bound thereby, would be pertinent if the contest was between Guy and Leech. The value of Mrs. Bond's security is impaired because Leech has not completed the building, and, for the same reason, the value of Guy's security is impaired. Leech has not fulfilled his duty toward either of them. Each took this chance with reference to Leech. There appears to be no reason why Guy should shift his share of this burden upon the shoulders of Mrs. Bond in addition to her own share of the burden.

The question of law involved here is carefully discussed, both upon principle and authority, in the cases cited to us by the appellant, most of which are reviewed by our own Supreme Court in the case of Martin v. Becker, 169 Cal. 301, at page 309 et seq., 146 Pac. 665, Ann. Cas. 1916D, 171. It is said in the case of Martin v. Becker, supra, in enumerating the different classes of cases in which the taking of new or additional security operates to destroy an existing lien, that, where it would be fraud upon other claimants to permit the earlier lien to be held valid, equity interposes and declares it to have been waived or lost by the taking of the later security, or, what is in effect the same, erects a bar to its enforcement.

[1, 2] The respondent is estopped to set up as against this appellant that he did not accept the trust deed in payment for his material and in lieu of any lien which the law allowed to him therefor. Respondent seeks to avoid the force of the facts constituting the estoppel by reason of the fact that the estoppel was not pleaded. While it is true that the general rule requires an estoppel to be pleaded, yet it has been held that there is an exception to this rule where the party is without knowledge that his claim must ultimately rest upon an estoppel. Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559. In the present case the appellant did not rely upon an estoppel as the foundation of her claim. She believed and alleged that Guy had accepted the trust deed in payment of his debt. The evidence upon the trial disclosed the fact that Guy was denying his acceptance of this trust deed. In rebutting this contention, facts were introduced in evidence which would constitute an estoppel. Under such circumstances appellant was entitled to take advantage of these facts, although they had not been pleaded. It is said in Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, that an estoppel in pais may be shown by way of equitable rebuttal, and that it is only when the plaintiff must rely upon an estoppel in pais in order to maintain his action at all against the defendant that it must be pleaded. In the present case it is admitted that Guy agreed to take the trust deed in payment; the trust deed to him was put upon record; he had told Mrs. Bond's agent that he would accept it subject to the first mortgage, and she alleged that he had so accepted it in payment. It was only when he sought to evade these facts that the estoppel needed to be invoked as an equitable rebuttal.

[3] There are, however, no findings upon which we could order a judgment to be entered decreeing the priority of appellant's mortgage lien. We have no power to make findings for the trial court. Blood v. La Serena L. & W. Co., supra. Therefore the judgment, in so far as it relates to the lien of the respondent Guy, and in so far as it decrees that lien to be superior to the mortgage of the appellant, is reversed.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 654

GEORGE et al. v. STENSLAND et al. (Civ. 3378.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Appeal and error ⇐1170(1)—Lack of service on husband of defendant wife harmless to wife.

Where a wife, sued for legal services in connection with her separate estate and transactions before marriage, was aided in her defense at every step by her husband, a practicing attorney, the fact that he was not served though named in the complaint as a defendant as John Doe was harmless to the wife, and no ground for reversal of judgment against her alone, under Const. art. 6, § 4½.

2. Appeal and error ⇐1073(3) — Defendant called indifferently by two names may not complain of judgment in one of such names.

Defendant wife, called indifferently by the name of Clarke or Stensland, who adopted the latter name in her notice of appeal, the two persons being completely identified in the record as herself, cannot complain that judgment was entered against her in the name of Clarke-Stensland.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Jesse George and Charles B. McCoy, copartners, against Elizabeth G. Clarke Stensland, sued as Elizabeth G. Clarke, and John Doe. From judgment for plaintiffs, defendant Stensland appeals. Affirmed.

Theodore Stensland and J. T. Reed, both of San Diego, for appellant.

Jesse George and Charles B. McCoy, both of San Diego, for respondents.

LANGDON, P. J. This is an appeal by the defendant, Elizabeth G. Clarke, from a judgment entered on a verdict of a jury for $514, in the superior court of San Diego county, in an action for the recovery of the reasonable value of attorneys' fees for professional services rendered by the plaintiffs to the appellant.

This appeal was originally taken not only from the judgment, but also from an order denying a new trial, and from an order of nonsuit on a cross-complaint, and from an order made in proceedings supplementary to judgment and execution. It is stated, however, by the appellant in her opening brief, that she "waives and abandons any and all her rights to appeal from said order denying a new trial, and from said order in supplementary proceedings," and prosecutes her appeal exclusive thereof.

The principal point argued by the appellant, and the one she states to be the important feature of the case, is that the judgment was erroneously entered by reason of the fact that said judgment was entered against a married woman in a cause in which she was sued as the wife of another party defendant, named in the complaint as "John Doe," and said husband of appellant was not served with summons in the action.

The facts pertinent to a discussion of the objection present some unusual features, and it will be necessary to state them rather fully. The plaintiffs sued, as aforesaid, to recover for legal services. The defendants named in the complaint are Elizabeth G. Clarke and John Doe. It is set out in the complaint that the services for which recovery is sought were contracted for by the defendant, Elizabeth G. Clarke, "being then and there an unmarried woman, and in the management of her own affairs." It is further set out in the complaint as follows:

"Plaintiffs further allege that they are informed and believe, and on such information and belief allege, that since this cause of action accrued, the defendant, Elizabeth G. Clarke, has married one John Doe, whose true name is unknown to these plaintiffs, but the plaintiffs have not sufficient information to determine whether or not, if defendant is married, her husband is a necessary party defendant, and plaintiffs pray that if it shall appear that the said defendant, Elizabeth G. Clarke, is married and that her husband is a necessary party, he may be joined and his true name as defendant herein inserted, and that the true name of the defendant, Elizabeth G. Clarke, be inserted herein in the event that she is shown to be married."

Answer and cross-complaint was filed by Elizabeth G. Clarke, in which she did not deny the allegation of the complaint upon information and belief, with reference to her marriage. She made no mention of this allegation in any way, and answered under the name of Elizabeth G. Clarke. Appellant's position is that, as the allegations of the complaint regarding defendant's coverture were admitted by a failure to deny the same, it became the duty of the plaintiffs to ascertain, by deposition or otherwise, the name of her husband, and to substitute such name for the fictitious name and serve him with summons.

The plaintiffs did, however, attempt to ascertain the facts regarding defendant's marriage by their demurrer to the answer and cross-complaint, in which demurrer one of the grounds urged is:

"The said answer to plaintiffs' first cause of action is uncertain in that the said answer admits that the defendant, Elizabeth G. Clarke, is married, by failing to deny the allegation of the complaint that she is married, but does not give her true name nor the true name of her husband, nor allege or set forth facts from which it can be determined whether or not her husband is a proper or necessary party defendant."

Another ground of demurrer to the answer and cross-complaint is that cross-complainant, Elizabeth G. Clarke, has not legal capacity to sue in that she admits in her answer and cross-complaint that she is married, and that the cross-complaint does not show that the action is one within any of the exceptions mentioned in section 370, Code of Civil Procedure. This demurrer was overruled, obviously because the property sought to be recovered under the cross-complaint was alleged to have been the sole and separate property of Elizabeth G. Clarke, and for the recovery of such property she had the right to sue alone. The attorney filing the cross-complaint was Theodore Stensland, and he appears throughout as attorney of record for the defendant, Elizabeth G. Clarke. In the answer to the cross-complaint, plaintiffs allege:

"Plaintiffs and cross-defendants are informed and advised and therefore allege the fact to be that at the time when the defendant, Elizabeth G. Clarke, claims to have become the owner of the draft mentioned and described in the first paragraph of her cross-complaint, and for some time prior thereto, the said defendant and cross-complainant was the wife of Theodore Stensland, her attorney herein; that the exact date of the marriage of the said Elizabeth G. Clarke and Theodore Stensland is unknown to these plaintiffs and cross-defendants; that Elizabeth G. Clarke is not the true and proper name of the defendant and cross-complainant, and John Doe is not the true name of the husband of the said defendant and cross-complainant, Elizabeth G. Clarke, but that the true name of said Elizabeth G. Clarke is Elizabeth G. Stensland, and the true name of the husband of the said Elizabeth G. Clarke is Theodore Stensland, who was and is her attorney herein, and that there are no facts set forth in said cross-complaint establishing or tending to establish that Theodore Stensland is not a necessary party cross-complainant and defendant as hereinafter more specifically set forth and shown."

After the granting of motions to strike out portions of the answer to the cross-complaint, relating to the necessity of joining appellant's husband as a cross-complainant, the cause went to trial upon these pleadings. Plaintiffs never amended their complaint by inserting the true name of the husband of Elizabeth G. Clarke. It does not appear in the record that the husband was or was not served under the fictitious name or otherwise. It would seem, therefore, that in support of the judgment we must assume that the service was duly made. However, even in the absence of this assumption, and assuming for the moment that the record must affirmatively show that the husband was served, we do not believe this error calls for a reversal of the judgment under the peculiar facts presented for our consideration.

Defendant, Elizabeth G. Stensland, did not object to the defect of parties by either demurrer or answer, nor otherwise, and upon the verdict of the jury upon the essential questions of fact involved the court rendered judgment against her alone.

Reliance is placed by the appellants upon the cases of McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817, and Fassio v. Woolfrey, 37 Cal. App. 754, 174 Pac. 700, holding that, the husband, being a necessary party defendant in cases where the wife is sued, he must not only be named in the complaint, but served with summons. Respondent's reply to this contention is that under the holding in the case of Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618, it is said that, although the husband is a necessary party defendant and the failure of plaintiff to make him a defendant would defeat his right of recovery if objection be properly presented, yet it is further provided by section 434, Code of Civil Procedure, that if no objection be taken to the defect of parties, either by demurrer or answer, the defendant must be deemed to have waived the same.

We are not unmindful of appellant's position that she could not properly demur for nonjoinder of parties since her husband was joined in the complaint as John Doe; that she had a right to expect that he would be served with summons in due time. However, she did not object to the entry of the judgment upon this ground, and her situation with reference to the demurrer would be of more weight and importance under other circumstances than those presented to us here. For the peculiar facts of this case certainly show that the defendant was not deprived of any possible right or advantage by reason of this oversight, that the purpose of the Code provision in question has not been subverted by plaintiffs' inadvertence, and that the case presents, clearly, a situation designed to be covered by section 4½, art. 6, of our Constitution. The husband of appellant is admitted to be a practicing attorney, and to have represented his wife in every stage of the litigation herein involved; he had actual notice of everything that occurred; he is not bound by the judgment and could not have been. The judgment relates to a matter connected with the wife's separate estate, and to transactions occurring previous to the marriage. It is said in McDonald v. Porsh, supra, and in the case of Terry v. Superior Court, 110 Cal. 85, 88, 42 Pac. 464, and some others, that the Code provision for joining the husband in such actions is not to the end that the husband or his property may be bound by the judgment, but solely that he may be able to aid his wife in her defense.

[1] Under the peculiar facts of this case, this purpose was fully accomplished, for the husband aided and conducted her defense at every step.

It would seem, therefore, that this is essentially one of those harmless errors which does not affect the merits of the judgment, and which comes within the remedial influence of the aforementioned amendment to our Constitution. It is held in Work v. Campbell, 164 Cal. 343, 349, 128 Pac. 943, 43 L. R. A. (N. S.) 581, in Lamb v. Harbaugh, 105 Cal. 680, 690, 39 Pac. 56, and in Baldwin v. Second Street, etc., Co., 77 Cal. 390, 19 Pac. 644, that a defect of parties is not a matter going to the jurisdiction of the court; and indeed that holding necessarily follows from the holding in many cases that it is a defect which may be waived by failure to demur.

[2] Some objection is made by appellant that the judgment is entered against her as Elizabeth G. Clarke Stensland. In her testimony on the trial, she stated that her name at that time was Elizabeth G. Clarke Stensland, but that she might be called by either the name of Clarke or Stensland. It is to be noted that she answered under the name of Clarke, and only upon her examination at the trial did she admit that her proper name was then Stensland. She has adopted the name of Stensland in her notice of appeal. The two persons are completely identified in the record. It would appear, therefore, that appellant has no complaint that judgment was entered against her in the name which she admits is at present her proper name. Thompson v. Alford, 135 Cal. 52, 66 Pac. 983; Alameda County v. Crocker et al., 125 Cal. 101, 57 Pac. 766; Bogart v. Woodruff, supra.

Some further objections are made by appellant with regard to the giving of instructions by the court, but we consider these to be without merit.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 710

HUTCHISON v. HOLLAND et al.
(Civ. 2980.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1920. Hearing Denied by Supreme Court July 22, 1920.)

1. Principal and agent ⟸145(2) — Recovery against undisclosed principal may be had only on nonnegotiable notes.

Where a negotiable note is executed unqualifiedly, recovery thereon cannot be had against an undisclosed principal, but such recovery may be had where the note is not negotiable.

2. Principal and agent ⟸23(5)—Evidence held not to show undisclosed principal.

Evidence *held* insufficient to sustain a finding that one of defendants was the undisclosed principal of another who made notes secured by mortgage.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by C. S. Hutchison against John P. Holland and others. Judgment against the named defendant, and he appeals. Reversed.

J. R. Whittemore, of Los Angeles (F. L. Anderson, of Los Angeles, of counsel), for appellant.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for respondent.

JAMES, J. Defendant Holland appeals from a judgment entered against him. The action was brought to recover a balance due on two promissory notes. The notes were executed by defendant Marie C. Heath, and certain real property was made security for the payment thereof, against which a trust deed was executed. Appellant did not join in the making of the promissory notes or the deed; in fact, his name did not appear in the instruments referred to at all. The notes, as before mentioned, were two in number. One was made payable to Elizabeth E. Curtis, and the second to Helen C. Brennan. The two last-named persons indorsed the same, and they were transferred to Nina A. Hutchison, who paid therefor $1,750. At the time the trust deed and notes were executed there was a first mortgage lien against the property, amounting to $3,000; hence the trust deed became second in order of security. Default was made in the payment of the notes, and upon sale of the property under the trust deed being had, a small part only of the principal debt evidenced by the notes was realized. Nina A. Hutchison transferred her interest to the plaintiff here, and this suit was brought to collect the deficiency. It was alleged in the complaint, and the court found the facts accordingly, that Holland was the undisclosed principal of Marie C. Heath. While rendering judgment against Holland, the court found in favor of Marie C. Heath, and determined that she was not liable for any part of the money claimed.

[1] It is the contention of appellant that, where a promissory note is executed unqualifiedly, it cannot be asserted that there exists any undisclosed principal against whom recovery may be had. Respondent has cited ample authority to show that appellant is correct only in his statement of the law where the notes considered are negotiable; that, where the notes are not negotiable, an undisclosed principal may be held.

[2] Admitting that the notes here exhibited are of the character which permits recovery against an undisclosed principal, it is the contention of appellant that under the evidence the court was not justified in finding that Holland held any relation of principal such as to make him liable to the plaintiff therefor. As the evidence discloses, Holland presented the trust deed and notes to the plaintiff, who was Nina A. Hutchison's agent, and recommended their purchase as a good investment; he stated to plaintiff that Marie C. Heath was the owner of the property; he also informed plaintiff of the existence of the $3,000 first mortgage lien; plaintiff and Nina A. Hutchison visited the property for the purpose of investigating the character of the security offered; after examining the property plaintiff closed the deal on behalf of his principal and paid to Holland $1,750, and received the promissory notes of Marie C. Heath, which were indorsed with the names of the payees. Throughout the transaction up to this point it was not claimed by the plaintiff or his principal that Holland pretended to have any interest in the property or the notes. Plaintiff further testified that, when interest installments became due and were unpaid, he demanded payment of Marie C. Heath, and she referred him to Holland, and Holland in turn referred him back to Marie C. Heath, stating that she would take care of it. Holland testified that he had no interest in the transaction other than that he received a commission. He stated that it was a fact that Marie C. Heath held the title to the property only for Curtis and Brennan, who were "Eastern" ladies, and that he (Holland) was the agent of Curtis and Brennan; that upon sale of the promissory notes secured by the trust deed to Nina A. Hutchison he (Holland) had, after deducting his commission, remitted the remainder of the money to Curtis and Brennan. The testimony of Holland stands uncontradicted. It may have been that the court disbelieved his statements, but, as the record discloses them, the statements of Holland do not bear the imprint of inherent improba-

bility; hence we must conclude that they amounted to substantial evidence, and that the court was not authorized to disregard them. Accepting Holland's testimony at its face value, it did not establish that he occupied the position of an undisclosed principal toward Nina A. Hutchison, or this plaintiff. That Marie C. Heath is liable upon the note obligation there can be no possible question. She made the notes, executed the trust deed, was in fact the record owner of the real property concerned, and was accepted by the Hutchisons in that relation. We are at a loss to understand why the court by its judgment relieved the maker of the notes from the duty to respond to the claim of the plaintiff.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 700

CONRAD v. LA PLANTE. (Civ. 3377.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

1. Appeal and error ⟸1011(1)—Trial court's findings on conflicting evidence conclusive.

Where the trial court had the witnesses before it and the evidence is clearly conflicting, its findings of fact are conclusive.

2. Bills and notes ⟸516—Evidence in action on notes held to sustain finding for plaintiff.

In action on promissory notes for money loaned, evidence *held* such that if the appellate court could substitute its conclusion for that of the trial court as to which witnesses were worth believing, it must sustain trial court's views in favor of plaintiff.

3. Appeal and error ⟸1071(1)—Error in findings held harmless.

In action for money lent, a finding that the loan was not made at an earlier date, if erroneous, was harmless to the defendant, and would not support reversal; there being no plea of statute of limitations.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Kokoa B. Conrad against William Parsons, in which William La Plante, as defendant's executor, was subsequently substituted. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Young, of Los Angeles, for appellant.

Dana Ong, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for respondent.

NOURSE, J. Defendant appeals from a judgment rendered against him and in favor of plaintiff for $2,750 upon a complaint containing four causes of action, the first three of which were upon promissory notes and the fourth for money loaned in the amount of $1,500. The attack upon the judgment is confined to that portion of it which relates to the fourth cause of action.

The facts material to the opinion are: In November, 1915, plaintiff delivered to defendant $3,000 and received from him shares of stock in the National Film Corporation of the par value of $2,000. As a part of the transaction it was agreed that the plaintiff should be employed as an actress or performer by the National Film Corporation at a salary of $40 per week. After plaintiff's money had been obtained by the defendant she was employed for a period of two weeks, and paid the stipulated salary. Thereupon the corporation ceased to do business, and permitted its charter to lapse through its failure to pay the state license tax. In February, 1916, plaintiff called upon defendant and made a demand for the return of her money, and thereupon defendant gave her $250 in cash, the three notes which are the basis of the first three causes of action herein, amounting to $1,250, and, as the plaintiff alleged and testified, promised to give her $1,500 more. The evidence relating to the transactions in November and February is conflicting. On behalf of plaintiff it is shown that the original transaction was a loan of $2,000, evidenced by a promissory note and secured by certificates of stock of the National Film Corporation of the par value of $2,000. The second installment of $1,000 it is claimed was also loaned to defendant by plaintiff, for which she received neither note nor security. On behalf of defendant it is claimed that the original transaction was a sale of 3,000 shares of the National Film Corporation at par for the sum of $3,000, which, admittedly, were of no value whatever. Defendant was president of this company.

The weakness of defendant's position in this respect is found in his own testimony to the effect that the company was at that time "broke, and everybody knew it," and that the stock was worthless; also in the testimony of one Miller, an agent of defendant, that "our company was practically broke, and we didn't know whether we were going to get another dollar in or not; and I was broke, and everybody else was broke; so it was a very uncertain proposition." Then the witness Hale, an employé of Parsons at the time of the original transaction, testified regarding the conversations had in his presence between defendant and Miller, as follows:

"Mr. Miller said we had a sucker, in plain English, talking of a woman who got money, and going to put in so much money, lend so much money, but you have to use her. I says, 'Has she ever done acting?' I was told no. I says, 'Good night'—that is my favorite expression. Then I was explained to use this wo-

man's money, we can't make any— Q. Who stated this? A. Mr. Parsons. Q. Did he say who the woman was? A. Miss Kokoa, Princess Kokoa—Kokoa Baldwin. Q. Was there anything more stated there with reference to the— A. She was to put $3,000 in—she was to loan $3,000 to the company, for which she was to receive some National stock security. She was to receive stock for security and this $3,000, or whatever the sum was—I can't swear to that, judge—that sum, but it was in the thousands—we were to make two pictures and get some money— Q. Who said that? A. Mr. Parsons. Q. At the time when Mr. Miller was present? A. Well, Mr. Miller was in and out of the studio; I can't exactly say that he was out. Mr. Miller was present on one occasion when discussing this money matter; he was to get his share out of it, $500, for getting the money, and I got $150 out of it, two weeks' work.

"The Court: Who said Mr. Miller was to get $500 out of it? A. Parsons told me that this money Mr. Miller was to procure and from this money he gets a commission of $500, which only would leave us $2,500 to make the pictures. * * * Q. Have you stated all that was said about lending the money? A. Well, lending the money—I don't know who it was made to directly, but Mr. Parsons was to give security of National stock for the loan of the money. I remember he said that, laughing, he says, 'I gave her some security, National Film Corporation stock.' "

[1, 2] In addition to this it is admitted that defendant, who was practically the sole owner of the stock of the corporation, had failed to pay the state license tax, so that the corporation forfeited its right to do business at about the time this transaction was had. On this evidence the trial court was required to determine whether he should believe the evidence offered on behalf of the plaintiff or the confessions of fraud and swindling offered to support the position of the defendant. Conflict in the evidence is clear, and even if this court could substitute its conclusion for that of the trial court, it would not be disposed to do so, in view of the character of the evidence offered by defendant.

The evidence relating to the transaction occurring on February 15, 1916, is confined solely to the conflicting testimony of plaintiff and defendant; they being the only persons present at any time while the transactions were had. The plaintiff testified that she returned to defendant his promissory note and the stock which she asserted had been delivered to her as security, and that in return therefor defendant paid her $250 in cash, gave her three notes amounting to $1,250, and promised to pay her $1,500 more at a future date. Defendant testified that plaintiff appealed to him in a destitute condition, requesting him to buy back the stock which he claimed to have sold to her in the preceding November, and he gave her $250 therefor, though he knew at the time that the stock was worthless; that the three notes were given with the understanding that they would be payable only in the event that defendant was able to sell one of the pictures in which plaintiff had participated, and that no promise of any nature was given regarding the payment of $1,500 nor any other sum than that evidenced by the three notes.

It is argued that plaintiff's story is incredible because, having taken written promises to pay $1,250, it is highly improbable that she would have accepted a verbal promise to pay $1,500 with no written evidence thereof. But defendant's story regarding this transaction is just as incredible. The trial court had both witnesses before it, it had rejected defendant's testimony regarding the transaction of November, 1915, and was in a position to determine whether plaintiff's story of the February transaction should be believed. The finding of the court upon this issue cannot be disturbed.

[3] It is argued by appellant that the evidence does not support the finding that the sum of $1,500 was loaned on or about the 15th day of February, 1916, as alleged in the fourth cause of action. In this connection it is said that, accepting plaintiff's story of the entire transaction, this loan was made in November, 1915, and not at the time alleged in the complaint. The judgment carries interest from the 15th day of February, 1916, and defendant is not harmed by the finding that the loan was not in fact made at an earlier date. This is especially true in a case where, as here, the plea of the statute of limitations is not made. Thus, if the finding was erroneous, it was harmless error which would not support a reversal.

For the reasons given the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 512

RUMETSCH v. DAVIE et al. (Civ. 3226.)

(District Court of Appeal, First District, Division 2, California. May 17, 1920.)

1. Municipal corporations ⟸187—Police pension computed on basis of salary at time of disability.

Under Charter of Oakland, § 91, amended to give police corporal $1,620 a year instead of $1,500 a year as formerly, and section 95, authorizing a pension on disability computed on basis of one-half the salary attached to rank held one year prior to retirement, a corporal retired less than one year after amendment is entitled to pension based on $1,620.

2. Statutes ⟸190—Construed to avoid ambiguities.

It is the duty of the courts to interpret statutes in such manner that they may be free from ambiguity and not to be ingenious to find ambiguities in them because of extraneous matters.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Mandamus proceedings by Herman O. Rumetsch against John L. Davie and others, as members of Board of Trustees of the Police Relief and Pension Fund of the City of Oakland. From a judgment granting writ, respondents appeal. Affirmed.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

BRITTAIN, J. The defendants appeal from a judgment awarding the plaintiff a peremptory writ of mandate in effect directing them to approve his claim as a retired corporal of police in the city of Oakland for one-half the amount of salary attached to the rank he had held for one year prior to his retirement. The facts are admitted, and the only question to be determined is whether the respondent is entitled to pension computed on a basis of the salary he was receiving at the date of retirement or that which he was receiving one year prior to retirement.

The charter of the city of Oakland was adopted in 1911. By section 91 it was provided that—

"The officers and members of the police department shall receive as annual compensations: * * * Corporals—$1,500.00. * * * Said compensations shall be paid in equal monthly installments. No compensation higher than those herein specified shall be paid to any officer. * * *"

Section 95 was as follows:

"Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty, upon his filing with the board of trustees a verified petition, setting forth the facts constituting such disability, and the cause thereof, accompanied by a certificate signed by the chief of police, the captain of the division to which he belongs, and by two regularly licensed physicians of the city, recommending his retirement upon a pension, on account of such disability, may be retired from the department upon an annual pension, equal to one-half the amount of salary attached to the rank which he held one year prior to the date of such retirement, to be paid to him during his life, and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement."

Under these provisions, when an officer who had held the rank of corporal for one year prior to his retirement was retired, he was paid one-half the amount of salary attached to the rank at the date of his retirement. Since that was the salary attached to the rank one year prior to the retirement, it was also equal to one-half the salary attached to the rank at that time. The language of the section was in no sense ambiguous or uncertain.

In 1919 the people of Oakland amended section 91 of the charter, and it became effective on the approval of the Legislature on January 17, 1919. As amended, it provided that—

"The officers and members of the police department shall receive annual compensations comprising their salaries of not less than: * * * Corporals—$1,620.00. * * * Said compensations shall be paid in equal monthly installments. * * *

"No other or further deduction shall be made from the pay of any officer or member of the department for any fund or purpose unless the same is authorized by this charter.

"No compensation or salary less than those herein specified shall be paid to any officer or member of the police department. * * *"

The respondent held the rank of corporal on April 1, 1918, and on April 1, 1919, the appellants, constituting the board of trustees adopted a resolution by which he was retired on account of physical disability received in the performance of his duty as corporal. Under the terms of the charter his salary is payable to him quarterly. The first payment on July, 1919, was made on the basis of a salary of $1,500. He presented a claim for the second quarter on the basis of salary at $1,620, plus the ratable shortage on the first payment. The appellants refused to allow the claim on the sole ground that the petitioner was entitled only to the salary attached to the rank of corporal one year prior to the date of retirement.

Under section 95, if the disability is removed, the pension will cease, and the respondent will be restored to the service in the rank he occupied at the date of his retirement. If he should be so restored, under the

provisions of section 91, as amended, he will immediately be entitled to salary at the rate of $1,620 a year. While he is on the retired list, it would seem to be entirely consistent with the language, as well as the purpose, of section 95, that he should receive as pension one-half the amount he would receive as a corporal if on active service. This court has no hesitation in determining that the amount of the pension is fixed by the salary attached to the rank of the retired man at the time of retirement, provided he held that rank for the period of one year prior to the date of retirement. If, in amending section 91, the people of Oakland had intended to change the plain and unambiguous meaning of section 95, without doubt they would have in terms amended the section. The amendment of section 91 did not serve to import an ambiguity into section 95, which had theretofore been free from uncertainty. It is the duty of the courts to interpret statutes in such a manner that they may be free from ambiguity, and not to be ingenious to find ambiguities in them because of extraneous matters, nor is it their duty to assume the function of the law-making power. Section 95 cannot be given the construction contended for by the appellants without amending it by interpolating a clause limiting its effect and changing its clear meaning. The conclusion reached coincides with the rule adopted in the city and county of San Francisco upon a similar provision of its charter. (Opinions City Attorney, Percy V. Long, January 20, 1908.)

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 470

SUGAR LOAF ORANGE GROWERS' ASS'N v. SKEWES. (Civ. 2825.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1920.)

1. Evidence ⊂=354(13)—Ledger account made up from memoranda admissible to prove items of charge.

In an action for an indebtedness due on book account as balance on picking, hauling, washing, packing, and shipping defendant's oranges, ledger account, contained in book kept by plaintiff showing its account with defendant, *held* admissible to prove items constituting charges for picking, hauling, washing, and packing, ledger having been made up from memoranda received by plaintiff in his regular course of business so that entry might be regarded as original.

2. Limitation of actions ⊂=54(2)—"Mutual, open, and current account" defined.

As respects the application of Code Civ. Proc. § 337, subd. 2, a "mutual, open, and current" account is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Sugar Loaf Orange Growers' Association against H. G. Skewes. From judgment for plaintiff, defendant appeals. Affirmed.

Benjamin Lewis, Mab. Copland Linneman, and H. N. Linneman, all of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

CONREY, P. J. As stated in the complaint, the cause of action sued on herein is an alleged indebtedness of the defendant to the plaintiff "upon a mutual, open, and current book account, said sum of $532.07 being the balance due and owing to plaintiff for the picking, hauling, washing, packing, and shipping of defendant's oranges during the season of 1912, together with certain moneys advanced by the plaintiff therefor at defendant's request, after deducting therefrom and crediting to the defendant all moneys received by the plaintiff for the defendant from the sale of defendant's oranges." The principal contention of appellant is that the court erred in overruling his objection to the introduction in evidence of a ledger account contained in a book kept by the plaintiff and showing its account with defendant. It is claimed that no sufficient foundation was laid for the admission in evidence of said ledger account. To the extent of $508 the account shows the items charged for picking, hauling, washing, and packing the oranges taken from defendant's orchard, together with a selling charge of 10 cents per box for the 750 packed boxes as shipped. The remaining items consist of an "account sales," showing the receipts from the sales and the charges for freight and refrigeration and for auction commission. The net result of the "account sales" was a balance of $24.07 debited against the defendant, thus making the total balance of $532.07, constituting plaintiff's claim. The witness E. F. Wolever was secretary and general manager of the plaintiff. Plaintiff's method of doing business was described by this witness. Plaintiff is a growers' organization which handles the growers' crops on an estimated cost basis. The Mutual Orange Distributors is a corporation having its central office at Redlands, Cal., which acts as the selling agent for a group of orange growers' associations, the plaintiff being one of those associations. In the instant case, the plaintiff agreed to pick, haul, and pack defendant's oranges and cause the same to be

shipped and sold through the agency of the Mutual Orange Distributors. This was done, and the account sued upon is the result of that transaction.

It appears from the testimony of Wolever that he personally paid out all of the moneys constituting the items charged against the defendant, and that he was personally acquainted with the facts with respect to the picking, hauling, washing, and packing of the oranges and the payment of the 10 cents per box commission to the Mutual Orange Distributors. He did not count and observe every detail, but he saw the work going on in defendant's orchard, and saw the fruit received at the packing house. For actual time of the work of the men in the orchard and in hauling he relied upon information furnished to him by the plaintiff's foreman at the orchard, the receiving clerk at plaintiff's packing house, and upon statements of the pickers themselves, all of which was in the usual course of business of the plaintiff. The entries made by Wolever in the ledger account were the original and only book entries made by the plaintiff; that is to say, the ledger entries were not copies from any other book or memorandum of the plaintiff.

[1] From the foregoing evidence we are satisfied that the ledger was admissible in evidence to prove the items constituting the first-mentioned charge amounting to $508. As to the "account sales," a separate statement will be made herein. The rule of evidence applying to account books is stated in Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 Pac. 657, as follows:

"In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time of the respective transactions: and that the person making them had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business. 1 Elliott on Evidence, §§ 458 to 463, inclusive; 2 Wigmore on Evidence, § 1554; 2 Jones on Evidence, § 322."

Counsel for appellant concede that Mr. Wolever did have knowledge, either direct or indirect, of the transactions concerning the packing, etc., of the oranges, and lay the emphasis of their objection upon that part of the ledger constituting the "account sales." The witness Wolever testified that he represented the plaintiff as one of the subsidiary associations making up the Mutual Orange Distributors, and was a member of the board of directors of the Mutual Orange Distributors. As such director he was familiar with the system under which the fruit was shipped, sold, and accounted for through that agency. The Mutual Orange Distributors shipped to various representatives throughout the country the fruit received by it, and the sales were made through these representatives, who then reported to the Mutual Orange Distributors by rendering in each case an "account sales" in the form of duplicate carbon copies containing the several statements of account. One of these duplicates is kept by the Mutual Orange Distributors as its record of the transaction, and the other is sent to the fruit growers' organization. Thus, in the instant case there were three "account sales," one for each of the three cars in which the fruit was shipped. One came from Cleveland, one from New York, and one from Boston. All of the sales were made at auction. Of the duplicate copies so received by the Mutual Orange Distributors, one of each was delivered to the plaintiff. It was from those statements that the entries were made by Mr. Wolever in the ledger account introduced in evidence in this action. The witness Wolever testified that the accounts of sales thus furnished constituted all of the memoranda and data which under that method of doing business are used in making settlements. In connection with the cross-examination of Mr. Wolever, the defendant called for the said accounts of sales furnished to plaintiff by the Mutual Orange Distributors, and introduced them in evidence. They are in the record as Defendant's Exhibit R, and correspond in amounts to the entries contained in the ledger account. No evidence to contradict them was offered by the defendant. It appears to us that if there was any error in the reception of the ledger account in evidence as covering these items of the "account sales," such error is cured by the introduction in evidence of said Exhibit R at the instance of the defendant himself. Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales, and to charge to the defendant the amount so paid out by the plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant.

[2] Appellant next contends that the evidence is insufficient to support the court's finding that the account sued upon is true and correct, "and constitutes an open, current, mutual, and book account." We think that the evidence established the character of the account as a mutual, open, and current account; it being within the following definition:

"An unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand. * * *" Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253, 146 Pac. 692; George Rice & Sons v. Cowan, 189 Pac. 132.

This being so, the cause of action was not barred by the statute of limitations, since the action was commenced within the period of four years from the time when the cause of action accrued. Code Civ. Proc. § 337, subd. 2.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J

47 Cal. App. 521

GROVER et al. v. MORRISON. (Civ. 2162.)

(District Court of Appeal, Third District, California. May 18, 1920.)

1. Judgment ⟸251(1) — Contributory negligence put in issue by cross-complaint.

In action for damages from automobile collision, in which defendant filed cross-complaint for damages to his own automobile as due to plaintiffs' negligence, a verdict for neither party, based on plaintiffs' negligence as well as defendant's, *held* warranted by the pleadings, as against the objection that contributory negligence was not pleaded, as all the pleadings and the issues submitted by them were necessarily to be considered in their entirety.

2. Trial ⟸29(3)—Court's question whether witness was "guessing" at distance testified to not error.

In automobile collision case, where witness had testified the wreck was a certain distance from the end of a bridge, the court was not without legal right to ask the witness whether he was "guessing" at the distance; this being no more than inquiry whether his statement was based on measurement or estimate.

3. Trial ⟸29(2) — Trial judge's inadvertent statement as to evidence which had been given not error.

In automobile collision case, the trial judge's inadvertent statement, in ruling on the admission of testimony, that two witnesses had testified that plaintiffs' machine was moved after the accident, which statement, on plaintiffs' counsel's calling attention to its incorrectness, was in a measure corrected by a subsequent observation by the judge, *held* not valid ground for objection.

4. Witnesses ⟸358—Cross-examination of impeaching witness as to drunkenness held proper.

Defendant's witness, having testified that plaintiffs' witness was drunk shortly before the automobile collision upon which the action was based, was properly asked by plaintiffs' counsel on cross-examination whether he was not drunk himself, and whether it was a fact that up to that time for months he did not draw a sober breath; it being proper to show that he was so intoxicated as not to be able to know whether plaintiffs' witness was intoxicated or to be under the impression that every person he met or saw, and not he, was in a state of intoxication.

5. Appeal and error ⟸1048(6)—Exclusion of cross-examination as to witness' intoxication held harmless.

Exclusion of cross-examination as to a witness' being intoxicated *held* not prejudicial.

6. Trial ⟸232(3)—Instruction as to recovery not being justified because of instruction as to damages held not error.

In automobile collision case, an instruction that the jury were not to understand they were to give damages simply because the court instructed on the measure of damages *held* not error.

7. Trial ⟸333—Ungrammatical verdict not error.

In automobile collision case, where defendant filed cross-complaint for damages to his machine, a verdict against both parties and that neither party "are" entitled to damages, although ungrammatical, was sufficiently clear.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Dewey S. Grover and Mae Grover against John Morrison, who filed a cross-complaint. From judgment awarding no damages to either party, plaintiffs appeal. Affirmed.

W. H. Carlin, of Marysville, for appellants.

Ray Manwell, of Marysville, for respondent.

HART, J. Plaintiffs brought the action to recover from defendant damages for injuries received by plaintiff Mae Grover in an automobile collision, alleged to have been caused by the negligence of the defendant, for physicians', nurses', and hospital charges incurred by her, and for damages to plaintiffs' automobile. Defendant filed a cross-complaint in which he asked for $600, damages to his automobile, claiming that the collision was due to the negligence of the plaintiffs. Trial was had before a jury, which found "against the plaintiffs and against the defendant and further find that neither party is entitled to damages." Judgment was accordingly entered, from which judgment plaintiffs prosecute this appeal.

It is first contended by appellants that the evidence is insufficient to justify the verdict.

Crossing the Yuba river, at the city of Marysville, is a bridge which, with its approaches, commences at the termination of D street, in said city, and is approximately

2,200 feet in length to the southerly bank of said river. The roadway on said bridge is 24 feet in width, with a raised sidewalk on each side 3 feet in width and railings on the outside of each sidewalk.

On the 8th day of December, 1917, at about the hour of 4 o'clock in the afternoon, with the sun shining, plaintiffs, husband and wife, drove upon the south end of the bridge in a Ford automobile on their way to Marysville. Plaintiff Dewey S. Grover testified that upon driving upon the bridge he traveled on the east, or right-hand, side at a speed approximately of 10 or 12 miles an hour and was traveling carefully. When he was about halfway across the bridge he saw approaching him a small tractor, driven by a man named Davis, coming south from the north end of the bridge on the west side. A little further on he saw defendant's machine coming around the left-hand side of the tractor to pass it. The witness testified:

"It kept coming right towards me. I was running along probably a foot or two from the sidewalk of the bridge. I supposed he would turn off in just a minute, which they do lots of times; people will run close to you and then turn off, but he kept coming, and when I saw he wasn't going to stop I jammed my car into the sidewalk, commenced stopping it, tried to stop it. When he got right up close, about 20 or 25 feet away from me, he turned out to the right right quick, to the west, and he didn't turn fast enough to miss me; his car caught on the corner of my car kind of sloping and jammed my car into the bridge and broke one of my wheels down; the hind end of his car flew around kind of catercornered across the bridge, toward the west and southerly. When we stopped my car was on the sidewalk, the hind wheels; his car was sitting against my car, sitting across the bridge; we were both kind of across the bridge then. The left-hand corner of defendant's car struck the left-hand corner of mine. When the collision came my car was right up against the east sidewalk of the bridge, probably 3 inches from it. Before the collision I should judge the defendant was going probably 20 miles an hour; he was going pretty fast."

The plaintiff Mae Grover testified practically to the same facts as did her husband. She was severely injured, and people in a passing automobile took her and her husband to Marysville.

William Davis, called as a witness for plaintiffs, testified that he was a tractor driver, and on the day of the collision was driving a tractor on the right-hand side of the bridge going south, and was about a third of the way or nearly halfway across the bridge when defendant's machine pulled around from behind him and ran into Grover's machine, who was coming north on the east side of the bridge. He said the defendant's automobile "had about 150 feet clearance to get on the other side, but it didn't seem to get there. He turned trying to make it go on the right, on his own side, but he didn't make it fast enough before they collided." The witness described the positions of the two automobiles after the collision, placing them about as plaintiffs did. He said he helped carry defendant's car around so he could pass. On cross-examination the witness was asked if he was drunk or sober at the time of the collision, and answered that he wasn't either one, but that he had had a couple of drinks.

J. J. Degire, a stableman residing at Marysville, at the time of the collision was hauling gravel with a two-horse team and wagon. As he drove on to the bridge from the south end he saw the accident and drove to the place. He testified:

"I got up and helped get the machines out of the way so I could come on to town." He described the location of the two cars. "I helped Mr. Davis, the tractor driver, move Mr. Morrison's machine out of the way so he could get by."

On cross-examination the witness said that Davis was sober so far as he could see.

Two other witnesses, one of them being R. C. De Witt, called on behalf of plaintiffs, testified that they saw the Ford after the collision, and that it was on the east side of the roadway.

The defendant testified that he had noticed Davis in the city of Marysville driving the tractor toward the bridge; that when he (defendant) drove upon the bridge there was no vehicle of any kind ahead of him on the bridge; that when he got fairly on the bridge he was traveling at a rate of about 10 or 15 miles an hour. He testified:

"I saw another machine coming towards me close up to the center, until he got so close to me that I had no chance to get away, and he was probably then 6 inches too close to me; he was over enough on my line so I couldn't turn off and get away fast enough to get away from him; he was coming along pretty fast speed."

His description of how the collision occurred, as to the positions of the two cars, was about as already given. He said that he, a man named Strawn, and a colored man moved defendant's car to the sidewalk on the west side.

On cross-examination the defendant first stated, as he did in his direct examination, that when the collision occurred the plaintiffs' car was "over the center (of the bridge) on my side." On further cross-examination as to this point, his answers were not as positive as they previously were. He, for instance, said:

"I don't know that he was over the center; he was at the center; he was at the center; he might have been over. Q. Would you say his left wheel would be at the center? A. I suppose so. * * * Q. How much space, approximately, does it require for your auto-

mobile to pass through, taking the full width of the machine at its widest part? A. Seven feet, probably 6½ or 7, I should judge. I don't know that would cover everything, fenders and all. Q. You came together and your left front wheel struck and locked with the left front wheel of plaintiffs' machine? A. Yes. Q. Both wheels were broken, were they? A. Yes, sir."

David Morrison, a brother of the defendant, testified that he was in a Ford machine and drove behind a tractor on the bridge, passed it, and saw there had been a wreck. He stopped and saw his brother and Strawn and another man move his brother's car to the west side of the center of the bridge, plaintiff's car being on the east side of the center, but he said it was not up on the sidewalk on the east side; the wheels might have been a foot or so from the sidewalk. James Strawn testified to having assisted in moving defendant's car.

[1] It is plainly apparent from the testimony, of which the foregoing statement embraces a correct epitome, that, when the collision occurred, both the plaintiffs and the defendant were driving very close to the center line of the bridge. At any rate, this court must so view the situation. It is likewise also apparent that upon the question whether, when the collision occurred, the two machines were both running on and along the center line of the bridge, there exists a sharp conflict in the evidence. In fact, there is a pronounced conflict in the evidence upon the question whether, at the time of the accident, the machine of the plaintiffs, who were traveling in a northerly direction, was or was not running beyond the west of the center line of the bridge a few inches. It is true that the defendant, after having on direct examination positively testified that the plaintiffs' machine was on the west of the center line of the bridge a few inches when the collision took place, was not so positive on that point on his cross-examination; still, it was for the jury, under such state of the testimony, to determine what was the fact in that regard. But, in any event, the evidence appears to be such as that the jury could well have found, as it did find, that both machines, when they collided, were traveling so close to the center line of the bridge that it would be very difficult to determine, if, indeed, it could justly be determined at all, which of the two, the plaintiff or the defendant, was to blame for the collision, or, in other words, whether it was the defendant's negligence or that of the plaintiff or the contemporaneous negligence of both that was the proximate cause of the injury. It follows, therefore, that this court is in no position to hold, as a matter of law, that the finding of the jury that both the plaintiff and the defendant were equally at fault, and that the accident would not have occurred but for the simultaneous negligence of both, is not supported by the evidence. The verdict, in effect, implies, of course, that, while the defendant was guilty of negligence, the plaintiff was guilty of contributory negligence, in the absence of which the collision and the injuries resulting therefrom to the plaintiff Mae Grover and to plaintiffs' machine would not have happened; and in this connection we notice the contention of the counsel for the appellants that contributory negligence upon the part of the plaintiffs is not set up or pleaded as a defense by the defendant, and, not being so pleaded, the defendant cannot avail himself of the defense of contributory negligence. But the reply to this contention is to be found in the averments of the cross-complaint filed by the defendant. In that pleading the defendant, asking for affirmative relief against the plaintiffs, alleged and charged in appropriate language that the collision and the consequent damage were due directly and solely to the negligence of the plaintiff Dewey S. Grover, in that, when the accident occurred, the latter was driving his machine on the west of the center line of the bridge. This is, of course, a straight allegation that the plaintiff himself, by his own negligence, directly contributed to the collision, and thus the issue of contributory negligence upon the part of the plaintiffs was expressly and directly submitted by the pleadings. The cause was not, as is often true where a cross-complaint is filed, and the real, vital issues are made up and tendered by an answer thereto, tried alone upon the cross-complaint and the answer of the plaintiff thereto. Each of the parties was seeking affirmative relief, and the case was necessarily tried upon all the pleadings of both parties—that is, upon all the issues involved in all the pleadings filed—and hence, as above suggested, to ascertain what the vital issues of fact to be determined by the jury were, all the pleadings and the issues submitted by them were necessarily to be considered in their entirety. Thus viewing the situation as to the issues of fact involved in the action, as they were made up by the several pleadings of the parties, it is plainly manifest, as above stated, that one of the important questions of fact raised by the pleadings as a whole and which the jury were required to consider and determine was whether the plaintiff Dewey S. Grover himself was guilty of negligence which proximately contributed to the collision and its consequences.

It is to be said, however, that the counsel for the appellants does not appear to be so insistent upon the proposition that there is no substantial support in the evidence for the verdict or upon the point that the issue of contributory negligence upon the part of the plaintiff Dewey S. Grover is not properly raised by the pleadings as he is upon the proposition that, in view of the asserted un-

satisfactory character of the evidence as a foundation for the finding of the jury, certain alleged erroneous rulings of the court upon the question of the legal propriety of certain testimony should, with certain alleged erroneous instructions as to the law of the case, be held a sufficient predicate for a judgment of reversal. These assignments will now briefly be considered.

During the direct examination of R. C. De Witt, a witness called for plaintiffs, he was asked where on the bridge he saw any evidence of collision. The question was objected to, counsel for defendant saying:

"This collision occurred about 10 minutes after 4; all these machines had been moved.

"Mr. Carlin: There is no evidence that the plaintiffs' machine was moved at all.

"The Court: Two witnesses testified it was moved.

"Mr. Carlin: Not the plaintiffs' machine; no witness testified at all that plaintiffs' machine was moved at any time.

"The Court: That is not asking about the plaintiffs' machine.

"Mr. Carlin: That is only preliminary.

"The Court: I will hear it; answer the question. A. I should judge 350 feet somewheres from the north end.

"Mr. Carlin: What did you see there?

"Counsel for Defendant: Same objection.

"The Court: It is very evident if that is true there was quite a change in the machines.

"Mr. Carlin: How many feet? A. About 350 feet.

"The Court: 427 feet.

"Mr. Carlin: Would you say 350 feet was exact, or might it be 427? (Objected to as leading, immaterial, irrelevant, and incompetent.)

"The Court: I will let him answer. You didn't measure it? A. No, sir.

"The Court: Just guessing at it? A. Just guessing at it.

"Mr. Carlin: What did you see? A. I saw a Ford and another car in front of it."

The point made by counsel as to the foregoing is that the court, in stating that the plaintiffs' machine had been moved from the position in which it was left by the collision, there having been no testimony that it was moved at the time referred to by the witness De Witt, "trenched upon the province of the jury." It is further objected that the court trespassed upon the domain of the jury when it stated that there was evidence of a collision on the bridge about "427 feet" from the north end thereof; the witness having previously estimated that the distance was about 350 feet from the north end of the bridge, and, further, that the court was without legal right to ask the witness if he was merely making a guess as to the distance.

[2, 3] There is nothing so serious in the action of the court thus referred to and criticized, assuming it to be justly amenable to all that is said against it, as to justify us in declaring that thereby the jury were unduly influenced in their consideration of the case or led to reach the conclusion evidenced by their verdict. The court had the right to ask the witness whether he was giving a mere approximation of the distance, or, what amounts to the same thing, "guessing at the distance," or whether his statement as to the distance was based upon an actual measurement thereof. Counsel would not say or contend that he or the attorney on the other side, according as the exigency of the situation might require it, would not be allowed properly to ask such a question or inquire whether a witness, in stating distances, based his testimony in that respect on actual measurements or a mere guess or approximation, and certainly, if counsel may ask such a question, it cannot be error for the court to ask it, if the question is propounded by the latter in a proper manner, or so that the jury may not infer that it is the desire or sole purpose of the court thus to discredit the witness or prejudice his testimony in the minds of the jury. As to the suggestion of the court that the machine of the plaintiffs had, before the witness saw any "evidence of a collision," been moved from the position in which it had been left as a result of the collision, it will be noted that, after counsel for plaintiffs stated that there was no testimony that the machine had been moved, the court remarked that the question objected to had no application or reference to plaintiffs' machine, and this observation by the court in a measure corrected its previous alleged misstatement as to the removal of said machine. Moreover, counsel for the plaintiffs having called attention to the fact that there was no testimony up to that stage of the case showing that plaintiffs' machine had been moved, the jury, we must assume, must also have then recalled that there was then no such testimony before them, and we must further assume that, if there was no proof of the plaintiffs' machine having been moved, the jury would not assume that there was on the mere inadvertent intimation by the court that such testimony had been given before them. We cannot perceive any merit in the objection here considered.

[4] The witness Davis, as above shown, testified in behalf of the plaintiffs. On cross-examination he was asked if he was not under the influence of intoxicating liquor at the time the accident, which he claimed to have witnessed, occurred. He denied that he was then intoxicated. The defendant called one L. P. Worden as a witness, who testified that he had seen the witness Davis as the latter was leaving Marysville with his tractor on the day of the collision, and that Davis was drunk. Counsel for plaintiffs, on cross-examination, asked the witness whether he was not drunk himself and whether it was a fact that up to that time for months he did not draw a sober breath. Objections to both questions were sustained, and referring to the second one, the court said:

"Mr. Carlin, that is not a proper question to ask. I have ruled. The witness is entitled to protection on the stand, and I am going to protect him; it isn't right to ask insulting questions of the witness, and don't do it any more."

[5] We are at a loss to understand the theory upon which the court disallowed the cross-examination. The obvious purpose of proving that Davis was intoxicated was to show that his mental condition was such at the time of the collision as that he was not able to form a proper or an accurate conception of the circumstances under which the collision occurred, or, in other words, to show that his testimony was unreliable and could not be depended upon; and the cross-examination of Davis on that line, as well as any testimony offered in impeachment of his denial of having been drunk at the time in question, were proper. Upon identically the same theory, it was proper for the plaintiffs to show, if it could be done, that Worden was himself intoxicated to an extent that he was thus rendered incapable of knowing or determining whether Davis was intoxicated, or whether, being intoxicated himself, and experiencing the usual effects of such a condition, his brain was susceptible to the impression that every person he met or saw, and not he, was in a state of alcoholic intoxication. But, while we doubt not that the ruling excluding the cross-examination was error, we do not feel that we are justified in holding that it was prejudicial to the rights of the plaintiffs. In other words, we cannot say that the jury's conclusion was affected by the ruling, or that a different result would have followed from the allowance of the cross-examination. Davis denied that he was intoxicated at the time of the accident, and it was for the jury to determine from his testimony, as compared to that of Worden, what his condition as to sobriety was. Furthermore, as above shown, the testimony of Davis was only corroborative of that of the plaintiffs as to the claim of the latter that the defendant, at the time of the collision, was driving on the east of the center line of the bridge, and, even with the testimony of Davis given upon the theory that he was in a perfect state of ebriety when the collision happened, the state of the evidence, as before declared, was such as that the jury might still be in serious doubt as to which of the parties was directly responsible for the accident, and thus have been brought to the conclusion at which they arrived, to wit, that both were equally at fault.

The several instructions given by the court at the request of the defendant, and to which objection is here made because, as is the contention, they do not state the law correctly, may be summarized as follows: That the jury are not to understand that they are to give damages simply because instructions involving the statement of the rule as to the measure of damages are addressed to them by the court; that such instructions have no application where the liability of the defendant has not been established, "and should not be understood as conveying any intimation that in the opinion of the court the plaintiff is entitled to damages or not" (instruction No. 1); "that if you believe from the evidence that the plaintiffs and defendant approached each other from opposite directions on what is commonly known as the D street bridge, and that their automobiles collided on the center line of said bridge, and that if ordinary care had been exercised on the part of both plaintiffs and defendant, and there was room for the said parties to have turned further to their right-hand sides of said bridge, respectively, thus avoiding any collision, then I instruct you that it is the law that both parties were negligent, and neither party may recover as against the other" (instruction No. 5); that, if neither party was negligent, neither can recover from the other (instruction 7); that, if both parties were equally guilty of negligence, then neither can recover (instruction 8); and the giving by the court to the jury of the form of verdict which they returned into court.

[6] The instructions thus referred to, although in some respects awkwardly phrased, stated the law correctly to the jury. Obviously the jury were not legally authorized to award damages to either party if the liability of neither was established by the evidence merely because the court explained to them the rule as to the measure of damages in such a case as this; and a more obvious proposition could not be stated than that if neither party was negligent, or if both parties were equally guilty of negligence, simultaneously committed, neither was entitled to recover against the other. By instruction No. 5 the court clearly meant to say, and undoubtedly the jury so understood the instruction, since it could bear or convey no other meaning than that if, when the collision occurred, both parties were driving on the center line of the bridge, then both were equally guilty of negligence contemporaneously occurring, and that in that case neither was entitled to a verdict for damages as against the other. As so understood, the instruction involved a correct enunciation of the rule in such a case. It may be added here that the court, in its charge to the jury, gave a full and fair statement of all the principles of law pertinent to the case as it was made by the evidence.

[7] The complaint against the form of the verdict returned by the jury possesses no merit. Its effect was merely to find against the plaintiffs on their complaint and against the defendant on his cross-complaint, and "that neither party *are* entitled to damages."

Although a little out of shape in its grammatical construction, the verdict is in language sufficiently clear and explicit to put beyond doubt the proposition that the result reached by the jury was that neither of the parties to the action was entitled to recover against the other.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

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